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TABLE OF DECISION NUMBERS

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

[B-176602]

Pay—Retired—Re-Retirement—Recomputation of Retired Pay—Cost-of-Living Increases

Members of the uniformed services initially retired on or before October 1, 1967, with retired or retainer pay based on the basic pay rates prescribed in Public Law 92-129, effective October 1, 1971, who are recalled to active duty and upon release from that duty become eligible to the recomputation of their retired or retainer pay pursuant to 10 U.S.C. 1402(a), are within the purview of 10 U.S.C. 1401a(e) and entitled to an adjustment of such pay to reflect changes in the Consumer Price Index, for under the literal terms of section 1401a(e) the pay of the members may not be less than it would have been had they become entitled to retired or retainer pay on September 30, 1971, the effective date of Public Law 92-129, in view of the intended purpose of 10 U.S.C. 1401a to treat members as equal as possible in matters involving Consumer Price Index adjustments and, therefore, it would be inconsistent to limit application of section 141a(e) "saved pay" provisions to initial retirement formulas only.

To the Secretary of Defense, February 2, 1973:

Further reference is made to a letter dated July 21, 1972, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to whether the provisions of 10 U.S. Code 1401a(e) are applicable to members, initially retired on or after October 1, 1967, who are recalled to active duty and upon release from that duty become entitled to recompute their retired pay under the provisions of 10 U.S.C. 1402(a). A copy of the Department of Defense Military Pay and Allowance Committee Action No. 465 setting forth and discussing the question was attached.

The question presented is as follows:

Are the provisions of section 1401a(e), title 10, United States Code, applicable to members, initially retired on or after 1 October 1967, who become entitled to recomputation of retired or retainer pay under section 1402(a) of that title?

Subsection (a) of section 1402, Title 10, U.S. Code, authorizes recomputation of retired or retainer pay for members who serve on active duty (other than for training), after becoming entitled to retired or retainer pay. The second sentence of footnote 1 to that subsection provides that such a member who has been entitled to basic pay for a continuous period of at least 2 years at the time of his release from active duty, but who has not been entitled to receive basic pay under the rates of basic pay in effect upon that release from active duty, for a continuous period of at least 2 years, may have his retired or retainer pay recomputed under the rates of basic pay replaced by those in effect upon release from active duty.

The discussion in the Committee Action states that under the literal terms of subsection 1401a(e), the retired or retainer pay of a member retired on or after October 1, 1967, whose pay is based on the basic pay rates prescribed in Public Law 92-129, 85 Stat. 348, effective

October 1, 1971, may not be less than it would have been had he become entitled to retired or retainer pay on Steptember 30, 1971, the day before the effective date of Public Law 92–129. As pointed out in the discussion, subsection 1401a(e) makes no distinction as to whether the retired or retainer pay is based on those basic pay rates by virtue of an initial retirement or whether it is based on those rates through the operation of section 1402(a).

For comparison purposes, the Committee Action points out that members who were initially retired on or after June 1, 1971, but before October 1, 1971, whose retired or retainer pay was computed under the basic pay rates then in effect (Executive Order 11577, effective January 1, 1971), became entitled to a 0.6 percent increase (this adjustment became effective June 1, 1971, and represents the percent by which the base index of March 1971 exceeded the Consumer Price Index for December 1970) under 10 U.S.C. 1401a(d). The entitlement to this 0.6 percent increase, however, terminated on October 1, 1971, the effective date of new basic pay rates prescribed by Public Law 92–129.

It was further pointed out that members who were initially retired on or after October 1, 1971, but before January 1, 1972, whose retired or retainer pay was computed under basic pay rates prescribed by Public Law 92–129, but whose basic pay rates were not actually increased thereby, were entitled to receive the 0.6 percent partial CPI increase in retired or retainer pay by virtue of the provisions of 10 U.S.C. 1401a(e).

The discussion concludes by saying that since a member retiring on September 30, 1971, is entitled to receive a 0.6 percent partial CPI increase in such pay and to a full increase at the next CPI adjustment, the view is expressed that a member whose retired or retainer pay is recomputed under section 1402(a) and based on Public Law 92-129 basic pay rates, would also be entitled to those increases. In support of the view that the provisions of subsection 1401a(e) of Title 10 should be applicable to section 1402(a) members, the Committee Action cites 50 Comp. Gen. 232 (1970).

Subsection (e) of section 1401a of Title 10, U.S. Code, provides in pertinent part:

> (e) Notwithstanding subsections (c) and (d), the adjusted retired pay or retainer pay of a member or former member of an armed force retired on or after October 1, 1967, may not be less than it would have been had he become entitled to retired pay or retainer pay * * * on the day before the effective date of the rates of monthly basic pay on which his retired pay or retainer pay is based.

In 51 Comp. Gen. 384 (1971), where we cited with approval 50 Comp. Gen. 232 (1970), we took the position that 10 U.S.C. 1401a(e) preserves entitlement to a member, initially retired on or after October 1, 1971 (but no later than December 31, 1971), whose retired pay

is computed based on the basic pay rates prescribed in Public Law 92–129, to an amount not less than he would have been entitled to receive as adjusted retired pay had he retired on September 30, 1971, the day before the effective date of the then new basic pay rates. It was also said in that decision that:

Since it has been determined that the rates of basic pay prescribed in Public Law 92–129 are the applicable rates for the purpose of adjusted retired pay under 10 U.S.C. 1401a for members who retire on or after October 1, 1971, and since members covered by 10 U.S.C. 1402(a) are entitled to a partial CPI adjustment under 10 U.S.C. 1401a(c) and (d) (see 50 Comp. Gen. 232 (1970)), it would be inconsistent to adopt a different rule in recomputing retired or retainer pay for section 1402(a) members. It is our view that for the purposes of the first sentence of footnote 1 the starting date is October 1, 1971. For purposes of the second sentence of the footnote the basic pay rates prescribed by Public Law 92–129 are the rates in effect at the time of release (on or after October 1, 1971) and the rates prescribed by Executive Order 11577 effective January 1, 1971, are the rates replaced.

Thus, in the case of a member, initially retired on or after October 1, 1967, recalled to active duty and released from such duty on or after October 1, 1971, but before January 1, 1972, whose retired pay is recomputed under the formula of section 1402(a) and the second sentence of footnote 1, such retired pay would be based on the basic pay rates which became effective January 1, 1971 (Executive Order 11577). Additionally, such a member would be entitled to have his retired pay increased by the 0.6 percent partial CPI adjustment which became effective June 1, 1971 (method b computation, 50 Comp. Gen. 232 (1970)), upon that release from active duty.

In light of the holding in 50 Comp. Gen. 232 and 51 *id.* 384, cited above, and the intended purpose of 10 U.S.C. 1401a to treat members as equal as possible in matters involving Consumer Price Index adjustments, it is our view that it would be inconsistent to limit application of subsection 1401a(e) "saved pay" provisions to initial retirement formulas only. It follows that the provisions of subsection 1401a(e) are applicable to members retired on or after October 1, 1967, and who thereafter become entitled to recomputation of retired or retainer pay under section 1402(a) of Title 10.

Accordingly, the question is answered in the affirmative.

[B–133972]

National Guard—Civilian Employees—Technicians—Training Duty as Guardsman—Compensation and Leave Status

A National Guard technician employed under 32 U.S.C. 709, who upon completion of a civilian workday departs for 2 weeks full-time training duty as a National Guardsman for a course of instruction pursuant to 32 U.S.C. 505, and returns home in a military travel status shortly after midnight, reporting to his civilian position the same day, is entitled to civilian pay without charge to military or civilian leave for the day of departure since the civilian duties were

performed by the member before he became subject to military control and the performance of military duties, and to civilian compensation for the day he reported back to his civilian position at which time he no longer was subject to military control, and entitlement to military pay incident to the return travel from training is not incompatible to the performance of civilian duties or payment therefor after termination of active military training duty.

Leaves of Absence—Civilians on Military Duty—Leave, Etc., Status

A National Guard technician who became subject to military control upon reporting for full-time training duty to a National Guard School for recruiters pursuant to 32 U.S.C. 504 after completion of a civilian workday is entitled under the principle in 49 Comp. Gen. 233 to civilian pay without charge to leave for the day of reporting, even though he may be entitled to military pay for that day. However, since the full-time training duty is active duty under 37 U.S.C. 204(d), which is incompatible with civilian service, there is no entitlement under the rule in 37 Comp. Gen. 255 to civilian pay without charge to the appropriate leave—military, annual, or LWOP—for the days subsequent to coming under military control, even though the duties of the military assignment were such that the member was able to perform civilian duty on those days.

Pay—Double—Active Duty and Civilian Employment—Reimbursement Status

A National Guard technician who after 4 hours of civilian duty takes 4 hours of annual leave in order to perform military recruiting under orders issued pursuant to 32 U.S.C. 505 may receive 4 hours civilian pay and 4 hours annual leave as well as any military compensation which accrues under his orders since civilian compensation may be paid for the time worked prior to reporting for military duty, and a reservist or member of the National Guard may be placed on leave, including annual leave, while performing active or full-time training duty, and if the technician wishes to charge his absence to allowable military leave the charge must be for 1 day as there is no authority for charging military leave in increments of less than 1 day. Since the incompatibility rule should not prevent the charging of less than a full 8 hours of annual leave when a civilian employee performs services for a part of a day before becoming subject to military control, B-152908, December 17, 1963, is modified.

Compensation—Double—Civilians on Military Duty—National Guard Technicians

A National Guard technician who for a period of 5 days performs 4 hours of civilian duty each day followed by active military duty as part of the year around training authorized under 32 U.S.C. 503, defined as "training performed from time to time throughout the calendar year in varying increments as contrasted to 15 consecutive days," is entitled to civilian pay without charge to leave for the 4 hours worked in a civilian capacity on the day he reported for military duty, with a charge of 4 hours annual leave or a full day of military leave for the 4 remaining hours of the civilian duty day. In order for the technician to receive compensation from both the civilian and military sources, 8 hours of annual leave or a full day of military leave is chargeable for the balance of the 5-day period, since no additional pay would result for the part-time performance of civilian duties without a charge to leave.

To the Secretary of Defense, February 5, 1973:

We refer to the letter dated July 10, 1972, of the Chief, National Guard Bureau, Departments of the Army and Air Force, reference NGB–TNS, requesting our decision with regard to the pay entitlement of National Guard Technicians in several situations when both civilian duties and active duty with the National Guard are performed in one day.

As indicated in the submission we held in the final paragraph of 49 Comp. Gen. 233 at 243 (1969), that a civilian employee who is called to active military duty with his National Guard or Military Reserve unit after he has completed his civilian duties for the day may receive both civilian and military pay for that day without a charge to leave in the civilian position. That case involved military duty for law enforcement and the military leave provisions covered by 5 U.S. Code 6323(c). The question of whether the member's civilian pay should be reduced by the amount of his military pay under the provisions of 5 U.S.C. 5519 was also considered. It was held that reduction of civilian pay was not required because the employee/member had not been excused from his civilian duties in order to perform military duty nor had he become subject to military control at the time he performed his civilian duties. The questions now presented by the Chief, National Guard Bureau involve active duty military training (for which they are entitled to military leave under 5 U.S.C. 6323(a)) performed by civilian technicians of the National Guard and not duty to assist in law enforcement. The view is expressed that the same principles should apply to any full-time training duty or active duty on a day during which the employee had performed all of the duties of his civilian employment.

The first case presented and the questions concerning it are as follows:

A National Guard Technician employed under 32 U.S.C. 709 completes his civilian work day at 1700 hours, 1 July, in Sacramento, California. By Special Orders dated 28 June, he has been ordered to two weeks Full Time Training Duty (FTTD), as a National Guardsman, to be performed at a course of instruction at Fort Eustis, Virginia, under authority 32 U.S.C. 505. Reporting time at Fort Eustis is specified as 0800 hours, 2 July. He departs his home in military travel status at 1930 hours, 1 July, performs his period of FTTD and returns to his home in military travel status, arriving at 0130 hours, 16 July and reports to work at his civilian job at 0800 hours the same day.

Question #1—Is the technician entitled to both civilian and military pay for 1 July since he had completed his civilian workday prior to entering military status?

Question #2—Is the technician entitled to both civilian and military pay for 16 July since he had completed his military training prior to 0800 hours and he further reported to his civilian job and worked his scheduled tour of duty?

Question #3—Provided questions one and two are negative, should he have been charged appropriate leave (military, annual, LWOP) on 1 and 16 July, even though he worked his civilian tour of duty on both days involved?

The National Guard Technician involved in this case would be entitled to civilian pay without charge to leave (military or annual) for July 1 since he performed his civilian duties before he became subject to military control and performed duties incident to his military status. Having completed all the military training duties required in his orders he was no longer subject to military control at the time he reported for civilian duty on July 16. The fact that he may have been entitled to military pay for that day for the reason that his return

travel from training was not completed until 1:30 a.m. is not considered incompatible with the performance of his civilian duties or the payment of civilian compensation for actual work performed after termination of his active military training duty. Questions 1 and 2 are answered in the affirmative making an answer to Question 3 unnecessary.

The second case and related questions are as follows:

A National Guard School for Recruiters is to be held during the period 1 to 3 March, from 1800 to 2300 hours each day. 32 U.S.C. 504 is cited as the training authority and the member attending the school will be in military status (full time training duty) and entitled to military pay. He also works his customary 8 hours on each day in his civilian status, from 0800 to 1700 hours.

Question #1—Is the technician entitled to both civilian and military pay for 1, 2, and 3 March since he had completed his civilian workday prior to entering military status?

Question #2—Should he be charged appropriate leave (military, annual, LWOP) on each day in question, even though he worked his civilian tour of duty on each day involved?

If the member did not begin training or otherwise become subject to military control on March 1 until after he had performed all his civilian duties for that day he is entitled under the principle stated in 49 Comp. Gen. 233 to civilian pay without charge to leave even though he may have been entitled to military pay for that day. However, full-time training duty as a member of the National Guard is defined as active duty in 37 U.S.C. 204(d). The decision in 49 Comp. Gen. 233 at 243 as discussed above did not totally invalidate the long established rule as discussed in 37 Comp. Gen. 255 (1957) that active military duty is incompatible with civilian service although it did modify that rule to the extent that civilian services are performed before the individual first reports for military duty. Since the technician in this example was on active military duty for training from 6 p.m. March 1 until 11 p.m. March 3 he is not entitled to civilian pay without charge to leave for March 2 and 3 even though the duties of his military assignment were such that he was able to perform his civilian duties on those days. In summary, the technician may be paid both civilian and military pay for March 1 without charge to leave but he must be charged leave (military, annual, LWOP) for March 2 and 3. Your questions are answered accordingly.

The third case and the questions presented are as follows:

A National Guard Technician works at his civilian job from 0800 until 1200 hours and then takes Annual Leave for the balance of the day. He is in receipt of Special Orders authorizing FTTD under 32 U.S.C. 505 for recruiting purposes on the same day. He proceeds to a High School at 1400 hours where he performs recruiting activities and returns home at 1845 hours.

Question #1—Is the technician entitled to both civilian and military pay since he had completed four hours of his regular civilian tour of duty and was granted 4 hours of annual leave for the remainder of the civilian work day?

Question #2—If the technician applied for military leave to which he was entitled, would he have been charged with 8 hours or 4 hours, since he had completed four hours of civilian work tour before entering military status?

A technician properly ordered to full-time training duty may receive civilian pay for time worked in his civilian capacity prior to the time he became subject to military control through reporting for military duty. See answers to Cases 1 and 2. Further, a Reserve or member of the National Guard may be placed on leave including annual leave from his civilian position while performing active military duty or full-time training duty. Specifically the technician in this case may receive civilian pay for 4 hours based on time actually worked and 4 hours annual leave as well as any military compensation which accrues under the special orders applicable. However, there is no authority for charging military leave in increments of less than one day. B–165619, December 31, 1968, copy enclosed. Accordingly, if the technician wishes to charge his absence to allowable military leave the charge must be for one of the allowable 15 days.

We recognize that this holding is contrary to the rule stated in B–152908, December 17, 1963, in which an employee who began to serve a period of active military duty after he had worked 6 hours in his civilian position was required to be charged leave, annual or military, for the full day. However, on reconsideration of the matter and in view of 49 Comp. Gen. 233 (1969), we believe that the better view is that the incompatibility rule should not prevent the charging of less than a full 8 hours of annual leave when an employee has rendered services for a part of such day before becoming subject to military control. The decision B–152908, December 17, 1963, is modified accordingly. The same may not be said for military leave under 5 U.S.C. 6323(a) since that leave is not susceptible of charging in amounts less than full days.

The fourth case and related questions are as follows:

A National Guard Technician is ordered to perform military duty as part of the Year-Round Annual Training under section 503 of title 32 United States Code for 5 days, from 20–24 March, Monday thru Friday. The Annual Training has been scheduled to provide a military duty day from 1300 to 2200 hours each day and will be performed in the immediate vicinity of the technician's work station. The technician performs technician duties each day from 0800 to 1200 hours and then performs the military duties from 1300 to 2200 hours each day. He applies for and is granted 4 hours of annual leave from 1300 to 1700 hours each day.

Question #1—Is the technician entitled to both civilian and military pay since he completed four hours of his civilian tour of duty and was granted 4 hours annual leave for the remainder of each civilian work day involved?

Question #2—If the technician applied for military leave to which he was entitled, would he have been charged with 8 hours or 4 hours of military leave, since he worked 4 hours each day in a civilian status?

Question #3—Should the technician be allowed to perform civilian work on any of the work days involved since he is on five continuous days of military duty, even though his military tour of duty does not begin until 1300 hours each day?

Under the provisions of NGR 350–1, paragraph 3d, "Year around training" is defined as training performed from time to time through-

out the calendar year in varying increments as contrasted to 15 consecutive days. Technicians performing such training duty are apparently on active duty for the full period of time involved. *See* 37 U.S.C. 204(d). In that situation entitlement to civilian pay without charge to leave would terminate when the technician first reports for military duty and such entitlement would not be restored until his period of training was completed. In the case presented we believe that the technician should be allowed civilian pay without charge to leave for the 4 hours he worked in his civilian capacity on March 20 before reporting for military duty. However, annual leave (4 hours) or military leave (full day) would be chargeable for the remaining 4 hours that day and 8 hours of annual leave or a full day of military leave on each day March 21 through 24 in order for the technician to receive compensation from both sources. This is consistent with the answers in the third case presented.

We are aware of nothing which would prevent a technician from performing part of his civilian duties while on active military duty if such performance was appropriate in view of his military training requirements. However, such performance would not result in additional pay without the charging of leave as indicated above. The questions are answered accordingly.

[B–167015]

Contracts—Payments—Progress—Suspension—Equal Opportunity Program Compliance

Although the suspension of progress payments for violations of the standard Equal Opportunity clause in a contract is a sanction which is authorized by section 209(a)(5) of Executive Order 11246, under the regulations of the Department of Labor the final decision for invoking the sanctions referred to in 41 CFR 60–1.24(c)(3) is for determination only after the contractor has been afforded an opportunity for a hearing. Furthermore, even though a contractor's compliance or noncompliance with the Equal Opportunity clause is a question of fact, 41 CFR 60–1.1 specifically excludes equal opportunity matters from determination under the Disputes clause, and the determination responsibility therefore vests in the Contract Compliance Officer or other officials regularly involved in equal opportunity programs. Thus, a contractor's compliance posture is for consideration under the regulations and not the Progress Payment clause and progress payments may not be suspended without a hearing.

To the Acting Director, Office of Federal Contract Compliance, February 5, 1973:

Reference is made to your letter of September 25, 1972, regarding sanctions against contractors in case of noncompliance with Executive Order 11246, as amended.

You state that the principal sanctions presently available are contract cancellation and debarment, but you are now considering the

withholding of "progress payments" during the performance of a contract subject to the Executive order, whenever the contract involved includes provisions for progress payments and there appears to be a violation of the order. You advise that such progress payments would be withheld until such time as the violation is cured, and that the contractor would not have the right to request a formal hearing regarding the propriety of the suspension of his progress payments.

You point out that 41 CFR 60–1.1 precludes resort to the contract's "Disputes" clause procedures concerning disputes relative to a contractor's compliance with his obligations under the Equal Opportunity clause, but that the contractor may be notified of the proposed suspension by a show cause notice allowing him 30 days "to be heard" on the matter. Continued noncompliance would precipitate a notice of proposed debarment and contract cancellation allowing the contractor an opportunity for a full hearing at that time.

You express your belief that the proposed procedure for suspending progress payments, when a contractor is considered to be in violation of the Equal Opportunity clause, is authorized by Executive Order 11246, and is consistent with Federal procurement law principles. Regarding the latter contention, you note that paragraph (c) of the standard Progress Payment clauses provides for suspension of progress payments upon a finding by the contracting officers that the contractor has breached a material requirement of the contract, and you indicate that a revision of those clauses is not required for equal opportunity suspensions of progress payments. You suggest that all that is needed is that contracting officers be instructed by their agency head to consider compliance with the Equal Opportunity clause in determining a contractor's entitlement to progress payments. You ask for our comments regarding the proposed procedures.

We agree with your position that the suspension of a contractor's progress payments for violations of the standard Equal Opportunity clause of his contract is a sanction which is authorized by section 209(a)(5) of Executive Order 11246. This portion of the order permits, among other things, suspension of a contract, or a portion thereof, in accordance with such rules, regulations or orders as the Secretary of Labor may issue or adopt, for failure of the contractor to comply with the nondiscrimination provisions of the contract. Pursuant to your Department's regulation which is set out at 41 CFR 60–1.24(c)(3), the Director, Office of Federal Contract Compliance, or the agency head with the approval of the Director, may impose such sanctions as are authorized by the order. These sanctions, as indicated above, include the suspension of a "portion" of a contract, and it is our opinion that the progress payment provisions of a contract fall within

that terminology. However, the same regulation only permits such a sanction "If the final decision reached in accordance with the provisions of section 60–1.26 is that a violation of the equal opportunity clause has taken place."

Section 60-1.26 pertains to conducting either an informal or formal hearing for determining the compliance posture of a contractor with the terms of the Equal Opportunity clause of his contract. While section 60–1.26 does not specifically refer to orders for suspension of a portion of a contract, it seems clear that the regulations contemplate that the final decision for invoking the sanctions referred to in section 60–1.24(c)(3) will be rendered only after the contractor has been afforded an opportunity for a hearing. Although you state that under section 60–1.28 the contractor may be notified of the proposed suspension of progress payments by a show cause notice allowing the contractor 30 days "to be heard" on the matter, there appears to be no basis for imposing sanctions without a hearing so long as the contractor makes a timely response to the above cause order. Thus, it is our view that the present regulations of the Department of Labor implementing Executive Order 11246 do not authorize, without a hearing, the suspension of a contractor's progress payments for an indicated violation of the Equal Opportunity clause of his contract. Further, it is our opinion that a right to a hearing, prior to imposition of such a sanction, is conferred upon a contractor by the provisions of the regulations and by the inclusion of such regulations by reference thereto in paragraph 6 of the Equal Opportunity clause of his contract.

Concerning the suspension of progress payments under the provisions of paragraph (c) of the standard Progress Payment clauses, 41 CFR 1-30.510-1(a) (as distinguished from imposition of a sanction under the Equal Opportunity clause), this paragraph permits the contracting officer to suspend progress payments whenever he finds, upon substantial evidence, that the contractor has failed to comply with any material requirement of the contract. A contractor's compliance or noncompliance with material requirements of the Equal Opportunity clause of his contract would appear to be a question of fact, and the Disputes clause in Government contracts provides that any dispute concerning a question of fact arising under the contract which is not disposed of by agreement shall be decided by the contracting officer. The Disputes clause also provides for the appeal of such a decision to the head of the agency, and for the resolution of the appeal by the head of the agency, or his duly authorized representative for the determination of such appeals, generally, the agency's Board of Contract Appeals. There is no indication in the standard Progress Payment clauses that the usual procedures for resolving factual disputes

are not for application to the decisions made by the contracting officer under paragraph (c) of those clauses.

However, as pointed out in your letter of September 25, disputes concerning a contractor's compliance with his obligations under the Equal Opportunity clause of his contract are not resolved under the Disputes clause procedures, since 41 CFR 60–1.1 specifically states that "The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with his obligations under the Equal Opportunity clause regardless of whether or not his contract contains a 'Disputes' clause." The procedures in that part (60–1) do not indicate that reviews, findings and decisions concerning whether a contractor is in compliance with his obligations under the Equal Opportunity clause are to be made by the contracting officer. Instead, such responsibilities seem to be vested in the Contract Compliance Officer or other officials regularly involved in equal opportunity programs. Thus, since the regulations do not appear to contemplate that the contracting officer is to make factual findings and decisions regarding a contractor's equal opportunity compliance posture; since paragraph (c) of the standard Progress Payment clauses pertains only to findings and decisions by the contracting officer; and since 41 CFR 60–1.1 specifically excludes equal opportunity matters from determination under the Disputes clause, it is our view that the contractor is entitled to have his compliance posture decided under the procedures and by the personnel designated in the regulations, rather than by the contracting officer under the provisions of the Progress Payment clause.

In view of the foregoing, we conclude that, in the absence of appropriate amendments to your Department's regulations (and the resulting contract provisions), progress payments may not properly be suspended, without a hearing, for noncompliance by the contractor with his obligations under the Equal Opportunity clause of his contract.

We will, of course, be glad to discuss or consider your further comments or suggestions in the matter.

[B–174946]

Transportation—Household Effects—Limitation on Definition of Term

The term "baggage and household effects" used in 37 U.S.C. 406 to authorize transportation incident to a temporary or permanent station change for a member of the uniformed services and in the implementing Joint Travel Regulations, paragraph M8000–2, a term that does not lend itself to precise definition and which has been interpreted to mean in its ordinary and common usage as

referring to particular kinds of personal property associated with the home and person, may not be redefined to include all personal property associated with the home and person which will be accepted and shipped by a carrier at the rates established in the appropriate tariffs for household goods on the basis of the risk involved in shipping items not covered by regulation since the risk is the responsibility of the owner who may purchase insurance if he desires greater coverage than normally provided by the carrier.

To the Secretary of the Navy, February 5, 1973:

We again refer to letter of December 9, 1971, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs), requesting a decision whether the term "household goods" as defined in paragraph M8000–2 of the Joint Travel Regulations may be redefined to include all personal property associated with the home and person which will be accepted and shipped by a carrier at the rates established in the appropriate tariffs for household goods. The request was assigned Control No. PDTATAC No. 71–59 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary mentions that 37 U.S. Code 406(b) provides that in connection with a change of temporary or permanent station a member is entitled to transportation (including packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects, or reimbursement therefor, within such weight allowances as are prescribed by the Secretaries concerned, without regard to the comparative costs of the various modes of transportation. He says that subsection (c) of that section provides that the allowances and transportation authorized by subsection (b) are subject to such conditions and limitations, for such grades, ranks and ratings, and to and from such places as prescribed by the Secretaries concerned.

The Assistant Secretary points out that section 406 contains no definition of "baggage and household effects," and that the hearings which preceded the enactment of the statute furnish no clue as to the specific items to be included in that term. As a result, the definition of "household goods" in the Joint Travel Regulations has been amended from time to time as a result of decisions of this Office to include or exclude certain items.

The Assistant Secretary says it has been ascertained that a number of items which normally would not be considered as "household goods," such as a dog exercise pen consisting of sections of fencing and snowmobiles will be accepted and shipped by carriers at the tariff rates established for household goods. He also says that by excluding certain items from being considered as "household goods" a member may have no recourse when such an item is accepted and shipped by the carrier and the item is damaged, lost, or stolen while in transit. He further says that the proposed revision of the definition of "household goods" in the Joint Travel Regulations would reduce consider-

ably the need to obtain an advance decision from this Office whether an item can or cannot be considered as "household goods."

"Baggage and household effects" are general terms, not lending themselves to precise definition. The terms vary in scope depending upon the context in which they are used. It has been our view, however, that in ordinary and usual usage, they refer to particular kinds of personal property associated with the home and person. As generally understood, the term "household goods" refers to furniture and furnishings or equipment used in and about a place of residence for the comfort and accommodation of the members of a family. Thus, notwithstanding the lack of preciseness of the term, it has long been considered that various items, such as boats, airplanes and house-trailers do not come within its scope. 44 Comp. Gen. 65 (1964). In conformity with that concept paragraph M8000–2 of the Joint Travel Regulations is as follows:

HOUSEHOLD GOODS. The term "household goods," as used in this volume, means furniture and furnishings or equipment, clothing, baggage, personal effects, professional books, papers, and equipment under the conditions described in subpar. 3, and all other personal property associated with the home and person. Also included are spare parts for a privately owned motor vehicle (extra tires and wheels, tire chains, tools, battery chargers, accessories, etc.). The term "household goods" does not include the following:

1. personal baggage when carried free on tickets;
2. privately owned motor vehicle (for overseas shipment see Chapter 11);
3. trailers, with or without other property;
4. boats;
5. wines and/or liquors;
6. animals not required in the performance of official duties;
7. birds;
8. groceries and provisions other than those for consumption by the member and his immediate family;
9. articles of household goods acquired subsequent to the effective date of permanent change-of-station orders except when purchased in the United States for shipment to a duty station outside the United States with the approval of the appropriate authority of the Service concerned, or when they are bona fide replacements of articles which have become inadequate, worn out, broken, or unserviceable on or after the effective date of orders but prior to the date of release of the bulk of household goods to the transportation officer or carrier for shipment;
10. articles intended directly or indirectly for persons other than the member and his immediate family, or articles for sale.

While the ocean shipment of motor vehicles has been authorized by law, the Congress has not otherwise authorized their movement from station to station. It is noted that automobiles and motor vehicles including snowmobiles are also specifically excluded from shipment as household effects of Department of Defense civilian employees. Paragraph C1100, Volume 2, Joint Travel Regulations. Also, a separate allowance is authorized by law for the movement of trailers. 37 U.S.C. 409.

We do not believe the possibility that the member would have no recourse when an item long excluded from "household goods" is

shipped and is damaged, lost, or stolen while in transit is a valid reason for revision of the regulations to include such items. The risk involved in shipping items not covered by the regulations is the responsibility of the owner. Presumably he may purchase insurance if he desires greater coverage than normally provided by the carrier.

It is noted that the complete lists of excluded items in paragraph C1100, Volume 2, Joint Travel Regulations, and in section 1.2h, Office of Management and Budget Circular A-56, Revised, August 17, 1971 (for civilian employees), closely parallel the exclusions in paragraph M8000-2 of the Joint Travel Regulations, quoted above. Thus, the regulatory definitions of the respective terms "baggage and household effects," "furniture and household and personal effects" and "household goods and personal effects" as used in the various acts covering shipment of "personal property" for Government personnel have recognized, on the basis of a series of specific determinations over the years, that certain items should be excluded.

In view of the small number of requests we have received in recent years for advance decisions as to whether certain items may be shipped at Government expense, it would seem that the definitions have not generated either undue hardship or significant administrative problems. Additionally, the record before us does not support a finding that a sufficient in-depth review of the excluded items and the results flowing from adoption of the suggested broader definition of "household goods" has been made so as to justify a modification at this time. However, we recognize that this area is one in which the findings in a study thereof may present a basis in support of modifications to the existing definitions. We therefore suggest that your agency give consideration to a more detailed review of this matter, perhaps looking to a cooperative undertaking with the General Services Administration, the Department of State and our Office.

Accordingly, the question presented is answered in the negative.

[B-176287]

Pay—Active Duty—Grade or Rank—Orders Reissued

A graduate from an Army nursing school on May 28, 1971, discharged from his enlisted E-3 status effective August 2, 1971, to accept the commission of second lieutenant on August 3, 1971, who was not granted ordinary leave, did not request excess leave, and was not in an absent without leave status for the period he was at home following his commission and compliance with active duty orders dated November 1, 1971—August 12, 1971, orders not having been received did not become entitled to active duty pay and allowances as a second lieutenant until the date of necessary compliance with the November 1, 1971, orders. However, the member may retain the pay and allowances he drew as a private first class E-3 for the period May 29 to October 31, 1971, since participants in the

Army Student Nurse Program are retained on active duty for the usually short period between graduation and commissioned service, and the member told to remain at home considered himself on active duty.

To Major John T. Donohue, Department of the Army, February 5, 1973:

Further reference is made to your letter dated April 10, 1972, MEDEW-CF, forwarded to this Office by letter of the Office of the Comptroller of the Army dated June 16, 1972, DACA-FIS-PP, requesting a decision as to the entitlement of Second Lieutenant Philip H. Runyon, 443-50-0854, USAR, to active duty pay and allowances in the grade of private first class, E-3, during the period May 29 to August 2, 1971, and as a second lieutenant, O-1, from August 3 to October 31, 1971, subsequent to his graduation from nursing school on May 28, 1971. The request has been assigned control number DO-A-1160 by the Department of Defense Military Pay and Allowance Committee.

By Special Orders number 795, dated September 28, 1970, issued by the Armed Forces Examining and Entrance Station, Oklahoma City, Oklahoma, Lieutenant Runyon was ordered to active duty in the grade of private first class, E-3, for the purpose of participation in the Army Student Nurse Program with an active duty commitment of 24 months. That order assigned him to Student Detachment, Headquarters, Fourth United States Army with duty station at Hillcrest Medical Center School of Nursing, Tulsa, Oklahoma. His home of record was shown as Broken Arrow, Oklahoma, which is located within 5 miles of Tulsa.

You indicate that on May 28, 1971, Lieutenant Runyon graduated from nursing school and on August 3, 1971, he received his commission as second lieutenant in the Army Reserve.

Letter Orders Number A-08-148, dated August 12, 1971, Headquarters, Fifth United States Army, ordered Lieutenant Runyon from his home at Broken Arrow, Oklahoma, to active duty as a second lieutenant, Army Nurse Corps, from his active status as a private first class. Those orders directed him to perform temporary duty at the Student Detachment, Medical Field Service School, Brooke Army Medical Center, Fort Sam Houston, Texas, for approximately 6 weeks to attend the Army Medical Department Officer Basic Course with a reporting date of August 18, 1971, and further assigned him to Brooke General Hospital, Fort Sam Houston, with a reporting date of October 7, 1971. It appears Lieutenant Runyon never received those orders and consequently did not comply with them. Those orders were later revoked.

Special Orders Number 198 of Headquarters, Fort Sam Houston, Texas, dated September 27, 1971, confirmed verbal orders of the commanding officer discharging Lieutenant Runyon from his enlisted status effective August 2, 1971, to accept a commission as an officer in the Army.

Letter Orders Number A–11–01 of Headquarters, Fifth United States Army, dated November 1, 1971, again ordered Lieutenant Runyon to active duty as a second lieutenant, Army Nurse Corps, from his home at Broken Arrow, Oklahoma, directing him to report November 3, 1971, for temporary duty at the Brooke Army Medical Center to attend the Army Medical Department Officer Basic Course with ultimate assignment to the Brooke General Hospital to which he was to report on December 27, 1971. Lieutenant Runyon apparently received and complied with these orders.

The record includes a statement dated December 7, 1971, by Captain John T. Mahan, Assistant Adjutant, Headquarters, Fort Sam Houston, Texas, which provides the following facts. When Lieutenant Runyon failed to comply with the orders of August 12, 1971, he was telephoned by Headquarters, Fort Sam Houston, to determine why he had failed to comply. At that time Lieutenant Runyon apparently advised Headquarters that he had not received the orders and he was told that Headquarters would have to contact the Surgeon General in Washington, D.C., for authority to revoke the orders and request new assignment instructions. Lieutenant Runyon was also advised to take ordinary and excess leave in the interim. However, in accordance with change 4 of Army Regulations 601–19 he was further informed that he did not have to take leave unless he so desired. Lieutenant Runyon informed Headquarters that he was aware of the regulations and he did not desire ordinary or excess leave. Headquarters apparently called the Surgeon General's Office requesting authority to revoke the orders of August 12, 1971, and requesting new assignment instructions. The Surgeon General's Office advised Headquarters, Fort Sam Houston, that Lieutenan Runyon would be going to the November 3, 1971, Officer Basic Course and, accordingly, the orders of August 12, 1971, were revoked.

You indicate that during the period of May 29 to October 31, 1971 (from the time he completed nursing school until he complied with the orders of November 1, 1971), Lieutenant Runyon continued to draw pay and allowances as an E–3. You also say that there is no indication in Lieutenant Runyon's personnel file that he was granted ordinary or excess leave during that period nor was he considered administratively absent. However, it was apparently subsequently interpreted that Lieutenant Runyon was in an excess leave status during that period

and collection action was begun in December 1971 to liquidate the overpayment of $1,260.44 at the rate of $50 per month for the pay he received during that period. As of March 31, 1972, Lieutenant Runyon had paid back $200.

You have submitted vouchers covering the $200 Lieutenant Runyon has refunded as well as for the additional amount due him if he were entitled to pay and allowances as a second lieutenant from August 3 to October 31, 1971. Since there is no evidence of Lieutenant Runyon's requesting ordinary or excess leave for all or part of that period as provided in Army Regulations 601–19, you ask whether he is entitled to pay and allowances as a private first class, E–3, from May 29 to August 2, 1971, and as a second lieutenant, O–1, from August 3 to October 31, 1971.

The Army Student Nurse Program in which Lieutenant Runyon was participating, as outlined in Army Regulations 601–19, is a program designed to procure officers for active duty as professional nurses. Under the program selected nursing students at civilian nursing schools are enlisted in the Army Reserve and are subsequently ordered to active duty with station at their respective schools for the purpose of continuing their studies until completion of the educational requirements for a diploma or baccalaureate degree in nursing.

At the earliest date following graduation participants must accomplish a licensure examination in professional nursing, normally in the State in which the parent school is located. Then, generally, each participant is obligated to accept, if otherwise eligible, an appointment as an officer in the appropriate grade and serve on active duty under that appointment for the period of time determined under the applicable regulations. *See* Army Regulations 601–19, chapter 1, effective January 15, 1970, and chapter 3, change 2, effective August 20, 1970.

As you indicate, paragraph 3–2*f*, change 4, effective May 21, 1971, of those regulations provides generally, in part, that administrative absence from the vicinity of the school is authorized for such activities as attendance at the conferences and lectures in connection with studies, and that absences during vacation and holiday periods when the school is not in session will not be chargeable as ordinary leave. Subparagraphs 3–2*f* (3) and (5) provide specifically in part as follows:

(3) Ordinary leave (AR 630–5) requires prior approval of the commanding officer of the organization to which the student is assigned. A student may be granted ordinary leave in the amount accrued plus leave accrued during the period ordinary leave is taken.

* * * * * * *

(5) As an exception to limitations prescribed in AR 630–5, the commanding general of each Army area * * * may grant any necessary periods of excess leave under the following circumstances:

* * * * * * *

(c) Upon graduation from the educational program and prior to reassignment to a military medical installation.
(d) Excess leave will be granted *only when requested by the service member.* The individual will acknowledge that (he) (she) is aware that periods of excess leave are without pay and allowances and that no leave is earned or accrued during periods of excess leave. [Italic supplied.]

Also, in accordance with the provisions of Title 37, U.S. Code, and Parts 1 and 3 of the Department of Defense Military Pay and Allowances Manual, paragraph 3–2a(1) of Army Regulations 601–19, change 4, provides generally that, except as otherwise provided, all participants in the program are entitled to receive pay and allowances in the appropriate grade of Reserves on active duty.

In this case, Lieutenant Runyon was clearly on active duty as an E–3 for the purposes of receiving pay and allowances through the date of his graduation, May 28, 1971. After graduation presumably he prepared for and took the State nursing licensure examination as is required by Army Regulations 601–19. It appears that Lieutenant Runyon failed to receive the orders of August 12, 1971, through no fault of his own nor does he appear to have had prior notice of those orders which, therefore, never became effective. *See* 27 Comp. Gen. 176 (1947), 43 *id.* 833 (1964), and Army Regulations 310–10, paragraphs 1–2 b and c. Also during the period in question he apparently remained at or near his duty station, Hillcrest Medical Center School of Nursing, and was available to receive further orders or instructions, which he did.

Apparently at no time during the period of May 29 through October 31, 1971, did he request ordinary or excess leave. In fact, it is stated that he specifically advised Headquarters, Fort Sam Houston, that he did not wish to take such leave. Since the applicable regulations clearly provide that excess leave will be granted only when requested by the service member, which is in accordance with the decisions of this Office to the same effect, it appears that Lieutenant Runyon was not in an excess leave status during the period May 29 through October 31, 1971. *See* B–136919, September 17, 1958, and 46 Comp. Gen. 261 (1966). There is also no indication that he was considered absent without leave during that period.

While Lieutenant Runyon received his commission as a second lieutenant on August 3, 1971, he did not receive orders directing him to perform active duty in that capacity until he received the orders of November 1, 1971. Since, as a general rule, a Reserve member is not entitled to active duty pay and allowances until the date of necessary compliance with orders directing him to perform active duty, it is our view that Lieutenant Runyon did not become entitled to active duty pay and allowances as a second lieutenant until the date of necessary compliance with the orders of November 1, 1971. *See* Department of

Defense Military Pay and Allowances Entitlements Manual, paragraphs 10201, 10241, and Table 1–2–1, Rule 7.

While we recognize that the orders dated September 27, 1971, confirmed purported verbal orders of August 2, 1971, discharging the member from his enlisted status, presumably those orders were issued on the assumption that the member actually entered on active duty in his officer status when he was commissioned effective August 3, 1971. As indicated above, the member may not be considered as being on active duty as an officer for pay and allowance purposes prior to November 1, 1971.

The applicable regulations and our informal inquiries establish that it was the general practice to retain participants in the Army Student Nurse Program on active duty during the usually short period between their graduation from nursing school and the commencement of their active duty as officers. It also appears from the record that the member in this case considered himself on active duty and complied with the instructions of his superiors who also apparently considered him on active duty since he was requested to take leave, paid active duty pay and allowances as an enlisted man, and apparently told to remain at home to await further orders.

Therefore, while the member is not entitled to pay and allowances as a second lieutenant until November 1, 1971, we would not question the active duty pay and allowances paid to him as a private first class, E–3, during the period May 29 to October 31, 1971.

Accordingly, no further collection action need be taken against the member and, if otherwise correct, payment may be made on the voucher, returned herewith, covering the amount of $200 collected from him through March 31, 1972, for pay he received as an E–3 during the period in question. Since he is not entitled to pay and allowances as a second lieutenant prior to November 1, 1971, the voucher covering his claim for such payments will be retained here.

[B–177053]

Uniforms—Military Personnel—Damage, Loss, Etc., of Uniforms—Deceased Personnel

The value of military clothing lost at the same time a member of the uniformed services lost his life when his housetrailer was destroyed in a flood may not be paid to the heirs or legal representatives of the member since 37 U.S.C. 418 and implementing regulations prescribe that a claim for the loss, damage, or destruction of personal clothing is a personal right and on the basis of the rationale in 26 Comp. Gen. 613, the right does not extend beyond the life of the beneficiary. Although the claim for the clothing is cognizable under both 31 U.S.C. 241 and 37 U.S.C. 418, the jurisdiction of claims under 31 U.S.C. 241 is vested in the appropriate Secretary and limited to losses occurring in Government-assigned

quarters, even though claim may be made by a survivor, and under 37 U.S.C. 418, which relates to clothing furnished in kind or a monetary loss, the claim for a loss is personal to the member sustaining the loss.

To Second Lieutenant L. R. Moore, Department of the Air Force, February 5, 1973:

Further reference is made to your letter dated August 7, 1972, received here September 19, 1972, in which you request an advance decision as to the propriety of payment on a voucher in the amount of $214.34 representing the value of lost clothing of a deceased member. Your submission has been assigned Air Force Request No. DO-AF-1169 by the Department of Defense Military Pay and Allowance Committee.

In your letter you indicate that a claim for military clothing lost during the flood at Rapid City, South Dakota, June 10, 1972, has been presented by a Summary Courts Officer on behalf of Sergeant Brand T. Towner, USAF, who died on June 10, 1972.

Enclosed with your request is a statement by the deceased member's widow, Mrs. Sherylyn J. Towner, as to what transpired in the early morning hours on June 10, 1972. Mrs. Towner indicates that she and her husband, who was stationed at Ellsworth Air Force Base, South Dakota, resided in a rental trailer in a private trailer court, and that his military clothing was kept there. As a result of the flood, the trailer was struck by another trailer which was floating and the trailer they lived in subsequently began floating in the water and struck a bridge. She states that her husband had been standing in the door of the trailer. When the trailer hit the bridge the top of the trailer was torn off and she was thrown into the water. She says that she never saw her husband alive again after the trailer struck the bridge. It is indicated that his body was later recovered and identified by Air Force authorities.

Under the provisions of Air Force Manual 67-1, Volume 1, Chapter 2, paragraph 75, claims may be filed for the replacement of lost or damaged clothing. Under subparagraph a(5) of the manual, provision is made for losses resulting from an act of God. It is also provided in that subparagraph that each claim will be based on its own merit as revealed by investigation and that the base commander will render the final decision on claims resulting from acts of God. You indicate that the claim has been approved by the designee of the base commander.

Under the provisions of subparagraph 75b, AFM 67-1, claims must be complete and fully substantiated by the airman, who must be on active duty in the Air Force or a Reserve airman on pay status duty.

It is also provided that the claimant's status (temporary duty, travel, leave or off duty, etc.) will not be the determining factor in the consideration of claims.

Doubt as to the validity of the claim arises, you say, because the member died on the date of loss and was therefore no longer on active duty.

Under the provisions of 31 U.S. Code 241 the Secretary of a military Department is authorized to settle claims for the loss or damage to personal property of members of the uniformed services sustained incident to their service. Exclusive jurisdiction for the settlement of such claims is vested in the Secretary concerned or his designee. Under the provisions of subsection 241(b)(2) such claims may be made by the survivor of a person eligible to claim under 31 U.S.C. 241, if such person is deceased.

Under the provisions of 31 U.S.C. 241(c)(2), however, a claim under this section may be allowed only if the damage or loss to the property did not occur at quarters occupied by the claimant within the fifty States or the District of Columbia that were not assigned to him or otherwise provided in kind by the United States.

It appears that a claim for personal clothing items of a uniform is cognizable under the provisions of 31 U.S.C. 241. (Air Force Manual 112–1, table 6–2.) However, that table indicates that although such a claim is cognizable under that regulation, it is not payable under that regulation and refers to AFM 67–1. In view of this it appears that such a claim is cognizable under both 31 U.S.C. 241, and regulations issued pursuant to 37 U.S.C. 418 relating generally to clothing furnished in kind or a monetary allowance in lieu thereof.

While the information before us is insufficient for us to make a determination as to whether the claim is cognizable under the provisions of 31 U.S.C. 241, it appears that 31 U.S.C. 241(c)(2) would preclude recovery in this case. There is also for consideration whether such loss may be considered as incident to service. In any event, jurisdiction over a claim under 31 U.S.C. 241 is vested exclusively in the Secretary of the Department as noted above.

Therefore, it must be assumed that this claim is for consideration solely under the provisions of 37 U.S.C. 418 and the regulations issued pursuant thereto, rather than 31 U.S.C. 241.

Section 418, Title 37, U.S. Code, authorizes the President to prescribe the quantity and kind of clothing to be furnished annually to an enlisted member of the Armed Forces and to prescribe the amount of cash allowance to be paid to such a member if clothing is not furnished to him. The President, by Executive Order 10113, February 24, 1950, delegated the authority vested in the President to the Secretary of Defense with regard to clothing allowances for enlisted personnel.

Department of Defense Directive 1338.5, June 25, 1962, was issued pursuant to the delegation of authority contained in Executive Order 10113. Generally, the Directive sets forth the policies and regulations for the Clothing Monetary Allowance System.

Under the Clothing Monetary Allowance System an initial allowance is credited to enlisted members against which initial issues are debited and thereafter a maintenance allowance is paid to the member for maintenance and repair periodically under regulations prescribed by the Secretary concerned.

Section V.A. 9 of the Directive provides that when individual clothing items of a member are lost, damaged, destroyed, abandoned, captured or otherwise rendered unserviceable incident to service and such loss was not caused by any fault or negligence on the part of the member concerned, the member will be compensated therefor in accordance with procedures prescribed by the Secretary of the military Department concerned. Paragraph 30541 of the Department of Defense Military Pay and Allowances Entitlements Manual contains similar provisions. The regulations referred to in your letter were promulgated pursuant to this authority.

Section 418, Title 37, U.S. Code, the Department of Defense Directive, and the Air Force Manual make no provision for claims for lost clothing of deceased members. However, it is indicated that claims for lost clothing are to be considered as personal to the member sustaining the loss. As you note the regulations provide that the member may submit the claim and, also, no provision is made for the submission of a claim upon his death.

In our decision, 26 Comp. Gen. 613 (1947), there was considered a claim under the Military Personnel Claims Act of 1945, Ch. 135, 59 Stat. 225, 31 U.S.C. 223e, which provided for claims by military personnel for the loss or destruction of personal property incident to service under certain circumstances. In that decision a claim for compensation was submitted by the mother of a deceased member of the Navy whose personal property was lost at the same time he lost his life. We pointed out that the right to reimbursement under that act was a statutory right intended primarily for the personal benefit of members of the Armed Forces, and ordinarily such a personal right is not regarded as extending beyond the life of the beneficiary, unless the statute expressly so provides.

While in this case we are not dealing with a specific statute such as the Military Personnel Claims Act of 1945, we believe the rationale applied in 26 Comp. Gen. 613 to be applicable to this case when no specific provision of law or regulation exists authorizing the submis-

sion of claims for lost or destroyed items of personal military clothing of deceased members.

There appears to be little doubt that the regulations promulgated pursuant to the broad grant of authority in 37 U.S.C. 418 were intended, insofar as the loss, damage, or destruction of personal clothing items of members of the uniformed service incident to service is concerned, to grant a personal right to the member to compensation for such losses. Hence, it is our view that when a member dies prior to or simultaneously with the loss of the personal clothing items, no right to compensation vested in him could be extended to his heirs or legal representatives.

Accordingly, payment is not authorized and the voucher will be retained here.

[B–177230]

Compensation—Overtime—Traveltime—Performance of Work Status

The time spent by an employee after his normally scheduled duty hours in taking care of a Government vehicle which broke down while in use by him is not compensable as overtime under 5 U.S.C. 5542(b) (2) (B), even though the employee took steps to protect the vehicle beyond the standard established by GSA regulation (41 CFR 101–39.701). The fact that the employee was required to do more than mere driving and incidental care of the vehicle does not consitute "the performance of work while traveling," nor did the responsibility placed on the employee under the GSA regulation require him to take additional steps to protect the vehicle. Therefore, the time and effort expended by the employee that was beyond the standard of care required under the regulation to protect the vehicle entrusted to him is not compensable as work and does not provide a basis for payment of premium compensation.

To the Administrator, Federal Aviation Administration, February 6, 1973:

We refer to a letter dated October 4, 1972, from Mr. George U. Carneal, Jr., General Counsel of the Federal Aviation Administration, requesting our opinion as to whether time spent by Mr. Kenneth F. Freeman, an employee of the Federal Aviation Administration (FAA), after his normally scheduled duty hours, in taking care of a Government vehicle which broke down while in use by him is compensable as overtime under 5 U.S. Code 5542(b) (2) (B) or any other provision of law.

The letter of October 4, 1972, stated that:

Mr. Kenneth F. Freeman, employed by FAA as a Fixed Industrial Equipment Mechanic, was returning to his Tulsa, Oklahom official duty station via the Tulsa-Maskogee Turnpike at about 6:00 p.m. on 2 September 1971 in a GSA vehicle, when he noticed a low voltage problem. He stopped the car, and, after checking, found that the alternator on the vehicle had given out. Being unable to restart the vehicle, Mr. Freeman hired a man to take him to Webber Falls, Oklahoma, a distance of six miles, to secure jumper cables and to return him

to the ailing vehicle. After restarting the vehicle with the aid of the jumper cables, Mr. Freeman drove as far as Broken Arrow, Oklahoma, before it got too dark for driving without headlights. (Since the alternator was not working, the exhausted battery could not supply current for the headlights.) Mr. Freeman then contacted the GSA Motor Pool Chief, who drove him to his official station, arriving by 10:15 p.m. that evening. Mr. Freeman's normal tour of duty is 8:30 a.m. to 5:00 p.m. Monday through Friday.

It is the view of your General Counsel that Mr. Freeman's actions after the malfunctioning of the car constituted "work while traveling" within 5 U.S.C. 5542 which states in pertinent part as follows:

§ 5542. Overtime rates; computation.

(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 (*i*) *involves the performance of work while traveling,* (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively. [Italic supplied.]

In our decision of May 11, 1972, 51 Comp. Gen. 727, copy enclosed, this Office presented a detailed analysis of the scope and import of 5 U.S.C. 5542. Applying the principles contained in that decision, it does not appear that Mr. Freeman would be entitled to overtime compensation under the authority of 5 U.S.C. 5542, *supra.*

It is recognized by your General Counsel in the submission of the question that driving and incidental care of a vehicle in working order during nonduty hours has never been held to constitute "the performance of work while traveling." However, it is urged that in view of the provisions of the GSA regulations quoted below, 41 CFR 101–39.701, that Mr. Freeman under the circumstances involved was required to do more than mere driving and incidental care and, accordingly, should be considered as performing work while traveling.

The regulation provides:

§ 101–39.701 General.

Any official or employee issued a motor vehicle from a motor pool system shall be responsible for exercising reasonable diligence in the care of the vehicle at all times. Failure to take proper care of a vehicle may be considered as justification for refusal of further vehicle issuance to such official or employee after reasonable notice to the head of the local activity concerned.

It is our view that the responsibility placed upon the user of a Government vehicle by the above-quoted regulatory provision does not require the user to do more than take those reasonable steps needed to

insure protection of the vehicle when an operational difficulty occurs. These reasonable steps would entail notifying the proper authorities of the problem encountered, returning the vehicle to a motor pool or, if not feasible, either taking it to an approved repair shop or leaving it at the side of the road protected from oncoming traffic.

While it may be asserted that the additional steps taken by Mr. Freeman were reasonable (for example, hiring an individual to take him to a nearby town to procure jumper cables and return to the vehicle) and would be appropriate for consideration in connection with payments of per diem, it nevertheless remains that such actions were beyond those required by the cognizant regulations. *Cf.* 42 Comp. Gen. 436 (1963).

Insofar as 41 CFR 101–39.701 is concerned, we feel that a provision, such as here involved, which was promulgated to establish a standard of care for the use of Government vehicles, cannot be translated into a basis for providing premium compensation to employees who take additional steps to protect a vehicle entrusted to their custody. In cases such as here involved, the employee's obligation to the Government is fulfilled when those basic precautionary actions, described above, have been taken. The time and effort expended by an employee in the pursuit of measures not so required is not deemed as being compensable as work.

In view of the foregoing we perceive no basis upon which Mr. Freeman is entitled to overtime compensation as a result of the circumstance hereinabove described.

[B–177478]

Officers and Employees—Death or Injury—Liability of Government—Employee on Temporary Duty

The widow of an employee who died while on temporary duty away from his official station may be paid, pursuant to Executive Order 8557, as amended by Office of Management and Budget (OMB) Circular A–92, issued under the authority of 5 U.S.C. 5742, the cost of preparing the remains, limited to $250, the charges incurred for transporting the remains, including the cost of an outside shipping case, and the preparation of the casket for shipment, as well as the cost of necessary copies of the death certificate incident to the transportation of remains, notwithstanding the employee was not on authorized leave without pay. However, there is no authority to return the deceased employee's privately owned automobile to his home, and in accordance with OMB Circular No. A–7, per diem for the period the employee was absent without leave is not payable unless the absence was due to illness or injury and not to the employee's misconduct.

To Steve F. Heller, United States Department of Agriculture, February 6, 1973:

We refer to your letter of October 27, 1972, by which you request our advance decision as to whether you may certify for payment the en-

closed voucher to pay Mrs. Mary McGuire certain amounts incident to the death of her husband, Richard J. McGuire, Jr., an employee of the Agricultural Marketing Service, while he was on temporary duty away from his official station.

Mr. McGuire, whose official station was apparently in Newark, New Jersey, was detailed to the agency's office in Chicago, Illinois, beginning on Monday, July 24, 1972. The following Monday, July 31, he failed to report for work having been detained by the police on a charge of intoxication. Although Mr. McGuire was released from custody early on Tuesday, August 1, he did not report for work and all attempts to find him were unsuccessful until it was learned that he had been found dead by his landlady on the morning of August 18. During the period of his absence from July 31 to August 18, Mr. McGuire was considered to be absent without leave.

The voucher presented represents reimbursement for per diem at the rate of $13 from July 31 through August 17; charges for preparation of the employee's body for burial, transportation thereof to his official station, death certificates, and the cost of shipping the employee's privately owned automobile from Chicago to his home in New Jersey. The total amount involved is $804.23.

Regarding the costs which were incurred as a result of the employee's death while on temporary duty, Executive Order 8557, as amended by Bureau of the Budget (now Office of Management and Budget) Circular No. A–92, February 13, 1969, issued under the authority of 5 U.S. Code 5742 and prior legislation from which that section was derived, provides authority for payment by the Government of certain expenses when an employee dies while on temporary duty. Subsection (d) of such provision of law specifically states that the benefits thereof shall not be denied because the deceased was temporarily absent from duty when death occurred. We have recognized that absence in an authorized leave-without-pay status does not defeat eligibility under the law and regulations in question. 43 Comp. Gen. 128 (1963). While the employee here was not on authorized leave without pay, we do not believe that any distinction is warranted under the wording of the statutory provisions above. It appears, therefore, that reimbursement in accordance with Executive Order 8557, as amended, is authorized. Under the provision of such Executive order, as amended, and Circular No. A–92, the Government's payment for preparation of remains is limited to $250. Thus, only that part of the $350 charged for those services is reimbursable. Section 4 of the Executive order authorizes reimbursement of charges for transporting the remains including the cost of an "outside case for shipment" and preparation of the casket for shipment. Under that section the ship-

ping charges of $103.23 and the $30 "C.M.A.S." charge—a charge by the CMAS company for rental of padding to protect the casket and prepare it for air shipment—would be allowable if otherwise correct. The cost of copies of the death certificate, $7, would also be reimbursable to the extent such certificates were necessary in connection with transportation of the remains.

Executive Order 8557 does not authorize reimbursement of the cost of returning the employee's privately owned automobile to his home at his official station and we are not aware of any other authority for reimbursement of that cost. Accordingly, the $80 claimed for that service may not be allowed.

The reimbursement of per diem for the period the employee was absent without leave must also be disallowed under the provisions of section 6.5 of Office of Management and Budget Circular No. A–7, revised August 17, 1971, unless it is determined by proper authorities in your agency that the employee's absence resulted from illness or injury not due to the employee's own misconduct. *See* section 6.5b of the cited regulation. Since you have provided no information as to the reason for Mr. McGuire's absence from work from August 1 through August 17 or the circumstances surrounding his death, we are unable to determine whether per diem would be allowable for that period.

Action on the voucher presented, which is returned herewith together with supporting papers, should be in accordance with the above.

[B–177596]

Fees—Membership—Employee *v.* Agency

The annual dues an employee is required to pay for membership in a professional organization is not reimbursable to the employee, even though a savings would accrue to the Government from reduced subscription rates, and notwithstanding the Government would benefit from the employee's development as a result of the membership, since 5 U.S.C. 5946 prohibits the use of appropriated funds for the payment of membership fees or dues of officers and employees of the Government as individuals, except as authorized by specific appropriation, by express terms in a general appropriation, or in connection with employee training pursuant to 5 U.S.C. 4109 and 4110. However, the agency is not precluded by 5 U.S.C. 5946 from becoming a member and paying the required dues if it is administratively determined to be necessary in carrying out authorized agency activities.

To Carl E. Fanucci, United States Department of Justice, February 6, 1973:

Your letter of December 1, 1972, requests in effect, our decision as to whether you may certify for payment a voucher in the amount of $35 in favor of Mr. Charles Gaskin to reimburse him for the annual dues he is required to pay for his membership in the Institute of Electrical and Electronic Engineers, Inc. (IEEE). Mr. Gaskin is an elec-

tronics engineer employed by the Bureau of Narcotics and Dangerous Drugs (BNDD), Department of Justice.

You state that as a result of this employee's membership in IEEE the six IEEE publications subscribed to by the BNDD library are purchased at a reduced rate with an annual savings of $153 (based on subscription cost of $41 with his membership). If BNDD paid the membership dues, the net annual savings to the Government would be $118 ($153 less $35 annual dues). You also state that IEEE membership contributes to employee development and consequently benefits BNDD.

Section 5946, Title 5, U.S. Code, prohibits the use of appropriated funds for payment of membership fees or dues of officers or employees of the Government as individuals, except as authorized by a specific appropriation, by express terms in a general appropriation or, in connection with employee training, sections 4109 and 4110 of Title 5. Your submission does not indicate that any of the exceptions apply in this case. Consequently, section 5946 precludes the Government's payment of dues for an individual membership for an employee in IEEE, even though a savings accrues to the Government from reduced subscription rates, and notwithstanding that the Government would benefit from employee development as a result of such membership. *See* 32 Comp. Gen. 15 (1952).

On the other hand, we have held that this prohibition does not prevent a Federal agency as such from becoming a member of a society or association when the primary purpose of the membership is to obtain direct benefits for the Government necessary to the accomplishment of the functions or activities for which an appropriation has been made. *See* 33 Comp. Gen. 126 (1953).

Since BNDD may not reimburse the employee for his individual membership dues you may not certify Mr. Gaskin's claim for payment. However, BNDD is not precluded by 5 U.S.C. 5946 from becoming a member and paying the required dues if it is administratively determined to be necessary in carrying out authorized agency activities.

[B-177522]

Subsistence Allowance—Military Personnel—Cadets, Midshipmen, Etc.—Period of Entitlement to Allowance

The subsistence allowance of $100 per month authorized in 37 U.S.C. 209, as amended by the act of November 24, 1971, Public Law 92-171, and implemented by paragraphs 80401a, b, and d(2)(a) of the Department of Defense Military Pay and Allowances Entitlements Manual, may not be paid to an ROTC cadet or midshipman appointed under 10 U.S.C. 2107 for 10 full months of each academic year if the academic year is of shorter duration. In accordance with the legislative history of the 1971 act, cadets and midshipmen became entitled to a sub-

sistence allowance for a maximum of 20 months each during the first 2 years and second 2 years of schooling to preclude payment of the allowance during vacations when they had no military obligation and, therefore, there is no authority to pay the allowance to cadets and midshipmen when they are not in school.

To the Secretary of Defense, February 7, 1973:

Further reference is made to letter from the Assistant Secretary of Defense (Comptroller) dated November 22, 1972, requesting an advance decision as to whether an ROTC cadet or midshipman appointed under 10 U.S. Code 2107 may be paid subsistence allowance of $100 per month under the provisions of 37 U.S.C. 209 as amended by Public Law 92–171, approved November 24, 1971, 85 Stat. 490, for 10 full months of each academic year although the academic year is of a shorter duration. The question together with a discussion is set forth in Department of Defense Military Pay and Allowance Committee Action 468.

The discussion in the Committee Action points out that prior to the amendment of 37 U.S.C. 209(b) by the act of November 24, 1971, ROTC cadets and midshipmen appointed under 10 U.S.C. 2107 were paid $50 per month subsistence allowance for each month enrolled in the program, including vacations, the only limitation for nonentitlement being periods of field or sea training and a maximum of 4 academic years.

It is indicated in the Committee Action that cadets and midshipmen were paid $50 per month including periods of vacation between the first and second and second and third years of training. It is also indicated, however, that with the enactment of Public Law 92–171, cadets and midshipmen became entitled to the subsistence allowance for a maximum of 20 months each during the first 2 years and second 2 years of schooling. It is indicated that the purpose of this was to preclude payment during vacation periods. It is pointed out that this view is substantiated by House Report No. 92–356, July 13, 1971, wherein it is stated at page 2 that:

> Additionally, the committee believed that there was no justification for payment to ROTC cadets during the summers when they had no military obligation. Thus, language was included to limit the payments to ROTC students during their first 2 years of college to no more than 20 months.

Agreement with this view is also evidenced by the statement in Senate Report No. 92–433, November 11, 1971, at page 2 that:

> The Committee agrees that the $100 per month is a proper allowance for ROTC cadets. The Committee also agrees with the House amendment which would prohibit cost of living adjustments to this $100 per month allowance without congressional approval. Further, the Committee is in agreement that no justification exists for the payment of subsistence allowance during the first 2 years while the cadets are not in school and have no military obligations to participate in summer training.

In the Committee Action it is also noted that in hearing report dated November 5, 1971, resulting from hearings before a Subcommittee of the Senate Armed Services Committee, there are indications that the intent of the House amendment was to avoid the situation of paying someone during a period when he was not attending school.

Pursuant to the enactment of Public Law 92–171, the following changes to paragraphs 80401a, b, and d(2)(a) of the Department of Defense Military Pay and Allowances Entitlements Manual were promulgated.

a. Cadets or Midshipmen. Except while performing field training or at-sea training, a cadet or midshipman appointed under section 2107 of Title 10, U.S.C., is entitled to subsistence allowance at the rate of $100 per month for the following periods:

(1) A member enrolled in the first two years of a four-year program is entitled to receive the allowance beginning on the day he starts his first term of college work but not for more than 20 months.

(2) A member enrolled in the advanced course is entitled to subsistence allowance as prescribed for members enrolled under section 2104, Title 10, U.S.C., under b below.

For vacation periods see d(2) below.

b. Members Selected for Advanced Training. Except while performing field training or at-sea training, a member of the ROTC program who is selected for advanced training under section 2104 of Title 10, U.S.C., is entitled to subsistence allowance at the rate of $100 per month beginning on the day he starts advanced training and ending upon completion of his instruction under that section, but not for more than 20 months.

d(2)(a) A cadet or midshipman appointed under section 2107 of Title 10, U.S.C., and enrolled in the first two years of a four year program, is not entitled to subsistence allowance for periods between the normal 10 month academic school years, for example, summer vacations after the first and second years.

It is indicated in the Committee Action that following the publication of these regulations two interpretations as to the entitlement period have been advanced, one interpretation being that the military departments are authorized to pay subsistence for a maximum of 10 months each academic year regardless of when the academic year at a host institution begins or ends. It is noted that under this view cadets and midshipmen would receive an equal amount of subsistence regardless of which school is attended.

On the other hand, the Committee points out that the other interpretation is that payment of 10 full months of subsistence is not authorized where the academic year at a host institution is for a period of less than 10 months. If this interpretation is followed, it is indicated, payment would be authorized only for the months or fractions thereof the cadet or midshipman is actually attending school and participating in the ROTC program. Hence, the amount of payment to each cadet or midshipman would largely depend on the length of the academic year at his particular institution.

It is indicated that the matter was submitted to the Department of Defense Military Pay and Allowance Committee for consideration and a determination was made by the Committee that payment was

restricted to periods of schooling with a maximum period of 10 months in any one school year.

Following this action, it is stated that the Department of the Army by letter dated September 15, 1972, requested the views of the Chairman, House Armed Services Committee. The Committee Action quotes in part the Department of the Army letter stating its position:

> As you know, the initial legislative proposal was to increase the subsistence allowance to $100 per month for 12 months. This was based upon the 100% cost of living increase since the $50 amount was established by the Holloway Plan in 1946. The reduction in the number of months payment is authorized to 10 months has already reduced the maximum amount authorized well below what was needed to offset the cost of living increase. * * *.
>
> Therefore, it is considered in the best interest of the ROTC program and the Services to pay all cadets a full 10 months subsistence each academic year. This would be a more equitable practice and it would offer the added benefit of lessening the administrative burden of adjusting the amount of payment of each individual cadet.

The Chairman in response indicated his concurrence with this view.

Subsequently, the Department of the Army again submitted the matter to the Department of Defense Military Pay and Allowance Committee and requested the Pay and Allowances Entitlements Manual be changed in accordance with the Army's views. It is stated in the Committee Action, however, that it is the concensus of the Committee members that the law does not specifically or clearly authorize, or deny, the payment of subsistence allowance to ROTC cadets or midshipmen for 10 full months when the school year is of a shorter duration. Thus, a ruling is requested on the following question:

> May a ROTC cadet or midshipman appointed under section 2107, Title 10, United States Code, be paid subsistence allowance under the provisions of Section 209, Title 37, United States Code, as amended by P.L. 92-171, for 10 full months of each academic year even though the academic year is of shorter duration?

Section 209(b) of Title 37, U.S. Code, amended by Public Law 92-171, which became effective July 1, 1971, is as follows:

> Except when on active duty, a cadet or midshipman appointed under section 2107 of title 10 is entitled to a monthly subsistence allowance in the amount provided in subsection (a) of this section. A member enrolled in the first two years of a four-year program is entitled to receive subsistence for a maximum of twenty months. A member enrolled in the advanced course is entitled to subsistence as prescribed for a member enrolled under section 2104 of title 10 as prescribed in subsection (a) of this section.

Of significance in considering the question is the language of subsection 209(b) limiting entitlement to the subsistence allowance "for a maximum of twenty months." It seems clear that the use of such language conveys the intent that no more than 20 months is authorized by the law. It would seem to follow that by providing a maximum period of time, it was contemplated that a period of shorter duration might exist for which the subsistence would be computed on the basis of the shorter period.

The excerpts quoted in the Committee Action on H.R. 6724 (which became Public Law 92–171) by both the House and Senate Armed Services Committees which considered the bill, clearly indicate that it was the intention of those Committees to limit the payment of subsistence to those periods of time when a cadet or midshipman is attending school and has a military obligation. (Page 2 of S. Rep. 92–443 accompanying H.R. 6724 and Page 2 of H. Rep. 92–356 accompanying H.R. 6724.)

This view is further substantiated by statements of the Department of Defense representative then Major General Leo E. Benade, Deputy Assistant Secretary of Defense for Military Personnel Policy, who testified before the Senate Armed Services Subcommittee in connection with H.R. 6724. At page 27 of the hearing report of November 5, 1971, on Miscellaneous Bills before a Subcommittee of the Armed Services Committee in responding to a question concerning the administration of the subsistence program under H.R. 6724, General Benade stated:

> It is my understanding this legislation meets the point you are making. If not, I can assure you, in light of the legislative history, and the House made very clear what their intention was, it is our intention and the services' intention to administer the bill in the manner being described. That means the students will not be paid for periods while they are not in school or on active duty.

In the light of General Benade's statement and other quoted parts of the legislative history, it is our view that the law does not contemplate the payment of a subsistence allowance to cadets and midshipmen while they are not in school attending courses of instruction and have no military obligation to participate in summer training. Accordingly, there is no authority under section 209(b) of Title 37, as amended by Public Law 92–171, to pay a subsistence allowance to an ROTC cadet and midshipman appointed under 10 U.S.C. 2107 for 10 full months of an academic year where the individual attends an institution having a shorter academic year, namely, 9 months.

Accordingly, your question is answered in the negative.

[B–176394]

Contracts—Specifications—Conformability of Equipment, Etc., Offered—Approximated Requirements

Since the weight of the ripper required to be mounted on crawler tractors was significant in determining the ruggedness, strength, and desirability of the ripper, the low bid that offered a ripper with a weight deficiency of 22 percent from the approximate requirements stated in the invitation for bids properly was rejected in light of the contracting agency's responsibility to draft specifications that meet the actual needs of the Government and to determine the responsiveness of bids, and the record does not show the rejection was arbitrary, capricious, or was not based on substantial evidence. Doubt as to the weight difference and its

effect on competition, and the belief minimum and not approximate requirements should have been used to insure equal bidding, are matters that must be raised prior to bid opening as provided in 4 CFR 20.2(a), the Interim Bid Protest Procedures and Standards.

To the International Harvester Company, February 9, 1973:

We refer to your telefax of June 29, 1972, and subsequent correspondence, concerning your protest under invitation for bids No. 200–B–4197, issued by the Bureau of Reclamation, Department of the Interior, on May 1, 1972, for three crawler tractors. Two of the tractors were required to have a rear-mounted, hydraulic ripper with the following approximate dimensions and characteristics:

Hydraulic ripper (to be furnished for Items Nos. 1 and 2 of the Schedule only).—A multi-shank, parallelogram type hydraulic ripper, rear-mounted, shall be furnished complete with three straight shank teeth, with replaceable tips, together with mounting backplate, linkage assembly, hydraulic cylinder, carriage bar, hydraulic control, and any other parts required for operation. The ripper shall have the following approximate dimensions and characteristics:

Ground clearance, under teeth (fully raised)	13	inches
Maximum depth of penetration	18	inches
Number of teeth, standard	3	
Tooth spacing (center to center)	20	inches*
Weight, equipped with three teeth	3,200	pounds
Total width	7.9	feet

* If nonadjustable

The ripper shall be of heavy-duty construction throughout to withstand the most severe service. The ripper shanks shall be pin-attached type. The tooth shanks and teeth shall be of cast steel alloy, heat treated, or equal, having a maximum resistance to abrasion and wear.

In this connection, the IFB also required bidders to submit data which would show the conformity of their products with the specifications.

The record shows that bids were received from your concern, Caterpillar Tractor Company, R. H. Gorman Company, and Allis-Chalmers Corporation on May 31, 1972.

The contracting officer states that the data in your low bid was evaluated and, subsequently, the Department decided that your bid did not meet the approximate specifications of the IFB concerning the weight, width, and tooth spacing of the ripper. In this regard, the contracting officer has submitted the following analysis:

Weight

Paragraph B–12.b. on Page 19 of the solicitation states that the ripper, equipped with three teeth, shall weigh approximately 3,200 pounds. The Ateco Model PS–TD15C hydraulic ripper offered by International Harvester weighs 2,500 pounds, which International considers as meeting the approximate requirement. The weight of 2,500 pounds is 21.875 percent less than the approximate weight of 3,200 pounds stated in the solicitation. A difference of nearly 22 percent cannot be considered as being sufficiently close to be considered acceptable, especially since the specifications require heavy-duty construction to withstand the most severe service and the ripper is lighter rather than heavier than the specified weight. Webster's Dictionary defines approximate as "near to correctness, nearly exact, very near or close together." Aside from the definition of the word approximate,

the weight has to be considered as a significant factor in describing the ruggedness, strength, and durability of a heavy duty ripper. Moreover, the additional weight of the ripper minimizes the upward thrust on the tractor thereby providing more weight for traction to pull the ripper.

Width

The width of the ripper to be furnished is specified in Paragraph B-12.b. as approximately 7.9 feet, whereas the ripper offered by International has a width of 5 feet 9.5 inches, 2 feet 1.3 inches, or more than 26 percent shorter than specified. The width of 7.9 feet specified in the ripper is consistent with the width of the tractor for the purpose of providing space on the carriage bar for mounting ripper teeth over a space of approximately 80 inches, either by means of fixed brackets spaced approximately 20 inches apart or by an arrangement where the spacing between the ripper teeth is adjustable.

Tooth Spacing

In this regard the spacing of the teeth on International's ripper is not adjustable in the sense intended by the specifications, the only adjustment being accomplished by shifting the outer two of the three teeth from the brackets spaced 16 inches from the center of the carriage bar to the brackets spaced 32 inches from the center. Furthermore, their 16-inch tooth spacing is a 25 [20] percent deviation from the specification requirement that the teeth be spaced on approximately 20-inch centers if tooth spacing is not adjustable. A ripper 7.9 feet wide is of adequate width to provide five fixed tooth positions spaced 20 inches apart and it is common practice in rippers of this size and smaller, to provide five fixed positions or have the tooth positions adjustable outward from the center to utilize the full length of the carriage bar. It is also the practice of manufacturers to offer only three teeth with their rippers even though the ripper may have five tooth positions. By having five tooth positions and three teeth, the operator has the option of placing the teeth in the three center positions and ripping a narrow path or placing two of the teeth in the outer positions and ripping a wider path. The manufacturers also offer extra teeth as an option so that teeth may be placed in each of the five positions if desired.

In view of this decision, the contracting officer awarded the contract to Caterpillar Tractor Company, the second-low bidder, on June 19, 1972. The Department further advises that the tractors in question were delivered to the Department in October and November 1972.

You maintain that the "total balanced weight" of your tractor and ripper provides sufficient strength and durability for the effective operation of your ripper, notwithstanding the 22 percent difference between the weight of your ripper and the approximate weight for such attachment set forth in the IFB; that the width of your ripper is consistent with spacing three ripper teeth approximately 20 inches apart even though such width is 26 percent shorter than the approximate "total width" of the ripper set forth in the IFB; that the tooth spacing of your ripper is adjustable in the same manner that Caterpillar's spacing is adjustable; and that only Caterpillar's bid could be considered responsive under the Department's interpretation of the approximate specifications. In view thereof, you request that Caterpillar's contract be canceled, and the requirement awarded to you.

In reply, the contracting officer insists that the weight of the ripper is a significant factor in determining the ruggedness, strength, and durability of the ripper, contrary to your allegation that the "total balanced weight" of the tractor and ripper is more important. He

also persists in his view that your ripper, weighing 22 percent less than the approximate weight for the ripper set forth in the specifications, cannot be considered to approximate the specified weight, and that your bid was therefore properly rejected as nonresponsive. The contracting officer responds to your comments of October 31 on the weight factor, as follows:

> International indicates that it does recognize the factors on which the CO based the rejection of its offer. Paragraph 2 of the supplemental statement discusses this by showing how weight is a significant factor in evaluating the ruggedness, strength, and durability of this type of ripper. International states, in the first sentence of the last paragraph on page 1 of its letter of August 24, "Within a specified tolerance range, weight is a significant factor in describing ruggedness, strength, and durability of a heavy duty ripper." That weight is a significant factor is an important part of the central issue which IHC and the CO seem to be almost in agreement. On this basis, the CO determined that IHC's ripper weighing 21.8 percent less than the approximate weight required in the specifications represented a substantial deficiency in ruggedness, strength, and durability and, therefore, the offer was deficient in quality or quantity. On this basis the bid was not responsive and could not be accepted. The CO also stated that he used Webster's Dictionary to define "approximate" as "near to correctness, nearly exact, very near close or close together." IHC has not proposed any other definition to prove that the variation is within this definition.

As pointed out by the contracting officer, you have cited no authority to refute the administrative position that the weight of your proposed ripper does not approximate the weight shown in the IFB. Also, we do not find that you have demonstrated that the extra weight does not have a significant relationship to the ruggedness, strength and durability of the item sought by the Government.

It is well established that the drafting of specifications designed to meet the actual needs of the Government and determinations as to whether the bids received are factually responsive to such specifications are primarily the responsibility of the particular agency involved. In the instant case, it appears that the Department of the Interior has exercised that responsibility by the preparation of specifications which included an approximate overall weight designed to secure an item of heavy-duty construction throughout to withstand the most severe service. The agency has determined that the item which you offered did not adequately conform to this weight requirement which was considered to be a material factor. Since these decisions necessarily required the exercise of individual judgment by the contracting personnel, we will not substitute our judgment for that of the contracting agency unless it is clearly shown to be arbitrary, capricious or not based on substantial evidence. We do not believe that the record would support a finding that any of these conditions were involved in the administrative determinations concerned. In this connection, the courts have held that when it is alleged that agency actions were arbitrary or capricious, the protester must meet a high standard of proof by showing that such arbitrary or capricious action

as alleged did in fact exist. *Keko Industries, Inc.* v. *United States*, 192 Ct. Cl. 773, 784 (1970).

In view of the foregoing we must agree with the agency's action in rejecting your bid for the weight deficiency of the item offered. It follows that your contentions as to the responsiveness of your bid in other areas must be considered academic.

With respect to your suggestion that only Caterpillar's bid could be considered responsive under the Department's interpretation of the ripper specifications, as indicated above, the record does not provide a clear basis on which this Office may object to the agency's interpretation and application of the specification's approximate dimensions to the bids received. In light of the substantial differences between the specifications for your item and the specifications in the IFB, it is our view that the differences were such as to create sufficient doubt of the acceptability of the proposed item for a prudent bidder to have contacted the procuring activity and obtained a resolution regarding the item's acceptability, and whether the IFB specifications were unduly restrictive of competition, prior to the submission of his bid. In this connection, section 20.2(a) of our Interim Bid Protest Procedures and Standards, as set forth in Title 4 of the Code of Federal Regulations, requires that protests against alleged improprieties in an invitation for bids which are apparent prior to bid opening must be filed prior to bid opening for consideration by this Office.

Regarding your contention that the IFB should have contained minimum requirements, instead of approximate requirements, in order to insure equal bidding, since this provision was apparent at the time of the issuance of the IFB and you did not complain about the matter until after the contract was awarded, this aspect of your protest must also be considered untimely under the above regulation. However, we have been advised that the Bureau of Reclamation has taken appropriate steps with respect to the use of "approximate" to eliminate its use whenever practicable in future procurements.

For the reasons set forth above, your protest must be denied.

[B-163764]

Appropriations—Availability—Christmas Trees, Ornaments, and Decorations—Not a "Necessary Expense"

Seasonal items such as artificial Christmas trees, ornaments, and decorations purchased for Government offices do not constitute office furniture designed for permanent use so as to qualify as the kind of "necessary expense" that is chargeable to appropriated funds since the items have neither a direct connection nor an essentiality to the carrying out of the stated general purpose for which funds are appropriated. Therefore, the Bureau of Customs may not charge the purchase of such seasonal items to its appropriated funds as a legitimate expense unless

it can be demonstrated the purchased was a "necessary expense," a phrase construed to refer to current or running expenses of miscellaneous character arising out of and directly related to the work of an agency.

To Charles R. Vincent, Department of the Treasury, February 13, 1973:

Reference is made to your letter of December 14, 1972 (FIS–1–FM), requesting a decision, pursuant to 31 U.S. Code 82d, on the propriety of certifying six vouchers (subvouchers) for payment from appropriation 2030602, Salaries and Expenses, Bureau of Customs, 1973. Two of the vouchers in the amount of $39.99 each are for two 7-foot artificial Christmas trees; two of the vouchers in the amount of $30.37 and $20 respectively, one for Christmas decorations for a Government office; one voucher in the amount of $45.82 is for Christmas tree decorations including lights; and the other voucher in the amount of $3.15 is for garlands, making a total of $179.32.

The administrative officer authorizing the expenditures contends that the items purchased are not significantly different from ordinary office furnishings designed for permanent use.

The appropriation (Public Law 92–351, 86 Stat. 471, 472) proposed to be charged with the expenditures in question is available for "necessary expenses" of the Bureau of Customs. Since the appropriation is not specifically available for Christmas trees and other Christmas ornaments and decorations, in order to qualify as a legitimate expenditure it must be demonstrated that the purchase of such items constituted a "necessary expense" of the Bureau. We have previously construed that phrase as referring to current or running expenses of a "miscellaneous character arising out of and directly related to the agency's work * * *." 38 Comp. Gen. 758 (1959).

While the Christmas trees and decorations may have temporarily enhanced the appearance of the rooms or offices in which they were placed, in our opinion the purchase of such items for Government offices cannot be said to be a "necessary expense" as that term is used in the pertinent Bureau of Customs' appropriations. In other words, the purchase of seasonal decorations such as Christmas trees and related ornaments and decorations would have no direct connection with or be essential to the carrying out of the stated general purpose for which the funds were appropriated. Further, we do not agree that such items are not significantly different from ordinary office furnishings designed for permanent use.

Since the instant expenditures do not appear to represent a "necessary expense" under the appropriation involved, the vouchers in question may not be certified for payment.

The vouchers and related papers will be retained here for our files.

[B-176597]

Gratuities—Reenlistment Bonus—Critical Military Skills—Failure to Qualify

The discharge and reenlistment of a member of a Regular component before he was eligible for the variable reenlistment bonus (VRB) he was promised may not be declared retroactively invalid, in the absence of fraud, under the principle of the irrevocability of an executed discharge by competent authority, even should the member consent to the revocation of his reenlistment contract, and notwithstanding the member's ineligibility for the VRB was discovered subsequent to reenlistment, and recovery of the benefits received by the member incident to the discharge and reenlistment is not required. However, since the member did not qualify for a VRB at the time of reenlistment he is not entitled to the bonus even though erroneously informed that he was, and the later acquisition of the required qualifications does not retroactively entitle the member to the bonus.

To the Secretary of Defense, February 13, 1973:

Further reference is made to letter dated July 21, 1972, with enclosure, from the Assistant Secretary of Defense (Comptroller) requesting a decision whether a reenlistment or extension of enlistment contract may be modified, with the consent of the member, where through erroneous computation of service, the member did not at the time of reenlistment meet the eligibility requirements entitling him to certain monetary benefits.

The questions presented are contained in Department of Defense Military Pay and Allowances Committee Action No. 464 as follows:

1. May a reenlistment contract, and any precedent discharge given solely for the purpose of the reenlistment, be declared invalid upon discovery that a member is not qualified for a specific benefit promised as a consideration for the reenlistment, so as to require recovery of otherwise proper benefits—such as unused leave settlement, mileage allowance, or reenlistment bonus—paid incident to the discharge and reenlistment?
2. May a right to payment of a benefit—such as a variable reenlistment bonus (VRB)—be created by retroactively modifying the terms of a reenlistment contract with the consent of the parties to the contract?

The Committee Action indicates that instances have arisen in the military services where an enlisted member, induced in large part by a promise of a benefit such as a variable reenlistment bonus (VRB), has executed a reenlistment agreement, but has later been denied payment of the bonus because erroneous administrative computations of his service resulted in his agreeing to reenlist for a period not meeting the eligibility requirements for VRB entitlement. The following situation is stated to be typical of such instances:

A member is discharged and immediately reenlisted after completing 30 months of continuous active service under a three-year term of enlistment. He is eligible for a first reenlistment bonus, holds an appropriate grade, and is qualified and serving in a critical military skill. A prime inducement to his reenlistment is a promise —made by an agent with the apparent power and authority to bind the Government—that he will be paid a VRB if he reenlists for three years. He executes a three-year reenlistment contract in reliance on the promise. After the contract is consummated, it is discovered that payment of the VRB is not permitted because the member's obligated active service, combined with his prior

active service, does not total at least 69 months, a VRB eligibility requirement in the regulations of all services.

In discussing the questions presented, the Committee Action sets forth two opposite views on the matter. Under the first view, the reenlistment contract and precedent discharge would be canceled and the member restored to the status quo, whereas under the second view, a reenlistment contract and precedent discharge may not be declared invalid upon discovery that a member is not qualified for a specific benefit promised in connection with his reenlistment. The two views are quoted in pertinent part as follows:

One view of the matter is that in a case of this nature, no binding agreement has in fact been made. * * * In the illustrated case, for example, it would be legally unobjectionable to cancel the member's discharge and reenlistment and restore him to his previous enlistment or, alternatively, to retroactively change, by interlineation and substitution, the term of reenlistment reflected in the contract from three to four years, so long as the member fully consents to the alteration and his consent is properly documented.

The rationale for this opinion is that mutual consent is a prerequisite to the creation of a contract, and if there is a mistake of fact by the parties going to the essence of the contract, no agreement is in fact made. * * * If the reenlistment is invalid, so then is the precedent discharge, given solely for the purpose of reenlistment. Thus, it would be legally unobjectionable to cancel the early discharge and reenlistment contract, then reinstate the former enlistment contract and require the member to serve the remaining unserved portion.

It is also considered that although the legal effect of discovery of mutual mistake is restoration of the status quo, since the member has reenlisted in good faith and is being deprived of the benefit for which he reenlisted through no fault of his own, as an alternative he should be allowed to modify the reenlistment to either achieve the benefit or continue under the conditions of the reenlistment with modified benefits.

A second view of the matter is that a member's consideration for a contract of enlistment is his agreement to serve for a stipulated length of time, and the Government's consideration is payment of the pay and allowances due the member in the grades to which he may from time to time be assigned. Considerations such as a promise of a VRB, not included in the contract, do not affect the validity of the contract itself.

The opinion that a promise or inducement not included in a contract does not go to the validity of the contract is predicated on the well-established principle that no matter how sincere the Government's agents may be in the assumption that they are acting within their authority, and no matter how implicitly a member may rely on that assumption, neither sincerity of purpose on the agents' part nor good faith on the member's is sufficient to obligate the Government in any way. * * *

Legal remedies are available to ameliorate the harsh effect of an enlistment contract found to have been substantially motivated by mistaken extracontractual promises or inducements made and accepted in good faith but impossible of performance because of statutory or regulatory prohibitions. The contract may be terminated by discharging the member, the error or injustice may be removed by correcting the member's records, including modifying his enlistment contract, under the procedures authorized by 10 U.S.C. 1552, or, in appropriate cases, any indebtedness flowing from the error may be remitted or canceled under 10 U.S.C. 4837(d), 6161, or 9837(d).

Many decisions of the Comptroller General have held or noted that enlisted members were not, because of mistakes of fact or law, entitled to reenlistment bonuses or VRB's which they were promised, and often erroneously paid. See, for example, 42 Comp. Gen. 173; 47 *id.* 414; 49 *id.* 51. * * * Because of these factors, the second view is that a reenlistment contract and precedent discharge may not be declared invalid upon discovery that a member is not qualified for a specific benefit promised in connection with his reenlistment.

The Comptroller General has consistently held that a member's right to receive a VRB vests at the time of his reenlistment. 45 Comp. Gen. 379; 46 *id.* 322; 48 *id.* 624. He has also held that, since a member's right to a VRB vests at the time of reenlistment, an after-the-fact meeting of VRB eligibility criteria does not operate to give him a right to bonus payments. MS Comp. Gen. B–160096 of 4 March 1969. * * * In light of the cited decisions, the second view is that any VRB payment that might arise from a modification of this nature would be improper, even if both parties consented to the modification.

Sections 1169 and 1171 of Title 10, U.S. Code, provide the authority whereby enlisted members may be discharged from an armed force. Under 10 U.S.C. 505(e) and 508(b) a person discharged from a Regular component may, under such regulations as the Secretary concerned may prescribe, be reenlisted in a Regular armed force. And, pursuant to the provisions of 10 U.S.C. 509, under such regulations as the Secretary concerned may prescribe, the term of enlistment of a member of an armed force may be extended or reextended with his written consent.

The payment of reenlistment and variable reenlistment bonuses is authorized by 37 U.S.C. 308. Travel allowances payable upon separation from service are authorized by 37 U.S.C. 404(a)(3) and (f), and payments for unused accrued leave at time of discharge are authorized by 37 U.S.C. 501(b). Section 906 of Title 37, U.S. Code, provides that a member who extends his enlistment is entitled to the same pay and allowances as though he had reenlisted.

The situation described in the Committee Action is somewhat analogous to the circumstances involved in our decision 42 Comp. Gen. 317 (1962). In that case an Air Force enlisted member with a disability rating of 20 percent was honorably discharged and paid disability severance pay under Chapter 61 of Title 10, U.S. Code, since at the time of his discharge, his personnel file indicated that he had less than 20 years of active service. It was later established that he did in fact have 20 years of service and that had that fact been known at the time of his discharge, he would have been retired for physical disability. Subsequent to his discharge the Air Force issued special orders purporting to revoke the member's discharge and to place him on the retired list.

In that case, citing several of our decisions and decisions of the courts, we applied the principle of the irrevocability of an executed discharge by competent authority and stated that the member's discharge was not invalid; that the subsequent orders purporting to revoke his discharge were without effect; that he was not eligible for retired pay retroactive to the discharge date; and that the purported retirement date was not proper. However, we indicated that under the circumstances the Secretary concerned had the authority to achieve the desired result by correcting the member's records pursuant to 10 U.S.C. 1552.

In regard to an enlistment or reenlistment contract we recognize that in certain cases in which the applicable laws and regulations are not complied with or when there is fraud involved, such a contract may be revoked. *See*, for example, 31 Comp. Gen. 357 (1952) and 31 *id.* 562 (1952). However, in the absence of such extraordinary circumstances it is our view that a validly executed enlistment contract may not be revoked.

The pay and allowances of members of the uniformed services, including bonuses payable incident to a reenlistment, are provided by statutes and the regulations issued pursuant to such statutes. Under an enlistment or reenlistment contract, a member is entitled to any legally authorized pay and allowances. However, there is no legal basis for applying either a regulation issued pursuant to any pay or allowances statute, or a provision of the enlistment contract, as authorizing payments not provided by the statute.

Moreover, the rule is well-established that a soldier's entitlement to pay is dependent upon a statutory right (*Bell* v. *United States*, 366 U.S. 393, 401 (1961)) and that the common law governing private employment contracts has no place in the area of military pay (*United States* v. *Williams*, 302 U.S. 46 (1937)). A valid separation and discharge terminates the special status of an enlisted man created by his enlistment contract, and it ends whatever entitlement to pay and emoluments that he may have had during an enlistment. This rule was followed by the Court of Claims in the case of *Keef* v. *United States*, 185 Ct. Cl. 454, 471 (1968), where the plaintiff alleged, among other things, that his discharge was a breach of his enlistment contract.

Accordingly, and in light of the foregoing, a validly executed discharge and subsequent reenlistment may not be declared retroactively invalid so as to require recovery of benefits to which the member was entitled by law incident to such discharge and reenlistment. This is our view whether or not the member agrees to a revocation of his reenlistment contract, and the fact that subsequent to the reenlistment it is discovered that the member was not entitled to a variable reenlistment bonus to which it was believed he was entitled at the time he enlisted would not change that view. Question 1 is answered in the negative.

In regard to question 2, as is indicated in the Committee Action, this Office has consistently held that the right to a variable reenlistment bonus vests in the member at the time of reenlistment provided he possesses the required qualifications for such a bonus. *See* 45 Comp. Gen. 379 (1966) and 46 *id.* 322 (1966). If the member does not possesss those qualifications at the time of reenlistment, he is not entitled to the variable reenlistment bonus and this is true even though he may have

been erroneously informed as to his qualifications by an agent of the Government. See *Kendall Gordon Parker* v. *United States*, Ct. Cl. No. 297–71, decided June 16, 1972; 51 Comp. Gen. 261 (1971); 49 *id.* 51 (1969); 47 *id.* 414 (1968); and 42 *id.* 172 (1962). Later acquisition of the qualifications will not retroactively entitle a member to such a bonus. *See* 48 Comp. Gen. 624 (1969) (answer to question d), and B-160096, March 4, 1969, cited in the Committee Action.

Accordingly, question 2 is also answered in the negative.

As indicated in the Committee Action, appropriate remedies are available to alleviate situations such as described above. For example, 10 U.S.C. 1552 establishes procedures whereby military records may be corrected to correct an error or remove an injustice and to pay amounts found due incident to such corrections. Also, the indebtedness of enlisted members may be canceled or remitted, pursuant to 10 U.S.C. 4837(d), 6161, 9837(d) and 14 U.S.C. 461, when the Secretary concerned considers it in the best interests of the United States. *See, also*, 10 U.S.C. 2774 and 32 U.S.C. 716 as added by the act of October 2, 1972, Public Law 92–453, authorizing the waiver of claims of the United States arising out of certain erroneous payments.

[B-177049(1)]

Quarters Allowance—Government Quarters—Nonoccupancy—Personal Convenience

The payment of a basic allowance for quarters (BAQ) under 37 U.S.C. 403(a) to a female Air Force captain, pay grade O–3, as an officer without dependents, who resides in non-Government quarters with her officer husband and his two dependent children by a prior marriage, may not be authorized in the absence of a commanding officer's certification that Government quarters are unavailable or inadequate, the adequacy of the quarters to be determined on their fitness for use as bachelor quarters without regard to their suitability for a married woman who desires to reside with her husband since pursuant to Department of Defense Instructions 1338.1, which is for application notwithstanding the Civil Rights Act of 1964, the eligibility of married members for BAQ, without dependents, rests with the male member and the female member has no entitlement to the allowance unless single quarters are not available to her.

To Captain Gerald A. Reasor, Department of the Air Force, February 13, 1973:

We refer further to your letter dated August 29, 1972, with attachments, file reference 1840 ACF (Capt. Reasor/3107), forwarded here by letter of September 22, 1972, of Headquarters, United States Air Force (Department of Defense Military Pay and Allowance Committee Number DO–AF–1174), in which you request an advance decision as to the propriety of payment of basic allowance for quarters (BAQ) to Captain Betty M. Callicotte, USAF, effective August 21, 1972.

Captain Callicotte apparently resides in non-Government quarters with her husband, a major in the Air Force, who has two dependent children by a prior marriage. She has no children or other dependents.

On August 21, 1972, Captain Callicotte (pay grade O–3) made application for BAQ as an officer without dependents. She protests the criteria outlined in table 3–2–4, Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) which provide that where a service member is married to another member the male member is allowed to reside off-base and draw BAQ as a member without dependents, but his wife in pay grade O–3 and below is entitled to such allowance only if bachelor quarters are not available or are not considered adequate by the installation commander. Further, the officer questions how bachelor quarters may be considered to be adequate facilities for a married woman who has the right to establish a joint residence with her husband and who desires to do so. She considers that the current criteria discriminate against female members.

Subsection 403(a) of Title 37, U.S. Code, provides that except as otherwise provided in section 403 or another law, a member of a uniformed service entitled to basic pay is entitled to a basic allowance for quarters. Subsection (b) provides that except as otherwise provided by law, a member who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. However, except as provided by regulations prescribed under subsection 403(g) a commissioned officer without dependents who is in a pay grade above pay grade O–3 and who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade or rank and adequate for himself, may elect not to occupy those quarters and instead receive the basic allowance for quarters prescribed for his pay grade by this section. Subsection (g) provides that the President may prescribe regulations for the administration of section 403.

In accordance with section 407 of Executive Order 11157, June 22, 1964, as amended, issued pursuant to section 403(g), Department of Defense (DOD) Instruction 1338.1, January 30, 1964, establishes policy with respect to entitlement to basic allowance for quarters as follows:

A. It is the policy of the Department of Defense to encourage maintenance of the family unit. When both husband and wife are members of the Uniformed Services and are assigned to the same or adjacent military installations, the male member is authorized basic allowance for quarters prescribed for a member without dependents when public quarters for dependents are not available, notwithstanding the availability of single quarters.

* * * * * * *

C. When both husband and wife are members of the Uniformed Services with no other dependents and are stationed at the same or adjacent military installations the following provisions apply:

* * * * * * *

2. *Both Officer or Both Enlisted.* Eligibility for assignment to public quarters for dependents or to the payment of basic allowance for quarters prescribed for a member without dependents in lieu thereof rests with the male member. The female member is not eligible for assignment to public quarters for dependents nor is she entitled to the basic allowance for quarters prescribed for a member without dependents unless quarters for members without dependents are not available for her occupancy. Where quarters are available for her occupancy, the female member will nevertheless be permitted to reside with her husband but will not be entitled to the payment of the basic allowance for quarters prescribed for a member without dependents, unless she is in a pay grade above 0–3 and public quarters are not assigned for their joint occupancy.

* * * * * * *

4. The provisions of C.2 and C.3, above, are intended to permit the husband to draw the basic allowance for quarters prescribed for a member without dependents when public quarters for dependents are not available and the husband and wife desire to maintain joint residence off the military installation. * * *.

D. When both parties concerned are members of the Uniformed Services and either or both have dependents other than spouse, the assignment to public quarters for dependents rests with either or both and either or both may be entitled to the basic allowance for quarters prescribed for members with dependents when not assigned public quarters, depending on dependency status of each of the members. * * *.

This instruction is implemented in table 3–2–4, DODPM, which in Rule 10 provides that when both members are assigned to the same or adjacent bases or shore installations and the male member has dependents other than wife and the female member has no dependents in her own right, and family-type quarters are not assigned for joint occupancy, and single-type quarters are not available for assignment to the female member, or the female member is in pay grade O–4 or higher and elects not to occupy available quarters, then the male member is entitled to BAQ as a member with dependents and the female member is entitled to BAQ as a member without dependents.

Following the enactment of the Career Compensation Act of 1949, 63 Stat. 802, the Personnel Policy Board, Office of the Secretary of Defense, on April 12, 1950, issued a policy to the effect that members of the uniformed services married to each other who were assigned to permanent duty at the same or adjacent installations need not be assigned to Government quarters if the best interests of the service concerned were best served otherwise, and if not so assigned to Government quarters each married member, if otherwise entitled thereto, would receive a separate basic allowance for quarters prescribed for members without dependents.

It appears that under this policy in the interest of the members' morale, female married members were authorized quarters allowances without regard to the availability of single quarters for them. How-

ever, this policy was rescinded on March 2, 1951, by the board which then provided that eligibility for BAQ, without dependents, rested with the male member and that the female member had no entitlement to such allowance unless single quarters were not available to her. This requirement was incorporated in DOD Instruction 1338.1 dated April 16, 1954, and appears in the current instruction.

In decision B–117268, January 7, 1954, based upon regulations similar to those currently in force, we denied payment of BAQ to a female Air Force member who, because family quarters were not available at that station, lived off-base with her husband, also an Air Force member, as permission for both members to reside off-base did not warrant the conclusion that single quarters were not available to the female member in the absence of such determination by the commanding officer. In a similiar decision, B–152373, April 21, 1964, an Air Force officer's living off-base was treated as a voluntary relinquishment by her of single Government quarters in order to live with her husband. Disallowance of a similiar claim was affirmed in decision B–150830, July 26, 1963. Copies of these decisions are enclosed.

In decision of July 3, 1972 (52 Comp. Gen. 1), copy enclosed, we considered certain inequities in the dependency requirements applicable to female members who claim BAQ on account of a dependent husband. In this regard we referred to section 703(a) of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. 2000e–2, and we observed that in enacting this ban on discrimination based on sex, the Congress intended to bring to an end prescribed discriminatory practices against female employees based on stereotyped characterizations of the sexes and that even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity.

Consistent with this viewpoint, we examined our prior decision, 32 Comp. Gen. 364 (1953), and similar decisions concerning the dependency of a female member's husband who was physically and mentally capable of self-support. In the light of present-day developments in the law we concluded that the dependency concepts applicable to the traditional family and fundamental to those decisions were no longer for application under present standards. Therefore, to the extent that certain dependency requirements we had applied in our prior decisions were not specifically required by statutory provision, they were changed effective the date of that decision.

However, in the case of *Frontiero* v. *Laird*, 341 F. Supp. 201 (1972), the court upheld the constitutionality of 37 U.S.C. 401, which contains a dependency requirement applicable to female members who claim BAQ on account of a dependent husband. It found a reasonable rela-

tionship for the different methods of establishing dependency on the basis of administrative and economic circumstances. The case has been appealed to the United States Supreme Court, which is expected to render a decision during its current term.

It may be that the U.S. Supreme Court's decision in the *Frontiero* case, when rendered, will require a reexamination of our decisions as well as a revision of the administrative regulations relating to the payment of quarters allowances to female members of the uniform services. Accordingly, we do not consider that any reexamination of our decisions in this area would be appropriate at this time.

While the standard in question is not found in 37 U.S.C. 403(a), it has been established by regulations issued pursuant to section 407 of Executive Order 11157 and prior similar provisions which authorized the Secretaries concerned to issue such supplemental regulations as they deemed necessary or desirable to carry out those orders. Our previously cited decisions have been based on such regulations.

In view of the foregoing, Captain Callicotte's claim must be considered in light of the regulations presently in effect. Therefore, in the absence of a commanding officer's certification that Government quarters are unavailable or inadequate, quarters allowance may not be approved for her.

Regarding the adequacy of quarters, DOD Instruction 1338.1, IIIC.2 and table 3-2-4, DODPM, provide that the female member is not entitled to the basic allowance for quarters prescribed for a member without dependents unless quarters for members without dependents (single quarters) are not available for her occupancy. Under current regulations the adequacy of Government quarters is to be determined on their fitness for use as bachelor quarters, without regard to their suitability for a married woman who desires to reside with her husband. *See* decision of this date to First Lieutenant L. Jack Staley, USAF, 52 Comp. Gen. 514 (1973), copy enclosed.

Consequently, on the record now before us, Captain Betty M. Callicotte may not be authorized basic allowance for quarters at the without dependents rate. Her application will be retained here.

[B-177049(2)]

Quarters Allowance—Availability of Quarters—Nonoccupancy for Personal Reasons—Marriage to Another Member of the Uniformed Services

A female Air Force officer residing with her officer husband in non-Government housing who alleges discrimination in the denial of her application for quarters allowance, which she claimed on the basis of bachelor quarters (BAQ) on the Air Force base are unsuitable for her because she is married and wishes to

reside with her husband, since other married officers are entitled to BAQ at the dependent rate but her husband receives a quarters allowance without dependents rate and she receives no allowance, properly was denied a quarters allowance at the without dependent rate as the certification of the responsible commander was not based on the unavailability of quarters but on the presumed unsuitability of the quarters for a married woman who wishes to reside with her husband, whereas pursuant to 37 U.S.C. 204 and implementing regulations, a member is not entitled to BAQ on behalf of a spouse who is on active duty and is entitled to basic pay in her own right.

To First Lieutenant L. Jack Staley, Department of the Air Force, February 13, 1973:

We refer further to your letter dated July 21, 1972, with attachments, forwarded here by letter of September 15, 1972, of Headquarters United States Air Force (Department of Defense Military Pay and Allowance Committee Number DO–AF–1168), in which you request an advance decision as to the propriety of payment of basic allowance for quarters (BAQ) to Captain Lois R. Taylor, USAF, effective June 12, 1972.

Captain Taylor is married to another Air Force officer and apparently they reside together in non-Government housing located near her permanent duty station, Barksdale Air Force Base, Louisiana. Her application for quarters allowance is based on the unsuitability of bachelor officer quarters (BOQ) at Barksdale Air Force Base. She says that such accommodations are unsuitable for her because she is married and wishes to reside with her husband.

Additionally, Captain Taylor expresses the belief that the denial of BAQ to her at the single rate is discriminatory as other married Air Force officers are entitled to BAQ at the dependent rate, but her husband receives quarters allowance at the without dependents rate, and she receives no allowance.

In support of Captain Taylor's claim a copy of a military pay order dated June 12, 1972, has been submitted. It contains a statement from the Commander, 2d Combat Support Group (SAC), Barksdale Air Force Base, as follows, "*CONDITIONAL STATEMENT:* Determination is hereby made that Government Quarters for housing facilities are unsuitable for Captain Lois R. Taylor, 437–72–0274FV. Officer elects to live off base with her husband, Captain John R. Taylor."

You refer to table 3–2–4, Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) as indicating that entitlement to BAQ for a female member with no dependents in her own right is predicated on the unavailability of quarters but that there is no reference to, nor definition of unsuitability of quarters as a basis for authorization of the allowance.

The act of September 2, 1957, Public Law 85–272, 71 Stat. 597, validated BAQ payments made to female members prior to April 16, 1954, where, under criteria similar to those currently in effect, the Air Force did not assign those members to available single quarters, the appropriate base commander having certified that such quarters, though available, were neither appropriate nor adequate for female members in view of their marital status. In decision B–137538, December 9, 1958, copy enclosed, which made reference to the above-cited act, we disallowed a married female member's quarters allowance claim where it appeared that orders which purported to establish the unavailability of adequate quarters could not be accepted for that purpose as it was not clear that they had been based on the actual unavailability of adequate single quarters, and not on her marital status.

In decision of this date to Captain Gerald A. Reasor, USAF, 52 Comp. Gen. 510, copy enclosed, we considered the claim of a female member for BAQ without dependents in circumstances where she resided off-post with her member husband and bachelor quarters apparently were available to her. We said that under present regulations her claim should not be authorized in the absence of a commanding officer's certification that adequate Government quarters were unavailable. Furthermore, we indicated that since table 3–2–4, DODPM, as well as DOD Instruction 1338.1IIIC upon which it is based, specify that quarters allowance is not to be paid to a female member unless quarters for member without dependents (single-type quarters) are unavailable, the adequacy of Government quarters is to be determined on their fitness for the use as bachelor quarters, without regard to their suitability for a married woman who desires to reside with her husband.

It appears that the commander's statement of June 12, 1972, that Government quarters were unsuitable for Captain Lois R. Taylor, was not based on the actual unavailability of adequate single quarters, but on the presumed unsuitability of this type of quarters for a married member who wishes to reside with her husband. In such circumstances, under current regulations BAQ, without dependents, may not be authorized.

Section 420 of Title 37, U.S. Code, provides that a member of a uniformed service may not be paid an increased allowance under Chapter 7 of Title 37 on account of a dependent, for any period during which the dependent is entitled to basic pay under section 204 of that title. Accordingly, paragraph 30224a(2), DODPM, provides that a member is not entitled to BAQ on behalf of a spouse who is on active duty in the Armed Forces of the United States and entitled to basic

pay and allowances in her own right. Consequently, payment of increased quarters allowance to a member of the uniformed services because of his wife while she is serving on active duty and in receipt of basic pay, is unauthorized. In this regard *see* decision B-150830, July 26, 1963 (copy enclosed), and 47 Comp. Gen. 468 (1968).

It has been recognized in the past that where both husband and wife are service members they are at a disadvantage as compared to a member married to a civilian wife, who is entitled to increased quarters allowance because of her. However, while legislation has been introduced in the Congress to correct this apparent inequity, no remedial provision has been enacted into law.

Therefore, the fact that Captain Taylor's husband does not receive additional BAQ allowance for her because she is in receipt of basic pay as a member of one of the uniformed services, provides no legal basis for payment of BAQ allowances to her. As the record does not show that adequate bachelor Government quarters are unavailable, Captain Lois R. Taylor may not be authorized quarters allowance, at the without dependents rate.

[B-177095]

Public Buildings—Contracts—Dual System of Contracting—Construction and Financing

The proposed modifications in the dual system program procedures for the procurement of public buildings, a procedure which provides for separate construction contracts and purchase contracts for financing the building projects, does not require any change in the conclusions reached in 52 Comp. Gen. 226 that the dual system of contracting is within the legal framework of section 5 of the Public Buildings Amendments of 1972 since the decision will be equally applicable to the dual system as modified to provide alternatives in the method and timing of construction contracting; the timing of issuance of the Participation Certificates; and the terms of redemption and purchase of Participation Certificates, and the committees of Congress advised of the original plan should be informed of the proposed modifications to the plan.

To the Acting Administrator, General Services Administration, February 16, 1973:

Reference is made to letter of February 5, 1973, from your General Counsel, forwarding for our consideration a copy of a memorandum dated February 1, 1973 entitled "General Services Administration/Purchase Contract Program—Dual System/Certain Procedural Modifications." This memorandum supplements an earlier memorandum dated September 27, 1972, entitled "General Services Administration/Purchase Contract Program—Dual System/General Description." This last-named memorandum was the subject of our decision of October 19, 1972, 52 Comp. Gen. 226, wherein we concluded that the con-

tracting procedures set forth therein were within the framework of section 5 of the Public Buildings Amendments of 1972 approved June 16, 1972, 86 Stat. 219, 40 U.S. Code 602a. Your General Counsel asks whether such conclusion is equally applicable to the program as modified by the memorandum of February 1, 1973, and should be deemed to apply to the program as so modified.

Under the dual system program procedure—set out in detail in our decision of October 19, 1972—the General Services Administration (GSA) issues separate invitations (a) for bids for the construction of specified building projects and (b) for bids to finance and sell to the United States the group of projects. GSA then accepts the most favorable construction bid for each project by entering into a Construction Contract with the construction bidder and implements the most favorable financing bid for the projects by entering into a Public Buildings Purchase Contract and Trust Indenture ("Purchase Contract") with a Trustee. The Trustee receives the necessary funds through issuance of Participation Certificates to the successful financial bidders. Each Participation Certificate evidences an undivided interest in the obligation of the United States to make payment of the Purchase Price under the Purchase Contract, and such obligation of the United States includes the obligation to pay such amounts as may be necessary to enable the Trustee to pay the principal of and premium, if any, and interest on the Participation Certificates when and as the same become due and payable as specified therein.

The modifications in the dual system program procedures now proposed in the memorandum of February 1, 1973, consist of alternatives in respect of (1) the method and timing of the construction contracting, (2) the timing of issuance of the Participation Certificates, and (3) the terms of the redemption and purchase thereof prior to maturity. Such modifications are set forth in the memorandum as follows:

(1) *Method and Timing of Construction Contracting.* It is proposed that a "phased construction" method of construction contracting be permissible under the program. Under this method, instead of a single prime contract for the complete construction of each project, a number of prime contracts would be entered into from time to time, each covering one or more phases of design or construction of one or more projects. The prime contracts for certain phases would be entered into after performance of prime contracts for earlier phases has begun or been completed. Typical phases are design, foundation, structural frame, heating, ventilation and air-conditioning, partitions, etc. Site acquisition would in some cases occur after the initial design phase.

(2) *Timing of Issuance of Participation Certificates.* It is proposed that, where phased construction is used for a project, the bids for the Participation Certificates to be issued to finance the project would be invited at or after issuance of the invitation for bids or proposals for the prime contract for the initial phase of design or construction, and the bids for the Participation Certificates could be accepted prior to the award of such prime contract. As heretofore under the program, the principal amount of the Participation Certificates for which bids would be invited would not exceed the amount estimated by GSA, at approximately the time of the invitation, as the maximum which might be required to

cover the costs and expenses (including capitalized interest) to the Target Date, as more fully described in the September 27, 1972, memorandum.

Also, under the proposed modified procedures, whether or not phased construction is used, the terms of invitation for financial bids would, if and when deemed advantageous by the Administrator, provide that the Participation Certificates bid for would be purchased and paid for in installments at specified future dates, rather than on a single date.

As an additional alternative under the proposed modified procedures, the Administrator could, in lieu of initially inviting bids for the purchase of a principal amount of Participation Certificates sufficient to cover the maximum estimated costs and expenses for the projects, invite bids initially for only a portion of the estimated maximum, and subsequently from time to time as construction progresses invite bids for additional amounts of Participation Certificates of the same or new series to be issued under the same Purchase Contract, appropriately amended or supplemented each time to reflect the additional issuance. In the case of any such subsequent invitation, the principal amount for which bids are invited would not, however, exceed the amount estimated by GSA, at approximately the time of the invitation, as the maximum which might be required to cover future costs of construction and other applicable costs and expenses referred to above, after taking into account any available funds at the time remaining with the Trustee.

(3) *Redemption and Purchase of Participation Certificates.* Each Purchase Contract would contain provisions for (1) the mandatory redemption of Participation Certificates at a specified date within a year after the Target Date with any sums remaining in the Construction Fund after any transfer of sums to the Completion Fund for any uncompleted projects, and (2) the mandatory redemption of Participation Certificates at a specified date not later than one year following final completion (as determined by GSA), and in any event no later than three years following the Target Date, with any sums remaining in the Completion Fund. Provision would also be made for a Purchase Fund to permit the Administrator at any time to utilize under appropriate circumstances for the purchase and retirement of Participation Certificates sums held by the Trustee in the Construction or Completion Funds and no longed deemed necessary for construction or related costs or expenses, as well as additional moneys which may be paid by the Government to the Trustee for the purpose of purchase and retirement of Participation Certificates.

We find nothing in the modifications set forth above which—from a legal standpoint—would require any change in the conclusions reached in our decision of October 19, 1972. Accordingly, that decision is equally applicable to the program as so modified.

Inasmuch as the interested committees of the Congress were advised of the original plan by your agency, we suggest you advise the same committees of the instant modifications.

[B-177518]

Agriculture Department—Losses Sustained by Producers, Etc.—Turkey Growers—Indemnification

The losses sustained by five turkey growers in connection with the Department of Agriculture's quarantine program for the control and eradication of exotic Newcastle disease—a highly virulent communicable disease of poultry—which was imposed under the Department's authority to prevent the interstate dissemination of a disease, may not be indemnified under the terms of 21 U.S.C. 114a or pursuant to the authority in 7 U.S.C. 612c. 21 U.S.C. 114a authorizes indemnity payments for the destruction of animals, including poultry, when performed under the supervision of the Department, whereas the growers sold their flocks and eggs upon their own initiative, a disposition that is not considered a "con-

structive destruction" that resulted from the quarantine, 7 U.S.C. 612c is intended for application only when an entire commodity is in distress and, furthermore, indemnity payments have been founded upon specific legislation.

To the Secretary of Agriculture, February 16, 1973:

By letter dated November 22, 1972, the Acting Secretary of Agriculture requested our decision concerning the authority of the Department of Agriculture to make indemnity payments to five California turkey growers for losses sustained in connection with the Department's program for the control and eradication of exotic Newcastle disease.

In November 1971 exotic Newcastle disease—a highly virulent, communicable disease of poultry—broke out in certain areas of the United States. In December 1971 your Department responded to this situation by imposing a Federal quarantine in, among other areas, portions of southern California. This action was undertaken pursuant to section 2 of the act approved February 2, 1903, as amended, 21 U.S. Code 111, and the act approved March 3, 1905, as amended, 21 U.S.C. 123–127. Section 2 of the 1903 statute, as amended, authorizes the Secretary of Agriculture to make such regulations and take such measures as he may deem proper to, *inter alia*, prevent the interstate dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry. Section 1 of the 1905 statute, as amended, 21 U.S.C. 123, provides in part:

> The Secretary of Agriculture is authorized and directed to quarantine * * * any portion of any State * * * when he shall determine the fact that any animals and/or live poultry in such State * * * are affected with any contagious, infectious, or communicable disease of livestock or poultry or that the contagion of any such disease exists or that vectors which may disseminate any such disease exist in such State * * *.

The Federal quarantine relating to exotic Newcastle disease prohibited, except as otherwise provided, the interstate movement from the quarantine area of any poultry or eggs. 9 CFR § 82.4, as amended, 36 F.R. 25218 (December 30, 1971). An exception was provided to permit the interstate movement of live poultry solely to federally inspected slaughtering establishments for immediate slaughter and upon prior Federal approval. An exception was also made to permit interstate movement of "table eggs and eggs for processing" under certain conditions. The State of California quarantined the same area and imposed similar prohibitions and restrictions with respect to intrastate movement from the quarantine area. On March 10, 1972, the quarantine was extended by your Department and the State of California to encompass additional areas of southern California, including the ranches of the five turkey growers here involved.

In December 1971 your Department entered into a cooperative agreement with the State of California pursuant to section 11 of the

act approved May 29, 1884, as amended, 21 U.S.C. 114a, which provides in part:

> The Secretary of Agriculture, either independently or in cooperation with States * * * is authorized to control and eradicate any communicable diseases of livestock or poultry * * * including the payment of claims growing out of destruction of animals (including poultry), and of materials, affected by or exposed to any such disease, in accordance with such regulations as the Secretary may prescribe. * * *.

The Acting Secretary's letter reads, in part:

> The flocks of the five turkey growers * * * were substantial in size, i.e., 2200, 3000, 6000, 5000 and 12,000 breeders respectively. The growers have sustained substantial economic losses as a result of the quarantine imposed upon the area which encompasses their ranches. These growers raised turkey breeder flocks and produced hatching eggs which normally were shipped interstate as well as intrastate. As pointed out above, the Federal quarantine generally prohibited the interstate movement of hatching eggs, as well as poultry for purposes other than slaughter, and the State quarantine prohibited such movements intrastate from the quarantined area. The growers allege that these restrictions so adversely affected their businesses that they were forced to dispose of all of their turkeys and eggs. The turkeys were either destroyed or marketed for human consumption and the eggs were sold to commercial breakers. The disposition of the flocks and eggs was not ordered by this Department or the State under the cooperative program for the control and eradication of the exotic Newcastle disease. The flock owners voluntarily disposed of their flocks and eggs because of the economic losses incurred and not because of known infection or disease exposure in the flocks.

We are requested to determine whether the five growers may be indemnified for their losses under the terms of 21 U.S.C. 114a, or, in the alternative, whether they may be compensated under the authority of section 32 of the act approved August 24, 1935, as amended, 7 U.S.C. 612c.

Applicability of 21 U.S.C. 114a.

As noted previously, 21 U.S.C. 114a authorizes the Secretary of Agriculture, *inter alia*, to pay claims "growing out of destruction of animals (including poultry), and of materials, affected by or exposed to any such disease, in accordance with such regulations as the Secretary may prescribe." Regulations for the application of 21 U.S.C. 114a in connection with exotic Newcastle disease appear at 9 CFR §§ 53.1–53.10, as amended, 37 F.R. 134 (January 6, 1972) and 5689 (March 18, 1972). These regulations authorize payment of "the expenses of purchase, destruction and disposition of animals and materials required to be destroyed because of being contaminated by or exposed to" the disease under certain conditions [9 CFR § 53.2(b)]. Among the conditions are that the animals be appraised by employees of your Department [*id.* §§ 53.3, 53.10(c)], and that the animals be killed promptly after appraisal and disposed of by burial or burning, unless otherwise specifically provided, under the supervision of such employees. [*id.* § 53.4].

The position of the turkey growers is presented in a memorandum dated July 21, 1972, from Joseph D. Tydings, Esquire, of the law firm Danzansky, Dickey, Tydings, Quint & Gordon, to the Senate Committee on Agriculture and Forestry. This memorandum, at page 4, summarizes the growers' argument for application of 21 U.S.C. 114a as follows:

> The turkey breeder flock owners should be indemnified, as authorized by 9 C.F.R. § 53.2(b), because (1) there was a quarantine imposed on several southern California counties (See 36 Fed. Reg. 25218 (1971)) which prohibited the interstate movement of poultry, eggs, poultry carcasses, and various materials associated with the poultry industry; (2) the turkey breeder flocks in question were exposed to Exotic Newcastle Disease as required by 21 U.S.C. § 114a, 21 U.S.C. § 134a(b), and 9 C.F.R. § 53.2(b); and (3) as a result of the aforementioned the turkey breeder flocks were "destroyed," as required by 21 U.S.C. § 114a, 21 U.S.C. §§ 134a(b) (d), and 9 C.F.R. § 53.2(b) for compensation.

The memorandum, at page 6, elaborates upon the conclusion that these turkeys were exposed to the disease:

> Mr. Russ Barnum, who is acting as spokesman for the independent turkey growers, has absolutely no doubt that the birds were exposed to the disease. Barnum was in contact with several diseased ranches, i.e., poultry ranches where the disease had been discovered, and had made subsequent contact with the turkey ranches in question. In addition, vehicles which had been in contact with contaminated materials subsequently exposed the turkey breeder flocks to the disease. Finally, air currents, migratory birds, and other acts of nature were responsible for exposing the turkeys to the disease. Therefore, although the turkeys were not contaminated by the disease, they were exposed to it. It should also be noted that the Advisory Committee, a group of scientists who periodically advise USDA on various matters, chaired by Dr. Ben Pomeroy of the University of Minnesota, was not asked for its opinion on this matter, because apparently USDA was aware that the Advisory Committee would state that the turkeys had been exposed to the disease.

On the matter of destruction of the flocks, the memorandum, at page 7, adopts the following argument:

> The turkey breeder flock owners have been victims of "constructive destruction," i.e., there has been destruction as an economic fact of life although perhaps there was not actual destruction.
>
> There is no practical difference between the Department of Agriculture seizing and destroying chickens stricken or exposed to a dangerous, communicable disease covered by the statutes in question and imposing a quarantine on a certain area, including a prohibition on the interstate or intrastate (outside the quarantine area) movement of turkey hatching eggs which "forces" the turkey hatching egg producers to sell their birds to processors, drown their birds, or sell their eggs to commercial breakers, all of which are done at substantial losses. Although the turkey growers were not required to destroy their birds or their hatching eggs, the result was essentially the same because of the quarantine. The turkey flock owners, in order to reduce their substantial losses, either sold their birds to processors (for human consumption), sold their eggs to commercial breakers, or drowned their birds. This, in essence, is the "constructive destruction," and it can be analogized to the dairy industry. If because of some dangerous communicable disease, a quarantine is imposed on a county, e.g., and milk from cows cannot be shipped outside the quarantine area to its normal market, and the cows are ultimately sold to processors as meat, the farmer's dairy business has been constructively destroyed. The turkey growers have done all that is possible to mitigate their losses, but, for all practical purposes, the quarantine destroyed their flocks. Hence, they should be indemnified for their losses.

Concerning the question of exposure to disease, the Acting Secretary's letter states:

> * * * There is no definition of the term "exposed" in the statutory provision. This Department has deemed the determination as to whether animals were "exposed" to a communicable disease to be a matter of professional judgment based upon an epidemiological investigation as to the involvement of the particular animals with infected animals or premises. All relevant circumstances are considered, such as possible contact with infection through the movement of other animals, avian species, vectors, persons, products, equipment, or vehicles, as well as other factors which might be relevant, such as weather. The term "exposed" has been deemed to relate to such a determination with respect to particular animals and not to relate to all animals within a geographic area under quarantine regardless of the history of the animals in relation to the disease. All animals in a quarantined area are considered as having an "unknown status" unless they are identified as infected on the basis of clinical symptoms, virus isolation, or other diagnostic procedure, or they are identified as "exposed" based upon an epidemiological investigation.

With specific reference to the turkey flocks here involved, the letter states: "After investigation, representatives of this Department concluded that there is no evidence that the flocks were in fact exposed to exotic Newcastle disease * * *." Additional materials provided to us by your Department indicate that each of the ranches here involved was visited at least twice by Federal officials. The Acting Secretary's letter also states with reference to application of 21 U.S.C. 114a:

> Neither is the term "destruction" defined in the statute. The term is used in the regulations to relate to the disposition of animals specifically found to be infected with or exposed to a communicable disease and which are ordered to be disposed of by the Federal or State representatives cooperating in the control and eradication of disease under a cooperative agreement between this Department and the State.
>
> We have been advised by the Office of the General Counsel of this Department that, in view of the circumstances outlined above and the statutory language and legislative history thereof * * * there is serious question whether the term "exposed" is intended to automatically apply to all animals in a quarantined area and the authority of the Secretary to pay indemnities under the provisions of 21 U.S.C. 114a for "constructive destruction" or consequential damages resulting from the imposition of a quarantine is also subject to serious question. * * *.

On the basis of the information presented to us, we must conclude that 21 U.S.C. 114a is not by its terms applicable to the turkey growers here involved. It is conceded that the turkey flocks and eggs of these growers were not affected or contaminated by exotic Newcastle disease. With respect to the question of exposure to the disease your Department takes the position that such determinations are a matter of professional judgment based upon epidemiological investigation involving consideration of all relevant circumstances. The memorandum on behalf of the claimants also appears to approach the question of exposure as a matter of scientific judgment based upon epidemiological factors. Thus, the memorandum alleges that the flocks were exposed by contaminated vehicles, air currents, migratory birds, and other acts of nature. However, your Department's experts presumably considered these and any other relevant factors in concluding that the flocks were

not exposed. Moreover, the memorandum fails to present any expert opinion in support of its allegation as to exposure. The only assertions in this regard are that Mr. Russ Barnum, a spokesman for the growers, "has absolutely no doubt that the birds were exposed to the disease," and that if the question had been submitted to your Department's Advisory Committee, the Committee would have concluded that the flocks were exposed. However, there is no indication that Mr. Barnum is qualified to make epidemiological determinations; and the assertion as to what the Advisory Committee would have concluded must be considered speculative at best. In any event agency administrative determinations--such as the one here concluding that the flocks were not exposed—are binding on us in the absence of substantial evidence to the contrary. We find no such substantial evidence to the contrary in this case.

Apart from the matter of exposure, 21 U.S.C. 114a authorizes indemnity payments "growing out of destruction of animals (including poultry), and of materials * * * in accordance with such regulations as the Secretary may prescribe." As noted previously, Department of Agriculture regulations require, *inter alia*, appraisal, destruction, and disposal under the supervision of certain Department employees. In the present case, however, the turkey growers sold their flocks and eggs entirely at their own initiative, without any approval or involvement on the part of your Department's employees. Therefore, it appears that the actions taken with respect to the turkey flocks and eggs here involved were not within the normal application of the indemnity provision. However, Mr. Tydings' memorandum takes the position that even if there was no "actual" destruction, the turkey growers are the victims of a "constructive destruction" since, as a result of the quarantine, they were forced to dispose of their flocks and eggs for, in effect, salvage value. Thus, it is argued, there is no practical difference between an actual seizure and destruction by your Department pursuant to 21 U.S.C. 114a, and the imposition of restrictions upon transportation of flocks and eggs which eliminated normal markets.

The facts presented in the memorandum do not disclose whether the turkey growers may have had any practical alternatives less drastic than selling their flocks and eggs for salvage. However, assuming that no alternative existed—and, therefore, that the quarantine had the same practical effect as an actual destruction--the "constructive destruction" argument is directed entirely at the quarantine aspect of your Department's efforts to combat exotic Newcastle disease. On the other hand, it is apparent that the quarantine program is separate and distinct from the destruction program provided for under 21 U.S.C. 114a and 9 CFR, Part 53. Thus the quarantine program is founded

upon different authorities—primarily 21 U.S.C. 123 and 9 CFR, Part 82. The specific purposes of the two programs also differ. The quarantine program is in the nature of a preventive measure designed to inhibit the dissemination of disease; while the destruction program is concerned with the actual eradication of disease within a quarantine area. In this regard it is notable that while the destruction program is limited to animals and materials affected by or exposed to disease, a quarantine under 21 U.S.C. 123 may be imposed upon a determination, *inter alia*, that the contagion of a disease or vectors which may disseminate disease exist in a certain area.

In view of the foregoing, we believe that the indemnity authority of 21 U.S.C. 114a is limited to the actions specifically provided for in that section, i.e., in effect, the seizure and destruction by your Department of animals and materials actually affected by or exposed to disease. We are aware of nothing which suggests that this indemnity authority is designed for application to claims growing out of other actions taken by your Department in its general approach to the control and eradication of communicable diseases of animals or poultry.

Applicability of 7 U.S.C. 612c (Section 32 of Public Law 74–320).

Section 32 of the act approved August 24, 1935 (Public Law 74–320), Ch. 641, 49 Stat. 750, 774, as amended, 7 U.S.C. 612c, appropriates certain sums to be maintained in a separate fund and utilized by the Secretary of Agriculture to, *inter alia:*

* * * (3) re-establish farmers' purchasing power by making payments in connection with the normal production of any agricultural commodity for domestic consumption. * * *.

The Acting Secretary's letter to us points out that clause (3) of section 32 was applied in making indemnity payments to reestablish the purchasing power of cranberry growers following demoralization of commercial markets for the 1959 crop which occurred as a result of publicity concerning the use of chemical weed killers on some cranberries. It is also stated that our Office passed upon the legality of the cranberry program (see B–142279, March 28, 1960), and that no serious objections to the program were voiced by the Congress. However, concerning application of section 32 to the turkey growers here involved, the Acting Secretary states:

* * * there is a significant distinction between the cranberry situation and that of the turkey breeder flock owners. In the former case the whole industry throughout the United States was involved, while in the latter there are only five affected turkey producers, located within a small area of California. Section 32 refers to farmers' purchasing power—in the plural—and to the normal production of the agricultural commodity for domestic consumption. The section appears to contemplate a situation in which the entire crop of a commodity is in distress, rather than a situation involving a minor segment of the agricultural industry.

It may also be noted that since the cranberry payment program was conducted by this Department for the 1959 crop of cranberries, Congress has since seen fit to enact specific legislation in each subsequent instance where indemnification for farmers was considered appropriate. For example, in the case of milk, Congress authorized a milk indemnity program to compensate farmers and others who have suffered losses as a result of removal of their dairy products from commercial markets because such products contain residues of chemicals registered and approved for use by the Federal Government at the time of such use. (7 U.S.C. 450j) Similar authority has been provided for the indemnification of beekeepers "in cases in which the loss occurred as a result of the use of economic poisons which had been registered and approved for use by the Federal Government." (7 U.S.C. 135b note.) Accordingly, even if the provisions of section 32 are construed to be broad enough to permit payments to the turkey growers here involved, the subsequent specific legislation authorizing indemnification for certain losses make it questionable whether the general authority of section 32 remains available for such purpose.

We agree that, unlike the cranberry situation, the problem of the turkey growers here involved cannot—at least at the present time—be characterized as a general problem affecting the entire industry. More fundamentally, we also agree that, in view of the fact that application of section 32 to the cranberry situation was itself subject to some doubt, B-142279, *supra*, p. 6, and that subsequent indemnity programs have been founded upon specific legislation, it is questionable whether the general authority of section 32 remains available for indemnification payments of the type here contemplated.

For the reasons stated herein, it is our opinion that neither 21 U.S.C. 114a nor 7 U.S.C. 612c authorizes indemnity payments under the circumstances set forth in the Acting Secretary's letter and the materials enclosed therewith.

[B-177214]

Retirement—Civilian—Service Credits—Military Service—Waiver of Retired Pay

An Army sergeant who when retired on December 1, 1960, under 10 U.S.C. 3914, entered the Federal Civil Service from which he retired for disability on November 21, 1969, and who on October 1, 1970, both changed to full waiver his partial waiver of retired pay for Veterans Administration (VA) compensation, and waived retired pay to have his military service used in the computation of his civil service annuity pursuant to 5 U.S.C. 8332(c), may have his retired pay retroactively waived to the date of his civil service retirement if the Civil Service Commission agrees to recompute his annuity and pay the additional annuity due, since waiver of retired pay under 38 U.S.C. 3105 for VA compensation did not disturb the military status of the retiree, and the VA compensation erroneously paid will be recouped, nor will the double benefit prohibited by 38 U.S.C. 3104 result from the use of the military service for civil service annuity purposes as no military retired pay will be paid.

To the Secretary of the Army, February 20, 1973:

Further reference is made to letter dated October 4, 1972, from the Acting Assistant Secretary of the Army (Financial Management) requesting a decision as to the waiver of Sergeant Major Clifford Frank Clarry, SSAN 074-09-6523, of his retired pay in order that his

military service may be credited in the computation of his civil service annuity retroactive to November 21, 1969. The request has been assigned Submission No. SS–A 1166 by the Department of Defense Military Pay and Allowance Committee.

It is stated that Sergeant Major Clarry retired December 1, 1960, under the provisions of 10 U.S. Code 3914. He waived a portion of his retired pay to receive Veterans Administration compensation for the period from July 1, 1967, through September 30, 1970. The partial waiver was changed to a full waiver of retired pay effective October 1, 1970. The compensation award made on October 1, 1970, retroactive to November 3, 1969, of $498 per month exceeded the retired pay entitlement, his retired pay was stopped effective October 1, 1970, and the Veterans Administration is now recouping the overpayment of compensation equal to the amount of retired pay previously paid for the period from November 3, 1969, through September 30, 1970.

Sergeant Major Clarry was retired from the civil service for disability on November 21, 1969. The annuity was initially established without credit for his military service since he had never submitted a formal request to the Retired Pay Division, Department of the Army, to waive retired pay so that his military service could be used in the computation of his civil service annuity. He is now of the opinion that his waiver of retired pay and the retroactive award of compensation by the Veterans Administration constitutes a retroactive waiver of retired pay so as to allow him to credit his military service in the computation of his civil service annuity retroactive to November 21, 1969.

It is further stated that a notice was received on March 15, 1971, from the Civil Service Commission that a change in the monthly rate of Sergeant Major Clarry's civil service annuity to $320 was effective October 1, 1970, since he waived retired pay on that date and his military service was being used in the computation of his annuity effective the same date. The Commission, in a letter to the retired member dated January 17, 1972, indicated that if the Army Retired Pay Division would furnish a corrected record showing waiver of military retired pay on or before November 20, 1969, the annuity would be recomputed allowing credit for military service as of November 21, 1969, effective date of his civil service annuity.

By letter dated April 9, 1972, Sergeant Major Clarry requested a statement from the Retired Pay Division of waiver of his military retired pay effective October 3, 1969, the date it is reported that he waived his military retired pay for VA compensation. In view of his failure to elect an annuity computed on his military service at the time

of his civil service retirement on November 21, 1969, doubt is expressed as to whether a retroactive waiver of retired pay to that date is now permissible. If not, question is raised as to whether the effective date of the waiver should be October 1, 1970, date of the Veterans Administration award of compensation exceeding military retired pay, or at such date as a formal waiver for civil service annuity is received from the retired member.

Section 3104, Title 38, U.S. Code, provides in pertinent part, as follows:

(a) Except to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay, or initial award of naval pension granted after July 13, 1943, shall be made concurrently to any person based on his own service or concurrently to any person based on the service of any other person.

It is provided in 38 U.S.C. 3105 that any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, and who would be eligible to receive pension or compensation under the laws administered by the Veterans Administration if he were not receiving such retired pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired pay is paid of a waiver of so much of his retired pay or retirement pay as is equal in amount to such pension or compensation. It is assumed that Sergeant Major Clarry filed such a waiver with the Department of the Army.

Since the amount of retired pay which was subject to waiver is limited to an amount which is equal to the compensation to which a person is entitled to receive from the Veterans Administration, the waiver adjusts to any changes in the compensation award and if that award exceeds the monthly military retired pay such pay is stopped. However, a waiver of retired pay to receive pension or compensation does not disturb the person's status as a retired member and is effective only as to the amount of retired pay waived. Thus, if the Veterans Administration either reduces or stops altogether the payment of the pension or compensation the amount of waived retired pay of the person should be increased accordingly. *See* 28 Comp. Gen. 484 (1949), and 43 *id.* 39 (1963).

Waiver of military retired pay for the purpose of increasing a civil service annuity is covered by entirely different laws and regulations. The controlling statute, 5 U.S.C. 8332(c), provides as follows:

(c) Except as provided by subsection (d) of this section, an employee or Member shall be allowed credit for periods of military service before the date of the separation on which title to annuity is based. However, if an employee or Member is awarded retired pay on account of military service, his military service may not be credited unless the retired pay is awarded—

(1) on account of a service-connected disability—

(A) incurred in combat with an enemy of the United States; or

(B) caused by an instrumentality of war and incurred in line of duty during a period of war as defined by section 301 of title 38; or
(2) under chapter 67 of title 10.

It is provided in 5 U.S.C. 8345(d) that

(d) An individual entitled to annuity from the Fund may decline to accept all or any part of the annuity by a waiver signed and filed with the Civil Service Commission. The waiver may be revoked in writing at any time. Payment of the annuity waived may not be made for the period during which the waiver was in effect.

The regulations of the United States Civil Service Commission relating to the credit of military service are contained in subchapter S3, Federal Personnel Manual Supplement 831–1. Section S3–5 provides in pertinent part as follows:

f. Waiver of military retired pay. (1) An employee or employee-annuitant who is receiving military retired pay which bars credit for military service as explained in a(1) of this section may elect to waive the retired pay and have his military service added to his civilian service.
(2) Adjudication of many retirement claims involving waivers of retired pay are unduly delayed because the employee failed to execute a waiver and send it to his retired pay center on a timely basis and also because the employee has already received military retired pay beyond the effective date of his proposed waiver and a recovery of the overpayment is required. To avoid this delay, the employee's waiver request—specifying the effective date of the waiver—should be forwarded direct to the Military Finance Center from which retired pay is received at least 60 days before the commencing date of annuity under the civil service retirement law. The waiver should be worded in the following manner:

I (full name and military serial number) hereby waive my military retired pay effective (date of separation). I hereby authorize the Civil Service Commission to withhold from my civil service retirement annuity any amount of military retired pay granted beyond the effective date of this waiver due to any delay in receiving or processing this election.

While the regulations do not require that the employee or employee-annuitant make his election to waive his military retired pay in advance, the tenor of the regulations indicates that such waivers are to be given only prospective effect. Also, the regulation sets forth a form of waiver to be filed with the military finance center from which military pay is received. However, it would appear that any waiver clearly indicating the member's intentions would be acceptable and no double benefit would result from the use of the military service on which retired pay is computed for any period during which military retired pay is not paid. *Cf.* 50 Comp. Gen. 80 (1970).

While different laws and regulations govern the payment of civil service retirement, it would seem that the applicable waiver provisions are flexible enough to permit the starting or stopping of civil service annuity and military retired pay so as to give effect to the waiver filed pursuant to the above-cited 38 U.S.C. 3105 for the crediting of military service in the computation of the civil service annuity. It appears that the Civil Service Commission has recomputed Sergeant Major Clarry's annuity to include his military service and has been paying him an-

nuity on that basis from October 1, 1970, the date military retired pay was stopped under his waiver of military retired pay to receive Veterans Administration compensation. Since under the retroactive compensation award he is not entitled to retired pay after November 3, 1969, and the amount paid subsequent thereto is being recouped by the Veterans Administration, we see no reason why his military service may not be credited in the computation of his civil service annuity from November 21, 1969, date of retirement, provided the Civil Service Commission agrees to recomputation and payment of the additional annuity. Final decision in the matter rests with the Commission which has exclusive jurisdiction over the computation and payment of civil service annuity. Accordingly, we have no objection to considering the waiver of retired pay effective as of November 3, 1969.

It is apparent that the overpayment of military retired pay has not been fully recovered and it is our view that if the Civil Service Commission finds an additional amount of annuity due, the amount should be set off against the indebtedness before any payment is made to Sergeant Major Clarry.

[B–175895]

Contracts—Federal Supply Schedule—Purchases Elsewhere

A firm who had a yearly supply contract with the General Services Administration (GSA) for carpet servicing in Government buildings within a designated area at a specified price but accepted an oral order from an agency in another contractor's area may not be paid the higher price claimed on the basis of entitlement to be reimbursed as for an "open market" job at commercial prices. The firm cognizant of the limitations imposed by the GSA contracts is charged with notice of the lack of employee authority to obligate the Government and should have advised the agency of its error. Since the service was not within the urgency exception of the contract, the error in procuring the services on the open market rather than from the schedule contract does not legally obligate the Government beyond the extent of the price stipulated.

To the Director, Office of Administration, The Renegotiation Board, February 21, 1973:

Reference is made to your letter of April 12, 1972, with attachments, transmitting the claim of Afghan Carpet Cleaners (Afghan) for services furnished to your agency in January and February 1972, and requesting our decision as to the amount the Board may pay in satisfaction thereof.

The record reveals that Afghan was the recipient of the General Services Administration's (GSA) contract GS–03–DP–(P)–10023 for the cleaning, repairing and installation of rugs and carpets in Government buildings for the period of June 1, 1971, through May 31, 1972. Afghan's contract encompassed "Area 2" which was described as Southwest and Southeast Washington, D.C. The contract for North-

west and Northeast Washington, D.C. was held by Metro Maintenance, Inc. (Metro) of Falls Church, Virginia.

The master schedule for all such contracts in Region 3, identified as the Washington, D.C., Maryland and Virginia areas, stipulated that the term contracts and covering price schedules were mandatory on agencies within the respective geographical areas, and that the contractor holding the contract for a specified area would be required to fulfill all requirements of the agencies within the area encompassed by his contract subject to certain enumerated exceptions. The Government agency was required to use the contractor holding the contract for the agency's area, unless the services were required at a location outside a designated service area.

According to the record, your agency, located in the Northwest section of Washington, D.C., was in the process of moving from its premises at 1910 K Street, N.W. to its new location at 2000 M Street, N.W. during the month of January 1972.

You have stated that the agency orally ordered Afghan, which did not hold the contract for that area, to pick up some 13,162 square feet of carpet from 1910 K Street, N.W., clean it, and deliver it to your new offices. You further advise that during the course of 2 days in the week of January 10, 1972, Afghan's crew removed the carpeting from the old location with the assistance of two GSA laborers. The record relates that when the Afghan foreman was requested to furnish a receipt for the carpets as required by Afghan's contract, he merely tendered his business card and stated that Afghan would mail the receipt to the Board.

During the course of the following several weeks, your agency contacted Afghan regarding the determination of a price, but was purportedly advised by Afghan that a price had not yet been computed. For this reason, you state that the Board was unable to issue a purchase order.

The carpets, after being cleaned, were delivered to your new offices on or about February 15, 1972, at which time Afghan submitted an invoice in the sum of $2,579.76, which was computed by multiplying the 13,162 square feet of carpet by 20 cents per square foot less a discount of 2 percent for payment within 10 days.

A letter from Afghan, dated March 2, 1972, amended its invoice by offering an additional 3 percent discount if the invoice were paid by March 16, 1972. It was explained that the 20 cents per square foot figure was the price offered to all of Afghan's commercial customers and that it could not offer the Board more favorable treatment than its other commercial customers.

By letter of March 27, 1972, you advised Afghan that the services covered by the invoice were ordered on the basis of Afghan's GSA contract, and that the Board erred in selecting Afghan from the schedule as the authorized contractor for the Northwest area, since a review of the schedule showed Metro as holding that contract. You maintained that the Board was not authorized to pay more than Afghan's contract price of 8 cents per square foot, less discounts as set out in the GSA schedule. Therefore, you advised Afghan that you had prepared a purchase order at 8 cents per square foot, less a 45 percent prompt payment discount and an additional trade discount of 40 percent, for a total invoice price of $347.48. Afghan was advised that if it would submit a proper invoice in that amount, the invoice would receive prompt attention.

The record includes a copy of an undated letter from Afghan stating that it was charging the Board with knowledge of the fact that Metro, rather than Afghan, held the contract for Northwest Washington. The letter further indicates that Afghan knew Government agencies were obligated to order their requirements from the firm holding the contract for the area in which the agency was located. However, Afghan maintained that it could not afford to absorb losses on the removal and cleaning of carpets in sections of the city for which it did not hold a GSA contract, and claimed that any remuneration below the commercial price would result in a loss. Accordingly, the letter requested payment of $2,632.40, contending that the discount which Afghan had initially offered had been lost due to the expiration of the discount period.

Afghan, by way of its counsel, has submitted to this Office a summary of the expenses allegedly incurred in performing the referenced work, including the rental of a truck to transport the carpets to a subcontractor in Rockville, Maryland, and $721.75 allegedly paid to the subcontractor for cleaning services. Afghan's counsel maintains that because Afghan had performed "open market" jobs for certain other agencies, Afghan was entitled to believe the Renegotiation Board order was also for such an "open market" job.

In view of the foregoing, you have submitted Afghan's invoice for $2,579.76 to this Office and have requested an advance decision on the amount the Board may properly pay for the services received from Afghan.

With regard to supply schedule contracts, it has been the position of our Office that the procurement of such supplies or services on the open market, rather than from the scheduled contractor, where such procurement is due to an error on the part of Government personnel rather than a public exigency, does not legally obligate the Govern-

ment beyond the extent of the price stipulated in the applicable supply contract. Moreover, and most significantly, one entering into a contract with an officer or employee of the Government is charged with notice of the limitations placed upon the authority of the officer or employee to obligate the United States. 26 Comp. Gen. 866, 867–868 (1947); 30 *id.* 23 (1950).

Our perusal of the record reveals that Afghan was clearly cognizant of the limitations imposed by the GSA contracts upon the Government agencies ordering the services set out therein. It follows that Afghan is chargeable with knowledge that the Renegotiation Board was obligated to order these services from Metro. It would therefore appear that had Afghan advised the Renegotiation Board of its error at the time the services were ordered, Afghan could easily have averted any loss it may have sustained on the job. Instead, Afghan remained silent and now seeks to recover remuneration in excess of the price the Renegotiation Board was required to pay under Metro's GSA contract.

Afghan contends it was justified in believing that the Board was placing an "open market" order at commercial prices, since Afghan had previously received such orders from the Smithsonian Institution and from Andrews Air Force Base, neither of which was located within the area covered by Afghan's contract. We must, however, reject this contention since it does not appear that use of the schedule contracts was mandatory upon either the Air Force or the Smithsonian Institution.

Additionally, we cannot consider this case to fall within the urgency exception to the GSA contract, as urged by Afghan's counsel, because Afghan did not pick up the carpets in less than 24 hours, whereas the master schedule (p. 5) clearly requires that where the carpets are to be removed for servicing at the contractor's plant, they shall be picked up *within 24 hours after notification.* Had the Renegotiation Board not committed an error in selecting Afghan but had properly contacted Metro for this job, Metro therefore would have been obligated by its contract to perform these same services on the basis of 8 cents per square foot, notwithstanding that the work was to be performed at the contractor's plant (master schedule, p. 8). Moreover, in computing the invoice price, the Renegotiation Board would have been authorized to apply a 2 percent, 20 days prompt payment discount and a discount of 66½ percent for the area of Northwest Washington (master schedule, p. 12).

In view thereof, and of the cited decisions prohibiting remuneration in excess of the price at which the Renegotiation Board would have been able to obtain the same services from Metro, it is our opinion

that you may pay Afghan only on the basis of 8 cents per square foot, minus the discounts (if earned) applicable to Metro's GSA contract.

[B-175920]

Contracts—Mistakes—Price Adjustment—Specification Misinterpretation

The fact that the denial of a claim under 50 U.S.C. 1431–1435, which authorizes amending and modifying contracts to facilitate the national defense, is not subject to review by the United States General Accounting Office does not preclude consideration of the claim on the basis of bid mistake. However, the contractor is not entitled to a price adjustment based on the fact a second error—the first having been corrected before award—was due to the misinterpretation of the bid package because of a missing Government drawing since the contractor was cognizant of the omission but failed to recognize its significance, a situation similar to *Space Corporation v. United States*, Ct. Cl. No. 328–70, December 12, 1972. Neither the face of the bid nor the variance in price between low and second low bids puts the contracting officer on notice of the possibility of error, particularly since the contractor had reexamined its bid incident to the first error and, therefore, acceptance of the bid consummated a valid and binding contract.

To Oldaker & Oldaker, February 21, 1973:

Further reference is made to your letter dated May 4, 1972, and subsequent correspondence, on behalf of Eidal International Corporation, requesting relief due to a claimed mistake in bid under IFB DAAK01-69-B-8394, issued by the Army Mobility Equipment Command (MECOM), St. Louis, Missouri.

This matter was the subject of a claim filed by Eidal with MECOM under the provisions of Public Law 85–804, approved August 28, 1958, 72 Stat. 972, 50 U.S.C. Code 1431–1435, as implemented by section XVII of the Armed Services Procurement Regulation, which authorizes amending or modifying contracts to facilitate the national defense. Pursuant to such authority, Eidal's claim was heard and denied by the MECOM Contract Adjustment Board. You now request that we "review the attached documents, in order to correct the adverse decision of the Army in this matter."

Denials of claims under Public Law 85–804 are not subject to review by this Office, so far as entitlement to the relief authorized by that statute is concerned. B–156784, June 10, 1965. However:

> * * * factual findings made in the course of considering such claims are not endowed by any contractual or statutory provision with any attribute of finality which would require them to be considered as binding in connection with the consideration of any other form of remedy, and we therefore may consider the claim as we would any other claim based upon alleged mistake in bid. 48 Comp. Gen. 672 (1969).

Attached to your letter of May 4, 1972, was a file of correspondence and the decision of the MECOM Contract Adjustment Board, which you state contain the "essential facts" concerning Eidal's claim. It

appears therefrom that as a result of submitting the lowest of eight bids under IFB DAAK01-69-B8394 (IFB-8394), Eidal was awarded contract DAAK01-69-C-A851 (Contract -A851) for 81 mobile power units.

An hour after bid opening, Eidal advised MECOM that it had discovered a mistake in its bid in that it had inadvertently omitted the cost of the distribution box. On June 26, 1969, pursuant to Armed Services Procurement Regulation (ASPR) 2-406.3, the General Counsel, Army Materiel Command, authorized correction of the mistake thus increasing the unit price by $279.72. Award was made to Eidal on the following day in the corrected amount of $107,467.56. The second low bid of $127,191 was approximately 15 percent higher.

Contract -A851 required the contractor to mount certain Government and contractor-furnished equipment upon Government-furnished flatbed trailers. Slightly more than a month after award, Eidal was advised by a MECOM representative that a drawing had been omitted from a solicitation in a similar procurement. Eidal alleges that it then reexamined its copy of IFB -8394, whereupon it discovered the same drawing was missing. The drawing shows that the Government-furnished trailers would lack a steel deck or flatbed, the fabrication and installation of which was the contractor's responsibility.

Eidal asserts that because the drawing was omitted from its copy of the IFB, its bid was computed upon the assumption that the Government-furnished trailers would include a flatbed. Eidal requested an increase of $19,826.37 in its contract price to compensate it for furnishing the flatbeds. The request was initially made pursuant to ASPR 17-204.3(ii) which, in implementation of Public Law 85-804, permits modification of a contract to correct the effect of a mistake "on the part of the contractor which is so obvious that it was or should have been apparent to the contracting officer." In its decision No. 3-71, dated October 14, 1970, the MECOM Contract Adjustment Board denied Eidal's request for adjustment on the basis that the circumstances were not such as to place the contracting officer on constructive notice of error.

Eidal described its bid preparation procedure in a letter to MECOM dated September 2, 1969, which stated in part:

> The first step with the drawings was to find the major lists that referred to "Power Unit, PU-629/G" which is specified as the end product by the IFB. We found two lists. One is titled "DL 13205E4945." The item nomenclature is the same as the IFB. The second list called "PL," bears the same number and has as its first entry "Power Unit, PU-629/G" with the identifying drawing number being identical to the identifying number of the two lists, 13205E4945.
>
> The remainder of the prints were sorted out and checked against the lists. We found all of the drawings, except one, were on both lists. This drawing was found on the DL, shown as a "Data List" and was number 13216E7430 and given the title "Trailer Assembly, 1½ ton."

Although all of the other numbers were found to appear on both the DL and the PL, together with separate PL sheets of other numbers and on the drawings themselves, *we could find no other reference to 13216E7430, Neither could we find a drawing with this number or a separate parts list.*

The only other reference to the trailer, aside from in the IFB, was found as the second item of sheet two of PL 13205E4945. Here we find number "1", drawing size "D", part No. 13205E5157, quantity "1", nomenclature "TRAILER, FLATBED."

This drawing was in the IFB package. This drawing had no bill of material, either on the drawing or as a separate list. This drawing indicated dimensions for locating holes and the hole types and sizes in the "TRAILER, FLATBED." This was then our drawing.

As there were no other drawings of the trailer; no other parts lists; no component part drawings or parts lists and as the only reference to 13216E7430 was as a "DATA LIST" we very naturally felt that we had the complete set. We felt that as a "Data List" this number referred to the "Government Furnished Chassis Trailer, M103A3, FSN2330-141-8052" referred to in the IFB.

We were certain that this trailer would come to us as a flatbed trailer with the bed in place. [Italic supplied.]

However, MECOM advised Eidal that:

* * * the invitation for bids required the Power Unit to be in accordance with Drawing List 13205E4945 (which [you have] confirmed that you received as part of the bid package).

On sheet 2 of the foregoing drawing list, drawing number 13216E7430 was referenced. The latter drawing covered the Trailer Assembly and clearly requires furnishing of the deck on the trailer.

Notwithstanding the foregoing, it has not been conclusively established that the drawing was missing from the copy of IFB -8394 furnished Eidal. Apparently all copies of the IFB which remained in MECOM's possession were complete. However, assuming that the omission occurred, we believe a fair reading of the record shows that during the formulation of its bid Eidal realized the drawing was omitted, failed to recognize the significance of the omission, and priced its bid upon the erroneous assumption that the trailer would be furnished with the deck in place.

The instant case therefore is similar to that of *Space Corporation* v. *United States*, Ct. Cl. No. 328-70, December 12, 1972. Upon receipt of a solicitation for missile containers, Space Corporation's chief estimator observed that Drawing No. 202, relating to a monitoring system, was missing. Space Corporation made no inquiry of the Government concerning the missing drawing. Instead, based upon prior experience in manufacturing similar containers, the company estimated that the unit cost of the monitoring system would be about $35 and used that figure in computing its offer. After it was awarded the contract, Space Corporation obtained a copy of Drawing No. 202, which indicated that a certain manufacturer was the source of the monitoring systems. The unit price of the monitoring systems, which were available only from that manufacturer, was $410 rather than the $35 estimate included in Space Corporation's offer.

One of the theories upon which Space Corporation sought reimbursement from the Government was that there had been a mistake in

the contract which merited reformation. In regard to this theory, the Court of Claims stated:

> Plaintiff's second ground for recovery in the alternative is based upon the theory of reformation. Plaintiff argues that it misinterpreted the bid package due to the absence of Drawing No. 202 and is thus entitled to a reformation of the contract to reflect the original intentions of the parties. We find that the circumstances of this case do not warrant application of this equitable doctrine. As a general rule, the Court of Claims has jurisdiction to reform a government contract as an incident to the rendition of a money judgment. *California-Pacific Utilities Co.* v. *United States*, 194 Ct. Cl. 703, 715 (1971); however, the purpose of the remedy is to make a mistaken writing conform to antecedent expressions on which the parties agreed. *Bromion, Inc.* v. *United States*, 188 Ct. Cl. 31, 35, 411 F. 2d 1020, 1022 (1969). Most frequently reformation is warranted when there is a clear-cut clerical or arithmetical error. This court is concerned to protect the contractor from a contracting officer who knows or should know that the contactor has made a mistake in his bid. *Ruggiero* v. *United States*, 190 Ct. Cl. 327, 335, 420 F. 2d 709, 713 (1970). The record in this case does not support a finding that would merit equitable relief in the form of reformation of the contract.
>
> The *Ruggiero* line of cases is primarily concerned with mistakes made by the bidder which subsequently work to his disadvantage. The mistake in this case was by the defendant and the plaintiff was well aware of it prior to the submission of its bid. Plaintiff may recover on the theory of reformation under such circumstances only if the defendant's representatives knew or should have known of the mistake at the time the bid was accepted. *Wender Presses, Inc.* v. *United States*, 170 Ct. Cl. 483, 485, 343 F. 2d 961, 962 (1965).
>
> The plaintiff here does not argue that the defendant actually knew of this mistake, but rather contends that the defendant should have known that the drawing was missing. The test for such imputed knowledge of mistakes in bids is whether under the facts and circumstances of the case, there were any factors which reasonably should have raised the presumption of error in the mind of the contracting officer. *Chernick* v. *United States*, 178 Ct. Cl. 498, 504, 372 F. 2d 492, 496 (1967).
>
> [The Court then observed that plaintiff failed to inform the Government that its bid package was missing Drawing No. 202.] Thus it was a reasonable assumption on the part of the government to assume that the drawings were in proper order. Despite this, plaintiff would have us impose upon the government the duty of searching through each bid of each contract to assure that all parts were properly accounted for. This is certainly too great a burden. The duty, as discussed earlier in this opinion, is upon the contractor to call the government's attention to obvious omissions. It was the contractor, not the government, who was aware of the problem here and thus should be held to the greater duty.
>
> Thus, although in proper circumstances this court will reform a contract, the instant situation does not merit such equitable relief.

In the instant case, it is not contended that the contracting officer accepted Eidal's bid with actual notice of the alleged mistake, nor does it appear that there was any discrepancy upon the face of the bid which should have put the contracting officer on notice of the possibility of error. The sole factor which Eidal maintains placed the contracting officer on constructive notice of error is that Eidal's bid was approximately 15 percent less than that of the second low bidder.

We are of the opinion that the disparity in bids, standing alone, is an insufficient basis for concluding that the contracting officer had constructive notice of error before award. In evaluating the reasonableness of the contracting officer's acceptance of Eidal's bid without first requesting verification thereof, we believe it is proper to consider that the award to Eidal did reflect the correction of one mistake. Therefore,

at the time of award, the contracting officer was aware that Eidal had reexamined its bid, and could assume that Eidal had identified all errors therein.

Under the present record, the acceptance of Eidal's bid was in good faith. The acceptance of the bid, under the circumstances involved, consummated a valid and binding contract which fixed the rights and liabilities of the parties thereto. See *Ogden & Dougherty* v. *United States*, 102 Ct. Cl. 249 (1944); *Saligman et al.* v. *United States*, 56 F. Supp. 505 (E.D. Pa. 1944). Accordingly, on the present record there appears to be no legal basis for increasing the price of the contract awarded to Eidal.

[B-176509]

Taxes—State—Federal Employees—Leaves of Absence Effect on Tax Withholding

A nonresident Federal employee who will not return to his duty station in Philadelphia upon termination of his sick leave status at which time his disability retirement becomes effective is subject to the Pennsylvania Income Tax imposed on Federal employees by agreement between the Federal and State Governments pursuant to 5 U.S.C. 5517, and Executive Order No. 10407, for the period of the sick leave, July 19, 1972 until December 1973, during which time he will remain on the agency rolls since sick leave payments constitute wages for taxation purposes. The income tax withholding for the leave period is for computation in accordance with paragraph 3(b) of the Pennsylvania Personal Income Tax Information Bulletin, which excludes nonworkdays—Saturdays, Sundays, holidays, and days of absence—and the amount actually subject to tax and the tax ultimately due is for settlement between the employee and the State.

To R. G. Bordley, Defense Supply Agency, February 21, 1973:

Your letter of November 17, 1972, your reference DSAH-CFF, forwards a request dated November 8, 1972, from Mr. Norman Mogul, Special Disbursing Agent, for an advance decision concerning the withholding of Pennsylvania Personal Income Tax from the salary payments of a nonresident employee who was employed in Pennsylvania but is now on sick leave as the result of his application for disability retirement and is not expected to return to his duty station, but will be retired for disability upon expiration of his sick leave.

The request specifically refers to Mr. James P. Bradshaw, who is not now and never has been a resident of Pennsylvania, but is an employee of the Defense Personnel Support Center (DPSC), which is located in Philadelphia, Pennsylvania. His application for disability retirement has been approved by the Civil Service Commission, but will not become effective until December 1973, when his sick leave will be exhausted. He has been on sick leave since July 19, 1972, and will continue to be carried on the rolls of DPSC as an employee on sick leave until his retirement becomes effective. He is now a resident of the

State of Nebraska and is not expected to return to his duty station in Pennsylvania.

The withholding of the Pennsylvania income tax with respect to Federal employees is governed by the agreements entered into by the Secretary of the Treasury, pursuant to 5 U.S. Code 5517 and Executive Order 10407 dated November 6, 1952, with the Commonwealth of Pennsylvania, the latest version of which was signed March 14, 1972, by the Fiscal Assistant Secretary of the Treasury and on May 10, 1972, by the Secretary of Revenue of the Commonwealth of Pennsylvania. The cited agreement provides in pertinent part as follows:

1. The head of each agency of the United States shall comply with the withholding provisions of the Pennsylvania income tax law, regulations, procedural instructions and reciprocal agreements, which are applicable to employers generally, except as otherwise provided herein, with respect to employees of such agency who are subject to such tax and whose regular place of Federal employment is within the Commonwealth of Pennsylvania.

* * * * * * *

4. The compensation of Federal employes on which the Pennsylvania income tax shall be withheld shall be their "wages" as defined in Section 3401(a), as amended, of the Internal Revenue Code of 1954 and regulations issued thereunder.

While Mr. Bradshaw is on sick leave and will be retired for disability upon the expiration of such leave, and does not reside in Pennsylvania and does not expect to return to his duty station in Pennsylvania, he is still receiving compensation from the DPSC in Philadelphia, Pennsylvania, and is still on the rolls of that agency. Hence, the DPSC in Philadelphia still constitutes his official duty station and he must be considered as being a nonresident employee of that agency insofar as withholding for the Pennsylvania income tax is concerned. Since pay for sick leave of Federal employees is considered as "wages" subject to withholding for Federal income tax purposes, such pay is likewise subject to the withholding provisions of the Pennsylvania tax law, regulations, and procedural instructions.

The Pennsylvania personal income tax statute provides in part, quoting from Purdon's Pennsylvania Statutes Annotated, Title 72, section 7316 (Supp. 1972–1973):

Every employer maintaining an office or transacting business within this Commonwealth and making payment of compensation (i) to a resident individual, or (ii) to a nonresident individual taxpayer performing services on behalf of such employer within this Commonwealth, shall deduct and withhold from such compensation for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's compensation during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due for such year with respect to such compensation. The method of determining the amount to be withheld shall be prescribed by regulations of the department [of revenue].

The "procedural instructions" applicable hereto, Personal Income Tax Information Bulletin Number 3 (Withholding Instructions for Employers), issued by the Pennsylvania Department of Revenue, pro-

vide in paragraph 3(b) thereof as follows, concerning withholding from nonresident employees:

(b) Nonresident Employees

The tax shall be deducted and withheld on compensation paid to nonresident employees for services performed in Pennsylvania. Accordingly, if a nonresident employee performs all of his services in Pennsylvania, the tax shall be deducted and withheld from all compensation paid him.

If a nonresident employee performs services partly within and partly outside the Commonwealth, only compensation for services within the Commonwealth is subject to withholding. For example:

(1) The amount of compensation attributable to services within the Commonwealth is that proportion of the total compensation which the total number of working days employed within the Commonwealth bears to the total number of working days employed both within and outside the Commonwealth, exclusive of nonworking days. Nonworking days are normally considered to be Saturdays, Sundays, holidays, and days of absence because of illness or personal injury, vacation or leave with or without pay.

(2) With respect to earnings of a traveling salesman or other employee whose compensation depends directly on the volume of business transacted by him, the amount attributable to services within the Commonwealth is that proportion of the compensation received which the volume of business transacted by him within the Commonwealth bears to the total volume of business transacted by him both within and outside the Commonwealth.

The portion of compensation allocable to Pennsylvania may be determined by the employer on the basis of the preceding year's experience, or on the basis of an estimate for the current year made by the employee or his employer. In either case, the employer shall make any necessary adjustment during the year to assure that the proper amount is withheld for the current year.

An employer is required to withhold on all compensation paid to a nonresident who works partly within and partly outside Pennsylvania unless the employer maintains adequate current records to determine accurately the amounts of compensation from Pennsylvania sources.

Also, paragraph 4 of Bulletin Number 3 provides that: "The Pennsylvania tax is to be withheld on the basis of the same payroll period which is used for Federal withholding purposes."

It is clear from the above-quoted Pennsylvania statute and the implementing "Withholding Instructions" (paragraph 3(b)), that insofar as a nonresident employee is concerned only compensation for services performed within the State is subject to withholding and that compensation for nonworking days is excluded from the formula set forth in paragraph 3(b) for computing the amount of compensation attributable to services within the State. However, it is also clear from the Pennsylvania statute and paragraph 3(b) of the "Withholding Instructions" that an employer must compute the amount of tax to be withheld in a manner which will result--insofar as practicable--in there being withheld from a nonresident's compensation for the calendar year involved an amount substantially equivalent to the tax reasonably estimated to be due Pennsylvania that year from that employee from such compensation (i.e., the compensation paid that employee—for services performed in Pennsylvania—by that particular employer). In other words, under the statute and paragraph 3(b), an employer must withhold from a nonresident employee's compensation

each payday, in a calendar year, an amount sufficient—when the amounts deducted each payday are totaled—to cover the tax reasonably estimated to be due the State of Pennsylvania by the employee from such compensation.

Under paragraph 3(b) the portion of compensation allocable to Pennsylvania may be determined by the employer on the basis of the preceding year's experience or on the basis of an estimate for the current year made by the employee or his employer. In either case, under paragraph 3(b), the employer must make any adjustment necessary during the year to assure that the proper amount is withheld during such year.

Since Mr. Bradshaw is a nonresident employee of the DPSC, withholding of the Pennsylvania income tax from the compensation he is receiving while on extended sick leave must be computed in accordance with paragraph 3(b). Thus, insofar as calendar year 1972 is concerned, if it is determined in accordance with paragraph 3(b) that the amount withheld from his compensation prior to the date (July 19, 1972) he went on extended sick leave is substantially equivalent to the tax reasonably estimated to be due for calendar year 1972 from the compensation he received from the DPSC for such calendar year, then no further withholding need be made from Mr. Bradshaw's salary payments for calendar year 1972. That is to say, if the amount withheld from compensation paid Mr. Bradshaw prior to July 19, 1972, is substantially equivalent to the tax it is estimated he must pay Pennsylvania for calendar year 1972 from compensation paid him by the DPSC in such year, no withholding need be made from Mr. Bradshaw's salary for the balance of calendar year 1972.

Insofar as calendar year 1973 is concerned, if it is determined in accordance with paragraph 3(b) that Mr. Bradshaw will perform no services for the DPSC in Pennsylvania in such year (and apparently he will not), and hence will not be liable for any Pennsylvania income tax on compensation paid him by DPSC in calendar year 1973, then no amount need be withheld from Mr. Bradshaw's salary payments in 1973 for Pennsylvania income tax.

In connection with the matter generally, we might point out here, insofar as nonresident employees are concerned, that under paragraph 3(b) "Saturdays, Sundays, holidays, and days of absence because of illness or personal injury, vacation or leave with or without pay," are normally considered to be "nonworking days." However, the *withholding* of Pennsylvania income tax from compensation covering such periods is not necessarily precluded in a particular case, since under the Pennsylvania statute and the implementing "Withholding Instructions," read as a whole, the portion of a nonresident's compensation

allocable to Pennsylvania may be estimated for the year and the amount thereof to be withheld prorated over all the paydays in such year—with appropriate adjustment where necessary—including those paydays which may include compensation for nonworking days.

Your question is answered accordingly. Of course, this decision pertains only to the question of withholding of the Pennsylvania tax by the DPSC under the stated circumstances, and any question as to the amount actually subject to tax and the tax ultimately due from Mr. Bradshaw is for settlement between him and the Commonwealth of Pennsylvania.

[B-177063]

Military Personnel—Induction Into Military Service—Void *v.* Voidable

The reclassification and immediate induction of an individual because he failed to keep his draft board informed and therefore he was declared delinquent does not make the induction void but merely voidable, and upon discharge from the Marine Corps, under honorable conditions by reason of erroneous induction, the member who was absent without authority in a nonpay status for 1 year, 7 months, and 13 days out of the 2 years, 3 months, and 9 days of service, is considered a de jure member of the Corps until his discharge for pay purposes, and he is entitled to the full pay and allowances credited to his account and remaining unpaid subject, of course, to 37 U.S.C. 503(a), which provides for the forfeiture of all pay and allowances for a period of absence without leave or over leave, unless the absence is excused as unavoidable.

To Major F. D. Brady, United States Marine Corps, February 21, 1973:

Further reference is made to your letter dated September 6, 1972, which was forwarded here by letter dated September 18, 1972, of Headquarters, United States Marine Corps, requesting a decision as to whether you are authorized to make payment of unpaid pay and allowances credited to the pay account of former Private First Class Johnny L. Dean, 542 58 25 98, United States Marine Corps, under the circumstances in his case. Your request has been assigned Control No. DO-MC-1170 by the Department of Defense Military Pay and Allowance Committee.

You say that on October 21, 1969, Mr. Dean was declared a delinquent by Local Board No. 2, Selective Service System, St. Helens, Oregon, because of failure to keep the Board informed of his current address. Concurrent with being declared a delinquent, he was reclassified from III-A to I-A. He did not respond to the delinquency notice nor appeal his reclassification. On November 26, 1969, he was ordered to report for induction into the Armed Forces on December 9, 1969. He reported as ordered and was inducted into the Marine Corps. He was then 20 years of age, married and had 2 children. The authority

for the draft board's action is stated to have been then current 32 CFR 1642 and sections 1631.7, 1642.13 and 1642.21 of those regulations.

Of the 2 years, 3 months and 9 days included in the period of Mr. Dean's purported service in the Marine Corps, he was absent without authority and in a nonpay status for 1 year, 7 months and 13 days. Following his last period of unauthorized absence of over a year, he was referred to trial by court-martial. However, the charge against him was dismissed on the granting of a defense motion that the Marine Corps had never acquired jurisdiction over him because his induction was illegal. He was subsequently discharged under honorable conditions on March 17, 1972, by reason of erroneous induction.

The conclusion that the Marine Corps lacked court-martial jurisdiction was based on the decisions in *Gutknecht* v. *United States*, 395 U.S. 295 (1970), and *Breen* v. *Selective Service Local Board No. 16 et al.*, 396 U.S. 460 (1970), holding that the Selective Service delinquency regulations were void. Also considered were *Andre* v. *Resor*, 313 F. Supp. 957 (1970), affirmed 443 F. 2d 921 (1970), which expressly held that the decision in *Gutknecht* should be given retroactive application and *Bradley* v. *Laird*, 315 F. Supp. 544 (1970), holding that a person unlawfully inducted under the delinquency regulations is not legally within the Armed Forces.

Mr. Dean was credited with pay and allowances for so much of his purported service as was performed in a pay status but payment has actually been made to him for only part of the pay and allowances so credited. You expressed doubt as to whether you are authorized to pay him the pay and allowances that accrued to him through March 17, 1972, the date of his release from military control, or whether his entitlement is limited to retention of pay and allowances currently paid to him.

In the *Gutknecht* case the plaintiff refused to be inducted and in the *Breen* case the plaintiff sought an injunction against any possible induction. Hence, neither plaintiff was ever in the Armed Forces. In the *Andre* and *Bradley* cases the plaintiffs submitted to induction and actually served in the Army and each was granted a writ of habeas corpus on the ground that he was illegally in the Army and was ordered to be discharged. These decisions did not void the induction under the unlawful delinquency regulations but merely rendered them void upon affirmative pleas of illegality.

Mr. Dean was ordered to report for induction, reported and was inducted into the Marine Corps. It appears that he was found to be fit for military service; that all steps prescribed by statute and regulation in effect at the time of his induction were complied with; and that he was actually inducted into the Marine Corps. The only defect

in his induction, as later discovered, was his being declared a delinquent and determined to be subject to immediate induction. Hence, his induction need not be considered as void but merely voidable.

We have long recognized constructive enlistments in the military service where persons otherwise qualified to enlist enter upon and render full military duty and the Government accepts such service without condition and we have stated that such constructive enlistments may be regarded as de jure enlistments. *See* 45 Comp. Gen. 218 (1965). The courts have recognized a constructive induction. *See* 33 Comp. Gen. 34, 35 (1953) and cases there cited.

It is our view that since Mr. Dean was actually inducted into the Armed Forces and that he served on active duty for a stated period of time, he may be considered as a de jure member of the Marine Corps until his discharge for pay purposes. Accordingly, he is entitled to the full pay and allowances credited to his account subject, of course, to the provisions of 37 U.S. Code 503(a). Your questions are answered accordingly.

[B-176963]

Contracts—Specifications—Failure To Furnish Something Required—Addenda Acknowledgment—"Trivial" and "Negligible" Effect of Amendment

When an amendment to an invitation for bids has only a "trivial" or "negligible" effect on the total price of a bid, the failure to acknowledge an amendment that does not affect price, quantity, delivery, or the relative standing of bidders, may be waived as a minor informality under paragraph 2-405(iv)(B) of the Armed Services Procurement Regulation, and whether the change effected by an amendment is trivial or negligible in terms of price must be determined in relation to the overall scope of the work and the difference between the low bids. An award of a contract for the construction of a gymnasium to the low bidder who failed to acknowledge an amendment that increased costs by $966 was not improper, where the difference between the low bid of $702,000 and the next low bid was $17,000, and the failure had no effect on the competitive standing of bidders. Prior inconsistent decisions overruled.

To the Fortec Constructors, February 22, 1973:

We refer to your telefax and letter dated September 11, 1972, with enclosures, protesting against the award of a contract to McGilvray, Incorporated (McGilvray) under invitation for bids DACA 01-72-B-0105, issued by the United States Army Engineer District, Mobile, Alabama.

The invitation was issued on June 30, 1972, for the construction of a gymnasium at Homestead Air Force Base, Florida. The invitation was revised by four amendments, each of which contains a notation which states that "failure to acknowledge all amendments may cause rejection of the bid."

Five bids were received and opened on August 1, 1972. McGilvray's bid was low at $702,000 while your firm's bid was second low at $719,000.

By telegram and letter dated September 11, 1972, you protested any award to McGilvray because that firm had failed to acknowledge receipt of amendment No. 4. Award had been made to McGilvray on September 11, prior to receipt of the protest.

Amendment No. 4 revised 11 of 35 drawings and several sections of the specifications including insulation and sound equipment. Although you contend that the amendment increased the cost of performance in the amount of $4,497, the activity has estimated that it amounted to an increase of $966. We have no basis to conclude that the agency's estimate is unreasonably low.

The procuring activity has taken the position that the amendment resulted in a "trivial" and "negligible" effect on the total price of $702,000. The agency therefore contends that McGilvray's failure to acknowledge the amendment did not affect price, quantity, quality, delivery, or the relative standing of the bidders, and that such a deviation constituted a minor informality which could be waived in accordance with Armed Services Procurement Regulation (ASPR) 2-405 (iv) (B)).

ASPR 2-405 (iv) (B) provides for waiver of the failure to acknowledge an amendment if "the amendment clearly would have no effect or merely a trivial or negligible effect on price, quality, quantity, delivery, or the relative standing of bidders, * * *."

You contend that the low bidder's failure to acknowledge amendment No. 4 should not have been waived because the amendment had a significant effect on price. Although we can find no cases before our Office where the failure to acknowledge an amendment valued at more than $200 has been waived by a contracting officer (*see* 44 Comp. Gen. 753, 756 (1965) and B-175409, April 14, 1972), we have never established that figure as the standard for determining "trivial or negligible effect on price * * *." Indeed, we do not believe that any specific figure may be determinative without reference to the particular facts. In that connection, it is our view that whether the change effected by the amendment is trivial or negligible in terms of price must be determined in relation to the overall scope of the work and the difference between the low bids.

We believe that the $966 amount reasonably may be considered trivial in relation to the overall cost of the job ($702,000) and trivial in the context of the $17,000 difference between the low bid and your firm's next low bid. It is clear in this case that McGilvray's failure to

acknowledge amendment No. 4 had no effect on the competitive standing of the bidders. Since we find no basis to conclude that the award was improperly made, your protest is denied.

Any of our prior decisions inconsistent with the foregoing are hereby overruled.

[B-177122]

Contracts—Negotiation—Competition—Effect of Negotiation Procedures

The procurement of idler pulleys by negotiation rather than by formal advertising and the use of a brand name or equal purchase description, the solicitation of offers from approved sources only, and the restriction of the procurement to a named-part number was in the absence of adequate specification data in accord with 10 U.S.C. 2304(a)(10) and paragraph 3-210.2(xv) of the Armed Services Procurement Regulation (ASPR), which authorizes negotiation for replacement parts or components in support of specially designed equipment, with ASPR 1-313(c), which provides for the procurement of replacement parts from sources that satisfactorily manufactured or furnished parts in the past, and with ASPR 1-1206.2(b), which requires salient characteristics to be listed when a brand name or equal provision is used, and the procurement did not restrict competition since proposals from unapproved sources were not prohibited, and offers on other than the named part were considered.

To Fried, Frank, Harris, Shriver & Kampelman, February 22, 1973:

This is in reference to your letter of September 27, 1972, and subsequent correspondence, protesting on behalf of Artko Corporation against the provisions of request for proposals F34601-73-R-2821, issued by the Oklahoma City Air Materiel Area (OCAMA), Tinker AFB, Oklahoma.

The solicitation, issued on September 8, 1972, was for 2,428 idler pulleys, "Honeywell, Inc. P/N 944136-1." Proposals in response thereto were received on October 3, 1972, from Honeywell and from U.S. Dynamics Corporation. Artko did not submit a proposal but instead filed its protest prior to the October 3, 1972, date for receipt of proposals, claiming that the RFP precluded competition and requesting that a new solicitation be issued "on a truly competitive basis." Award has not yet been made.

You assert that it was improper to issue an "RFP" rather than an "IFB" for this procurement because there "is a reasonable forecast of competition" for an item that is not "so complex or indefinite in description that numerous firms could not satisfy the Air Force's needs." You state that the item has previously been furnished by both Honeywell and U.S. Dynamics, and that Artko has drawings for the manufacture of the pulleys which have been approved by the Air Force. You also assert that a "brand name or equal" purchase description should have been used and that restricting the procurement to the

Honeywell part number was contrary to Armed Services Procurement Regulation (ASPR) 1–1206.1(a). You also take exception to the provision of the RFP which stated:

> Only those sources for this item previously approved by the Government have been solicited. The time required for approval of a new supplier is normally such that award cannot be delayed pending approval of the new source. If you have not been solicited and you can furnish proof of your prior approval as a supplier of this item, please notify the PCO in writing, furnishing said proof along with your request for a solicitation.

You claim that since the pulleys are not on a qualified products list, this provision improperly excludes every supplier except Honeywell and U.S. Dynamics (the prior suppliers for this item) from having their proposals considered for this procurement. You state that Artko's ability to supply the required item is a matter of responsibility that cannot be predetermined by such a provision, but instead must be determined by the Small Business Administration since Artko is a small business. You assert that there is no "lawful justification for limiting competition to pre-selected 'qualified sources.' "

The Air Force reports that both Honeywell and U.S. Dynamics are approved sources for the idler pulleys, and that "the listing of only the Honeywell part number was entirely inadvertent" and probably due to the fact that the two parts manufactured by the two companies are identical. The Air Force report further states that the idler pulley in question is an important component of the Pressure Ratio Transducer utilized in the B–52 aircraft; that in order to maintain required quality and performance control for this part, it may be purchased only from approved sources; that the Air Force does not own sufficient data rights to this part to permit the drafting of satisfactory design specifications; that the only description of the part available to the Air Force consisted of an Air Force stock number and the part numbers of the approved sources; and that these circumstances dictated drafting the item description in the solicitation in terms of the stock number and part number of the source.

The report further states that Artko was not an approved supplier because samples submitted by Artko after Air Force had approved its drawings were found to deviate from the drawings and Artko had never submitted additional samples for evaluation, despite its being informed by letters of June 12 and July 21, 1972, that it would be added to the approved source list upon resubmission and qualification of other samples. Air Force also denies that the procurement was restricted to Honeywell and U.S. Dynamics, and states that negotiation rather than formal advertising was selected because the Government does not have the rights to data necessary to prepare adequate specifications.

10 U.S. Code 2304(a)(10) and ASPR 3-210.2(xv) authorize the use of negotiation in lieu of formal advertising when "the contemplated procurement is for parts or components being procured as replacement parts in support of equipment specially designed by the manufacturer, where data available is not adequate to assure that the part or component will perform the same function in the equipment as the part or component it is to replace." It was pursuant to these provisions that the contracting officer found that adequate data was not available and determined that negotiation was required. The contracting officer's findings in support of the decision to negotiate are made final by 10 U.S.C. 2310(b) and are not subject to question by our Office. Furthermore, the fact that more than one firm could provide the required item would not preclude the use of negotiation although such negotiation is required by 10 U.S.C. 2304(g) to be competitive to the extent possible.

It is your claim, however, that the procurement is not competitive in that consideration of offers is restricted only to those submitted by firms previously found to be qualified, in this case Honeywell and U.S. Dynamics. We do not agree that only those companies' proposals could be considered for award. The RFP provision you refer to warns potential offerors that normally time will not permit approval of new sources prior to award; however, it does not prohibit submission and consideration of proposals from previously unapproved sources. B-176256, November 30, 1972. Thus, we have upheld award to a firm found to be capable of furnishing an acceptable product notwithstanding solicitation language which appeared to restrict the procurement to a specified manufacturer. B-174384, May 9, 1972. *See* B-172901, October 14, 1971. We believe, however, that the RFP provision could have been interpreted by potential offerors as restricting consideration of offers to previously approved sources. Accordingly, we are suggesting to the Secretary of the Air Force that the provision be rewritten to make it clear that competition is not limited to prior suppliers.

We think the type of qualification procedures used here to which you also object, is contemplated by ASPR 1-313(c). That section authorizes procurement of replacement parts "only from sources that have satisfactorily manufactured or furnished such parts in the past, unless fully adequate data * * * test results, and quality assurance procedures, are available with the right to use for procurement purposes. * * *." We think the Air Force could properly require a prospective offeror to furnish data and samples for examination and possible testing as a prerequisite to receiving award for the needed parts, since award could be limited to approved sources. The use of the qualification procedure for determining approved sources has been

recognized as an appropriate way to qualify a new source. B–176256, November 30, 1972. We note that on a previous procurement, which you also protested, U.S. Dynamics became an approved source and was awarded a contract pursuant to this type of qualification procedure. 51 Comp. Gen. 755 (1972). Subsequent to that procurement, as indicated above, Artko received approval of its drawing, but the Air Force did not approve its samples. Artko has not furnished additional samples, although Air Force has stated its willingness to approve Artko as a supplier upon submission of acceptable samples.

With regard to your assertion regarding use of a brand name or equal provision, the use of such a purchase description would require the listing of salient characteristics of the desired item (ASPR 1–1206.2(b) and 49 Comp. Gen. 274 (1969)) and we understand the Air Force position to be that its lack of sufficient data for use in the procurement would preclude such a listing. *See* B–173230, September 27, 1971.

Also, we think your argument regarding the determination of Artko's responsibility by the Small Business Administration is not applicable, since Artko was not precluded from submitting a proposal under this RFP or from receiving award upon a determination that it was a qualified source.

Finally, while it is clear that the solicitation should have specified the U.S. Dynamics' part number as well as the Honeywell product, Artko was not prejudiced by this omission, and the contracting officer states that the omission was inadvertent and that the U.S. Dynamics' proposal is being considered.

For the foregoing reasons, the protest is denied.

[B–177655]

Bonds—Fidelity Bonds—Other Than Federal Employees

The obtaining of bonds for employees of State courts who process the bonding of Federal offenders detained pursuant to 18 U.S.C. 3041, and for the employees who handle bail and fine money for part-time United States magistrates is not precluded by section 101(a) of the act of June 6, 1972, as the prohibition against requiring or obtaining surety bonds applies only to civilian employees or military personnel of the Federal Government which is charged with assuming the risks of fidelity losses. Since neither the State court employees nor the employees of the part-time magistrates are within the scope of the act, the Administrative Office of the United States Courts is not precluded from determining to bond the employees or assume the risks of fidelity losses, and if bonded the cost of bonding State court employees is payable under 18 U.S.C. 3041, and the cost to part-time magistrates for bonding their employees is a reimbursable expense.

To the Director, Administrative Office of the United States Courts, February 22, 1973:

Your letter requesting our advice concerning the bonding of certain employees of State courts and employees of part-time United States magistrates has been received.

You state that it has been proposed that a Federal court designate one or more employees of a State court (which courts, under the provisions of 18 U.S. Code 3041, have authority to perform certain functions in connection with the arrest and detention of Federal offenders) as deputy clerks for the purpose of completing bond process for such offenders. Such State court employees would occasionally have in their possession substantial amounts of cash belonging to the Federal district court, pending prompt forwarding thereof to the Federal court. Hence, it has been suggested that they should be bonded. Since such individuals are not employees of the Federal court, the question has been raised as to the applicability thereto of Public Law 92–310, 31 U.S.C. 1201, and, if said statute is not applicable, whether there is authority for your office to obtain bonds for such State court employees.

A similar question has been raised concerning employees of part-time United States magistrates. Such magistrates are authorized reimbursement of their expenses, including costs of secretarial and clerical assistance. These part-time magistrates receive bail and fine moneys, most of which must actually be handled by their employees, who are not Federal employees. You state that your office had previously concluded that the employees of part-time United States magistrates could not be bonded under the blanket position bonds authorized by 6 U.S.C. 14 prior to its repeal by section 203 of Public Law 92-310, 6 U.S.C. 6, but that the costs of a bond procured for such employees by a part-time United States magistrate in accordance with regulations would be an allowable expense. You inquire as to whether such employees are covered by Public Law 92–310 and, if not, whether you may continue to reimburse part-time magistrates for their expenses of bonding these individuals.

Section 101(a) of the act of June 6, 1972, Public Law 92–310, 86 Stat. 201, 31 U.S.C. 1201, provides as follows:

> No agency of the Federal Government may require or obtain surety bonds for its civilian employees or military personnel in connection wth the performance of their official duties.

The judicial branch of the Government is included within the definition of the term "agency of the Federal Government" by section 101 (c) of the act, 31 U.S.C. 1201. Also, section 102(a) of that act, 31 U.S.C. 1202, which provides for the adjustment of uncollectible losses

to the United States due to the fault or negligence of an accountable officer or his agent, provides:

> (a) Whenever—
> (1) it is necessary to restore or otherwise adjust the account of any accountable officer or his agent for any loss to the United States due to the fault or negligence of such officer or agent, and
> (2) the head of the agency of the Federal Government concerned determines that the amount of the loss is uncollectable,
> such amount shall be charged to the appropriation or fund available for the expenses of the accountable function at the time the restoration or adjustment is made. Such restoration or adjustment shall not affect the personal financial liability of such officer or agent on account of such loss.

By its own terms, the prohibition against requiring or obtaining surety bonds contained in section 101(a) applies only to "civilian employees or military personnel" of the Federal Government. Likewise, while it does not expressly so state, it is apparent from the context and tenor of the act as a whole that section 102(a) also refers only to civilian employees or military personnel of the Federal Government. This interpretation is confirmed by S. Rept. No. 92–790, 92d Congress, 2d session, on H.R. 13150, which was subsequently enacted as Public Law 92–310, which states on page 1 thereof that:

> The purpose of H.R. 13150 is to provide that the Federal Government shall assume the risks of fidelity loss. It thus establishes the policy that no agency of any branch of the Federal Government shall obtain surety bonds for its civilian or military personnel who have the responsibility for substantial sums of money in connection with their official duties. The bill repeals or amends existing law requiring Federal agencies to obtain surety bonds for these civilian and military personnel. It provides that the amount of any loss due to the fault or negligence of a Federal employee shall be charged to the agency's appropriation or other available appropriate fund.

Hence, since neither the employees of the State courts nor the employees of the part-time United States magistrates are employees of the Federal Government, Public Law 92–310 does not prohibit requiring or obtaining surety bonds for such persons if it is determined by your office that they should be bonded, nor does it authorize or preclude the assumption by your office of the risks of fidelity losses occasioned by such persons. In other words the persons in question are not encompassed within the scope of Public Law 92–310.

With respect to the question as to whether your office may pay for bonds for the persons in question, 18 U.S.C. 3041 provides that the functions to be performed thereunder for the Government by the State courts shall be "at the expense of the United States." If bonds are required from the employees of such State courts by your office, the cost of such bonds would clearly be within the meaning of "at the expense of the United States" as that term is used in 18 U.S.C. 3041, and may be paid by your office as a part of such "expense." Insofar as the employees of the part-time United States magistrates are con-

cerned, if your office determines that such employees should be bonded, we see no valid reason why the cost of such bonds should not continue to be considered as a reimbursable expense of such magistrates.

[B-177043]

Transportation—Household Effects—Military Personnel—Weight Limitation—Overseas Assignment

Since under 37 U.S.C. 406, the Defense Department Secretaries have broad authority to restrict the entitlement of members of the uniformed services to shipment of household goods between a duty station in the United States and an overseas duty station, including that portion of the shipment within the continental United States, they have the authority to amend paragraph M8003-2 of the Joint Travel Regulations to prescribe that excess charges for shipment of household goods to and from an overseas area that provides Government-owned furniture should be based for the portion of the shipment within the United States only on the weight above that prescribed for a member's rank or grade, a provision which will be in addition to the weight limitation applicable to the overseas portion. However, any proposed revision should be prospective and should consider the Congressional expression of policy in the legislative history of the Defense Department Appropriation Act, 1973, respecting the cost of shipping members' possessions overseas.

To the Secretary of the Air Force, February 27, 1973:

We refer further to letter dated August 24, 1972, from the Assistant Secretary of the Air Force (Manpower and Reserve Affairs), forwarded here by letter of September 1, 1972, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 72-42), requesting a decision regarding a proposed revision of paragraph M8003-2 of the Joint Travel Regulations.

In his letter the Assistant Secretary of the Air Force refers to Department of Defense (DOD) Instruction 4165.43 which restricts the weight of household goods that may be shipped at Government expense to 2,000 pounds net weight (exclusive of hold baggage) or 25% of a member's authorized weight allowance, whichever is greater, when shipment is to an area where Government-owned furniture is provided. Effective July 1, 1972, the instruction was revised to permit shipment of a member's full household goods weight allowance, less the weight of household goods already placed in nontemporary storage in the United States, from overseas areas having an administrative weight restriction.

The Assistant Secretary indicates that question has arisen as to whether excess charges on the weight of household goods exceeding the administrative weight limitation should be computed on the basis of the through rate from a member's old permanent duty station in the United States to his new permanent duty station outside the United States, or whether the excess charges should be applied only to that

portion of the distance from the port of embarkation to the overseas duty station. Additionally, the question of whether to apply the excess charges to the "within United States" portion of shipments from overseas areas where the administrative restriction applied prior to July 1, 1972, also is raised.

It appears to be the view of the Assistant Secretary that the 2,000 pound or 25% administrative weight limitation does not apply to the movement of household goods within the United States, since there is no basis to deny a member his lawful entitlement to shipment of any of his prescribed weight allowance within the United States, incident to an ordered change of permanent station between the United States and an overseas duty station where an administrative weight limitation is in effect. Therefore, it appears to him that excess costs are chargeable to a member for movement of his household goods within the United States only when he exceeds the prescribed weight allowance for his rank or grade.

Consequently, it is proposed to revise paragraph M8003-2 of the Joint Travel Regulations to provide that excess charges will be based only on the weight above that prescribed for the member's rank or grade on that portion of the shipment inside the United States. However, before this revision is initiated, our opinion regarding this matter is requested.

Section 406, Title 37, U.S. Code, provides in part as follows:

(b) In connection with a change of temporary or permanent station, a member is entitled to transportation (including packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects, or reimbursement therefor, within such weight allowances prescribed by the Secretaries concerned, without regard to the comparative costs of the various modes of transportation.

(c) The allowances and transportation authorized by subsections (a) and (b) of this section are in addition to those authorized by sections 404 and 405 of this title and are—

(1) subject to such conditions and limitations;
(2) for such grades, ranks, and ratings; and
(3) to and from such places;

prescribed by the Secretaries concerned. * * *

(d) The nontemporary storage of baggage and household effects may be authorized * * *. However, the weight of baggage and household effects stored, plus the weight of the baggage and household effects transported, in connection with a change of station may not be more than the maximum weight limitations in regulations prescribed by the Secretaries concerned when it is not otherwise fixed by law. * * *

DOD Instruction 4165.43IV.D., August 7, 1970 (change 1, May 14, 1971), provides as follows:

7. Weight limitations to areas where government furnishings are provided, in whole or in part, are as follows:

a. Restrictions or limitations applied to the shipment of personal household goods in contemplation of the provision of Government-owned furnishings in either public or private quarters will in all instances be construed as a reduction in the maximum net weight to be shipped by all personnel being transported to the selected area. Under these conditions the maximum entitlement of individual personnel will be two thousand net pounds (2,000

lbs.) or twenty five percent (25%) of the prescribed JTR weight allowance, whichever is greater, exclusive of unaccompanied baggage, whenever full furnishings are provided. Increases in this allowance are authorized in direct proportion to the amount (weight) of personally owned furnishings required, in lieu of unavailable government furnishings, provided that in no event shall the weight of household furnishings stored plus the weight of household furnishings transported be more than the maximum weight currently entitled by law.

b. Household goods weight limitations in connection with return shipments from overseas areas to the United States or to other unrestricted areas at government expense by Government Bill of Lading, shall not exceed the full household goods limitation less the amount (weight) of household goods already placed in nontemporary storage in the United States.

* * * * * * *

d. The provision of subparagraph 7.b., above, is effective July 1, 1972. Prior to that date household goods weight limitations in connection with return shipments from overseas areas to the United States, or to other unrestricted areas, at government expense, shall not exceed the weight limitations applicable to the overseas shipment.

Paragraph M8003–1, Joint Travel Regulations, prescribes the weight allowances authorized for each grade or rating incident to temporary and permanent change of station orders for members of the uniformed services. Paragraph M8003–2 of the regulations (change 233, effective July 1, 1972) implements the above-quoted DOD Instruction and provides as follows:

ADMINISTRATIVE WEIGHT RESTRICTIONS. For shipments of household goods and personal effects at Government expense incident to permanent change-of-station orders to overseas stations designated by the Service concerned where either public quarters or private housing is furnished with Government-owned furnishings, the authorized weight allowance for all members except members on duty with United States Defense Attaches will be limited to 2,000 pounds (net weight) or 25% (net weight) of the maximum permanent change-of-station weight allowance prescribed in subpar. 1, whichever is greater, exclusive of the weight of unaccompanied baggage, whenever full furnishings are provided. * * * The provisions of this subparagraph will not apply to shipments made to other unrestricted overseas areas or return shipments made to the United States on permanent change-of-station orders with an effective date on or after 1 July 1972, under which conditions the household goods shipment weight allowance will be the maximum permanent change-of-station weight allowance prescribed in subpar. 1, less the weight of household goods in nontemporary storage. * * *

Under the authority vested in the Secretaries by the provisions of 37 U.S.C. 406, they may establish conditions and limitations, make distinctions by grade or rank, and may prescribe the places to and from which the transportation of household effects, including reimbursement therefor, may be authorized to members in connection with their changes of station. Consequently, weight allowances have been established by grade or rank for temporary and permanent changes of station (par. M8003–1, JTR), subject to further restriction where incident to permanent changes of station to certain overseas locations Government furnishings are provided for use in Government or private housing (par. M8003–2, JTR).

Subsequent to the receipt of the Assistant Secretary's letter of August 24, 1972, the authority provided in paragraph M8003–2 of the

regulations to permit shipment of a member's full household goods weight allowance from overseas areas having the administrative weight restriction has been rescinded. *See* Joint Determination No. 119-72 dated December 8, 1972, of the Per Diem, Travel and Transportation Allowance Committee, which revised that portion of paragraph M8003-2, effective January 1, 1973 (Change No. 240 of the Joint Travel Regulations). Thus, the authority to ship household goods at Government expense at the member's maximum weight allowance from an overseas area, as described in paragraph M8003-2, remained in effect only for the period July 1, 1972, to December 31, 1972.

It appears that this change in policy by the Department of Defense stemmed from the insistence of the Committee on Appropriations, House of Representatives, as indicated on pages 76 and 77 of House Report No. 92-1389 dated September 11, 1972, to accompany H.R. 16593 which became the Department of Defense Appropriation Act, 1973. (86 Stat. 1184.) It is reported in pertinent part on pages 76 and 77 as follows:

> On July 1, 1972, despite a request by the Committee to refrain, the DOD implemented new policies with respect to the shipment of household goods. Prior to July 1, a member was limited to 2,000 pounds or 25 percent of the prescribed Permanent Change of Station (PCS) allowance on household goods shipped from overseas areas where government furnishings are provided in quarters. In most cases (E-7 and above) the limitation was more than 2,000 pounds, i.e. 2,500 for a first Lieutenant, 3,375 for a Colonel. Under the new policy the military member can return to the United States the full household goods limitation less the amount of household goods he may have in nontemporary storage in the United States. Thus, the member can return to the United States, even if he did not take anything out of the country from 7,000 pounds (for an E-4) to 24,000 pounds (for a General). The average would probably be about 10,000 pounds. The DOD has estimated the cost of this policy change to be $12,000,000 in fiscal year 1973.
>
> The effect of this increased household goods allowance is, of course, an immediate cost increase in PCS charges and provides military personnel with a good reason to buy foreign made furniture and other possessions for shipment to the United States. This policy will further upset our poor trade balance and most certainly cost the United States heavily in balance of payments transactions. * * *.
>
> * * * * * * *
>
> In order to preclude an injustice with respect to individual service members, the Committee has included funds in this bill to finance this change in policy through December 31, 1972, at which time the DOD is directed to return to the previous policies with respect to the shipment of foreign automobiles and household goods.

We are of the view that under the broad authority in 37 U.S.C. 406 the Secretaries have authority to restrict a member's entitlement by an administrative weight limitation covering shipment of household goods made between a duty station in the United States and an overseas duty station, including that portion of the shipment within the continental United States. Further, in the light of such broad authority, we believe the regulations can be amended to provide that excess charges for shipment of household goods to or from an overseas area

to which the above-mentioned administrative restriction applies would be based only on the weight above that prescribed for a member's rank or grade on that portion of the shipment inside the United States.

Any such amendment to the regulations should be prospective only, since it is well settled that when regulations are issued rights thereunder become fixed and they may not be amended retroactively, except to correct obvious errors. We recognize that for the period July 1, 1972, through December 31, 1972, the regulations authorized shipment from the overseas duty station to a duty station in the United States based on the weight prescribed for a member's rank or grade. The regulations during that period, however, required excess costs for shipments to the overseas areas to which the administrative weight limitation applied to be computed on the basis of the through rate from the member's old permanent duty station in the United States.

Notwithstanding the above, we are aware that in view of the above statement of the House Appropriations Committee it may well be it has been determined administratively not to amend the regulations other than as already accomplished by the amendment effective January 1, 1973.

[B-150847]

Appointments—Presidential—Recess—Continuation of Service Upon Expiration of Term

A presidential recess nominee, appointed under Article II, section 2, clause 3 of the Constitution, whose appointment was not confirmed by the Senate and he continued to serve after the expiration on December 31, 1972, of his recess term pursuant to 49 U.S.C. 11, which provides for continued service until a successor is appointed and confirmed, and whose nomination to a full term was not submitted within 40 days after the beginning of the next session of Congress, is not entitled pursuant to 5 U.S.C. 5503(b) to receive compensation after the expiration of 40 days after the beginning of the first session of the 93d Congress. However, since the prohibition against paying the recess appointee does not affect his right to hold office until the confirmation of a nominee or the end of the 1st session of the 93d Congress, should the recess appointee be nominated and confirmed his right to pay would relate back to the 41st day.

To the Chairman, Interstate Commerce Commission, February 28, 1973:

We refer to your letter of February 16, 1973, concerning the entitlement of Interstate Commerce Commissioner Rodolfo Montejano to the compensation of his office after the expiration of 40 days from the beginning of the first session of the 93d Congress.

Commissioner Montejano's nomination by the President to fill the remainder of the term expiring December 31, 1972, of Commissioner Laurence K. Walrath whose resignation had been accepted to be effective June 30, 1972, was submitted to the Senate on June 15, 1972. How-

ever, the Senate did not act upon that nomination prior to adjournment. On November 1, 1972, the President announced the recess appointment of Commissioner Montejano to the unexpired term in question. As you were advised by the Assistant Attorney General, Office of Legal Counsel, in his letter of November 10, 1972, Commissioner Motejano's recess appointment was valid under Article II, section 2, clause 3 of the Constitution and payment to him for the compensation of that office was not prohibited under 5 U.S. Code 5503 by virtue of the exception contained in paragraph (a)(2) thereof. *See* 36 Comp. Gen. 444 (1956).

The question presented involves the continued entitlement of Commissioner Montejano to compensation in view of the fact that a nomination to fill the vacancy which he is occupying under a recess appointment was not submitted to the Senate within 40 days after the beginning of the session next following the date of his appointment as required by 5 U.S.C. 5503(b). The particular circumstance which gives rise to a question in this case is that the term to which the Commissioner was appointed expired on December 31, 1972, although he continued to serve as a Commissioner under the last sentence of 49 U.S.C. 11, which provides:

> * * * Upon the expiration of his term of office a Commissioner shall continue to serve until his successor is appointed and shall have qualified.

Under the wording of 5 U.S.C. 5503(b) the pay of a recess appointee is terminated if a nomination is not submitted within the 40 days prescribed by that provision. This is supported by the statute from which 5 U.S.C. 5503(b) was derived which clearly limited the right to receive pay to not later than 40 days after the beginning of the next session of Congress. *See* R.S. 1761 (5 U.S.C. 56 (1964 ed.)). *Also see* 41 Op. Atty. Gen. 463, 477 (1960). We also point out that if 5 U.S.C. 5503(b) is not viewed as terminating the compensation of individuals who are subject to the terms thereof that provision would have no practical effect. It is a well settled rule of statutory construction that effect must be given, if possible to every word, phrase and sentence of a statute. 47 Comp. Gen. 418, 430 (1968).

Commissioner Montejano is filling the vacancy to which he was originally appointed even though the term to which he was appointed expired on December 31, 1972. He did not receive a new recess appointment to the term beginning January 1, 1973. In any event under the provisions of 49 U.S.C. 11 each Interstate Commerce Commissioner is appointed to one of the 11 positions authorized as successor to a specific former Commissioner whether he is appointed to complete an unexpired term or to fill a full 7-year term. Therefore, it is our opinion that Commissioner Montejano continues to fill the vacancy to which he was

appointed on or about November 1, 1972, and that since the President did not submit a nomination to fill that vacancy to the Senate within 40 days after the beginning of the 1st session of the 93d Congress the prohibition with respect to payment of his pay became effective on the 41st day after the beginning of such session.

As indicated in the Assistant Attorney General's letter to you the prohibition against paying Commissioner Montejano does not affect his right to hold the position under the terms of his recess appointment. That is, he may continue to function as a member of the Commission but without pay until he is nominated by the President to the full term and that nomination is confirmed by the Senate, until some other person is appointed and qualifies for that position, or until the end of the current session of the Senate if neither of the preceding occurs prior to that date.

Since 5 U.S.C. 5503 places a restriction on the expenditure of funds and not on the holding of an office and since that restriction by its terms applies only "until the appointee has been confirmed by the Senate," an appointee would be entitled to the full pay of the position occupied upon Senate confirmation. Thus, if Commissioner Montejano is nominated by the President to fill the office he occupies and if that nomination is confirmed by the Senate, his right to pay would relate back to the 41st day following the beginning of the current session of the Senate—i.e., the day on which his right to pay terminated under 5 U.S.C. 5503(b). *See* 17 Op. Atty. Gen. 521 (1883).

For the reasons stated, Commissioner Montejano may not be paid for his services as a Commissioner for any period after the expiration of the 40-day period prescribed in the statute in question unless and until he has been nominated for that office and such nomination has been confirmed by the Senate.

[B-157179]

States—Federal Aid, Grants, Etc.—Matching Fund Activities—"Hard-Match" Requirement—Funds From Private, Etc., Sources

The purpose of the "hard-match" requirement in the Omnibus Crime Control and Safe Streets Act of 1968, as amended, which authorizes the Law Enforcement Assistance Administration (LEAA) to grant funds for strengthening and improving law enforcement, being to assure State and local governments share in LEAA programs with monies they appropriated, and not to exclude private organizations, the "hard-match" requirement does not prevent the use in LEAA-sponsored National Scope projects of matching funds from private sources, or the use of Model City funds allotted by grantees to LEAA projects, as such funds are considered "money appropriated" for the purposes of the "hard-match" requirement. The "hard-match requirement" in connection with subgrants to nongovernmental units also may be interpreted to permit the use of private sources, and as the funds for the administration of American Samoa lose their Federal identity, they meet the requirement.

To the Administrator, Law Enforcement Assistance Administration, February 28, 1973:

Reference is made to your letter of October 16, 1972, presenting for decision four questions concerning the legality of certain grants proposed to be made by the Law Enforcement Assistance Administration (hereinafter referred to as LEAA or as the Administration). The grants in question would be made pursuant to title I of the Omnibus Crime Control and Safe Streets Act of 1968, approved June 19, 1968, Public Law 90–351, 82 Stat. 197, as amended by the Omnibus Crime Control and Safe Streets Act of 1970, approved January 2, 1971, Public Law 91–644, 84 Stat. 1880, 42 U.S.C. 3701 *et seq.* The four questions presented all involve the application of the so-called "hard-match" requirement of the 1968 act, as amended.

LEAA was established by the above-cited 1968 act, and was given authority to grant Federal funds for the purposes of strengthening and improving law enforcement. A matching requirement was established as a condition for grants of funds by LEAA and each grant was to be limited in amount to a certain specified percentage of the total cost of the law enforcement program being assisted. *See* section 301(c). Although the remainder of the cost of the program had to come from sources other than LEAA, the 1968 act specified neither the source nor the character of the required "match." In addition to changing the percentages of matching funds required, the 1970 act added the "hard-match" requirement. Specifically, effective July 1, 1972:

> * * * at least 40 per centum of the non-Federal fundings of the cost of any program or project to be funded by [a block grant under section 301 or a discretionary grant under section 306 of the act of 1968 as amended] * * * shall be of money appropriated in the aggregate, by State or individual unit of government, for the purpose of the shared funding of such programs or projects. See 42 U.S.C. 3731(c), 3736.

Your first question is whether so-called National Scope projects funded under section 306 of the 1968 act, as amended, 42 U.S.C. 3736, require governmentally appropriated funds for "hard-match" or whether funds from private sources can be used as "hard-match" for these projects.

Your letter explains the National Scope projects as follows:

> The Administration in some instances uses discretionary funds allocated under Section 306 to assist national programs of assistance to all State and local law enforcement. These projects generally impact on particularized agencies within the law enforcement area, such as prosecutor offices, all State courts, or juvenile courts. They are called "National Scope" projects because they affect the nation as a whole as opposed to individual States, cities, or regions. The discretionary grant is made to a State Planning Agency (SPA), with the funds generally subgranted to a non-governmental agency. The SPA is also handling the administration of the grant.

Under the provisions of 306 at least 25 percent of the project cost must be from non-Federal sources. The grantee who receives a grant for a "National Scope" project is normally active in the law enforcement area and a part of the particularized agency group affected. * * *

You state that there is no clear indication from the legislation or its history how the "hard-match" requirement is to affect National Scope projects. While it appears clear that Congress intended the Administration to continue to fund the National Scope projects which affect "combinations" of governmental units, you urge that to require governmentally appropriated funds in combination projects is an impossibility. In illustration, the Appellate Judge Conference with participants from many jurisdictions is discussed by you to the point that requiring the use of appropriated funds for matching would require each unit of government planning to send an appellate judge to pledge from locally appropriated funds a cash contribution to the National College of State Judiciary before LEAA could consider funding the program. Such a procedure, you state, would be unworkable.

It would serve good purpose to present here a summary of the legislative history of the "hard-match" requirement.

As already noted, the 1968 act placed no limitation on the manner in which that portion of the cost of an LEAA-assisted program not covered by the LEAA grant might be financed. Thus, the "match" might be from State, local or private sources, and might be in cash, or in the form of property or services. In 1970, Congress considered various proposed amendments to the 1968 act, ultimately resulting in the 1970 amendment which incorporate the "hard-match" requirement. As related in your letter:

* * * The House passed the 1970 Amendments first in H.R. 17825. This amended the 1968 bill to allow 90 percent of the cost of a project to be Federal funds rather than the requirement of 60 percent in the Act. The Senate Amendment was included in Senate Report No. 91-1253, which first added the Hard Match requirement. That Committee report had a requirement that Federal funds could make up to 70 percent of the cost of a project and the requirement that at least 50 percent of the non-Federal portion be in money appropriated for the purposes of the program.

The Senate Judiciary Committee Report accompanying the 1970 Amendments, Senate Report No. 91-1253, contained the following explanation of the change to Section 306 (page 35):

> The Committee has modified substantially the House amendment to Section 306 of the Act dealing with discretionary grants. The changes are designed to spell out expressly the authority of LEAA to make discretionary grants and the limitations applicable to them. In general, the same limitations would be made applicable to block grants under Section 301 that are made applicable to discretionary grants. Thus, the personnel compensation limitations are made applicable, and the share of the cost of programs and projects that may be paid from Federal funds is limited to 70 percent, the limitation applicable to most block grant programs. The Administration could make 100 percent grants only to Indian tribes and other aboriginal groups, including Eskimos, as is the case with block grants, noted above. And at least one-half of the non-Federal funding for all discretionary programs and projects would have to be of specifically appropriated money, as distinguished from

donated goods or services. The requirement of "appropriated," of course, has reference to governmental units, not private individuals or organizations.

The Senate Judiciary Committee report also contained the following comment on the matching requirement:

* * * Experience under the LEAA program has indicated that the local matching requirement will become a serious problem for most States should it remain at its present rate of 40 percent for most programs. Lowering the requirement to 30 percent will afford substantial relief and will diminish the extent to which the States must rely on counting the value of donated goods and services, rather than money, to make up the non-Federal share of program costs. In this regard, the Committee has included a requirement that at least one-half of the non-Federal share of the cost of any program or project shall be money appropriated expressly for the shared funding of such program or project. This provision should work to guarantee that these new Federal funds will, in fact, draw new State and local funds into the criminal justice system and avoid the real danger that Federal funds will merely replace State and local funds in financing the present system. S. Rep. No. 91-1253, 31 (1970).

Your letter further relates that:

When the Judiciary Committee report was being debated, Senator McClellan, the Committee Chairman, submitted a sectional analysis of the bill, which included the following on Section 306 (116 Cong. Rec. 35692 (1970)):

> The Committee bill modifies substantially the House amendment to Section 306 of the Act dealing with discretionary grants. The changes are designed to spell out expressly the authority of LEAA to make discretionary grants and the limitations applicable to them. In general, the same limitations applicable to block grants under Section 301 are made applicable to discretionary grants. Thus, the personnel compensation limitations are made applicable, and the share of the cost of programs and projects that may be paid from Federal funds is limited to 70 percent, the limitation applicable to most block grant programs. The Administration could make 100 percent grants only to Indian tribes or other aboriginal groups, as is the case with block grants, noted above. And at least one-half of the non-Federal funding for all discretionary programs and projects would have to be of money, as distinguished from donated goods or services.

Senator Hruska, the ranking minority member of the Judiciary Committee, made the following statement in his explanation of the bill (116 Cong. Rec. 35695 (1970)):

> The Senate provision is more desirable than the House amendment, I believe, because it recognizes that States and units of local government have difficulty supplying the needed matching funds but at the same time recognizes the need for the States and units of local government to make a substantial financial commitment to action programs.

The Senate then debated the two issues mentioned earlier, and amended 306 only to the extent of delaying the Hard Match requirement until July 1, 1972, and adding the phase of allowing the Hard Match to be met in the aggregate.

The House and Senate bills then went to conference and the conference adopted the "hard-match" requirement of the Senate bill without substantive comment, except to indicate that the cash requirement was reduced to 40 percent. *See* pages 16 and 17, H.R. Rept. No. 91-1768 (1970). However, during consideration by the Senate and the House of the conference report, there was discussion on the floors of both chambers of the "hard-match" requirement. In the Senate, Senator Hruska, one of the managers of the bill in conference, described the purpose of that requirement:

* * * The hard match would include any funds appropriated by a State or unit of local government which are specifically earmarked for matching LEAA action grants.

LEAA experience in the past 2 years has found that the State and local share of action programs has frequently if not always been figured in donated property or services and it is hoped that the provision for hard match will stimulate the expenditure of new funds for law enforcement purposes. 116 Cong. Rec. 42149 (1970).

In the House, Mr. Poff, also a conference manager, explained the action of the conference committee with respect to "hard-match" as follows:

The conference also adopted a provision which requires that beginning in fiscal year 1973, at least 40 percent of the Federal [sic] share of the funding of any program or project be from money expressly appropriated by the State or local government in the aggregate for such programs or projects—as opposed to donated services or property. This is the so-called hard-match requirement and it applies equally to block grants and discretionary grants. If a State or local government appropriates money to participate directly in an LEAA program, that is obviously a hard match. But what if the State or local government transfers personnel to participate in LEAA programs or projects? That is not a hard match. It can only be considered a hard match, if the State or local government were to appropriate money to fill the vacancies created by the transfer. The controlling purpose of the hard-match provision is the desire to stimulate new State and local money for imaginative and innovative State and local anticrime programs. This purpose is already ensconced in section 303(10) of the law. The hard-match requirement puts teeth into that legislative purpose. * * * 116 Cong. Rec. 42197 (1970).

(Section 303(10), of the 1968 act, 42 U.S.C. 3733(10), referred to by Mr. Poff, provides that each State plan for participation in the LEAA action grant program shall:

* * * set forth policies and procedures to assure that Federal funds made available under this title will be so used as not to supplant State or local funds, but to increase the amount of such funds that would in the absence of such Federal funds be made available for law enforcement.)

The purpose of the "hard-match" requirement is abundantly clear from the above-described legislative history; that being to assure that State and local governments not use Federal funds available under the act in order to supplant their own funds (section 303(10)). It had been found that State and local governments had been in some instances matching LEAA funds with property or services which had not been acquired for the purpose of the grant program but rather had been transferred from other activities of these governments. By this means, States or localities participating in an LEAA-assisted law enforcement project avoided committing any new resources to the project. Requiring these governmental units to match at least a portion of their shares of the cost of a project with money appropriated for that purpose would thus "work to guarantee that these new Federal funds will, in fact, draw new State and local funds into the criminal justice system and avoid the real danger that Federal funds will merely replace State and local funds." S. Rept. No. 91–1253, 31 (1970).

In essence then, the congressional purpose for "hard-match" is to regulate the conditions of financial participation by State and local governments in LEAA programs; it is not, by the same token, to limit participation in those programs by private organizations. There is support in the language of the Senate Judiciary Committee Report previously cited for the conclusion that the "hard-match" requirement was not intended to prevent the use in LEAA-sponsored National Scope projects of matching funds supplied from private sources. The specific language in the Report reads:

> * * * And at least one-half of the non-Federal funding for all discretionary programs and projects would have to be of specifically appropriated money, as distinguished from donated goods or services. *The requirement of "appropriated," of course, has reference to governmental units, not private individuals or organizations.* S. Rept. No. 91–1253, 36.
> [Italic supplied.]

To read the "hard-match" requirement so as to preclude the use of private funds for "hard-match" in National Scope projects would thus be in derogation of the overall purpose of the act and would also be inconsistent with the specific purpose for which the "hard-match" requirement was added.

We conclude therefore that the "hard-match" requirement is satisfied when 40 percent of the non-Federal funding of an LEAA-sponsored project is in the form of money rather than goods or services, and that the source of the cash may be either private or governmental. As we interpret the "hard-match" requirement, the import of section 306(a) of the act, 42 U.S.C. 3736(a), is essentially that 40 percent of non-Federal funding of a program or project shall be money rather than property or services. The further requirement in the statutory language that the money be appropriated for the purpose of the shared funding of the program or project, by its terms, applies only when the non-Federal money comes from a State or individual unit of government. When, on the other hand, "hard-match" is to be provided in the form of donated money from a private source, the requirement of the "hard-match" provision that non-Federal fundings be appropriated by governmental units for the purpose of the shared funding of the program is inapplicable, since the goal of that requirement—to insure the commitment of new funds by State and local governments—is not relevant when private funds are the source of the "hard-match." Matching funds, whether governmental or donated, must still of course satisfy the statutory requirement that at least 40 percent thereof be money. Your first question is answered accordingly.

Your second question is whether funds received by cities from the Department of Housing and Urban Development under title I of the Demonstration Cities and Metropolitan Development Act of 1966, ap-

proved November 3, 1966, Public Law 89–754, 80 Stat. 1255, 42 U.S.C. 3301 note, may be used as "hard-match" for LEAA projects.

You explain that:

> To aid in the solution of urban problems, Congress established the Model Cities program by passing the Demonstration Cities and Metropolitan Development Act of 1966. The purpose of the Act is to (Section 101) "provide additional financial and technical assistance to enable cities of all sizes . . . to plan, develop and carry out locally prepared and scheduled comprehensive city demonstration projects containing new and imaginative proposals to rebuild or revitalize large slum and blighted areas . . . to reduce the incidence of crime and delinquency . . . and to accomplish these objectives through the most effective and economical concentration and coordination of Federal, State, and local public and private efforts to improve the quality of urban life." In its implementation of this act, Congress provided a novel feature in the authority of local government to use these funds in Section 105(d). It states that those funds "May be used and credited as part or all of the required non-Federal contribution to projects or activities, assisted under a Federal grant-in-aid program . . ."
>
> In its sectional analysis of this section, the House report explains that (1966 U.S. Code, Cong. & Admin. News, p. 4045) ". . . such funds shall be credited toward the required non-Federal contribution to such projects or activities" and to participate in this program, the city must submit a "comprehensive city demonstration program" which must meet various criteria. * * *
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> Prior to July 1, 1972, the Law Enforcement Assistance Administration funds were matched by "model cities" funds in programs where co-existing responsibility occurred. The 1970 amendments included the Hard Match requirement in Section 301(c). This sentence is exactly the same as that in 306 mentioned earlier, and requires that ". . . at least 40 per centum of the non-Federal share . . . shall be of money appropriated in the aggregate, by State or individual unit of government . . ." * * *

Your Administration has "made an interim decision pending clarification, that model cities funds may not be used as LEAA Hard Match." The specific question presented is therefore whether LEAA may, subsequent to July 1, 1972, continue to fund projects in conjunction with cities under section 301 of the 1968 act, as amended, 42 U.S.C. 3725, when some or all of the local matching funds required of these cities by section 301(c) would consist of moneys granted to them under the Demonstration Cities Act.

As noted above, section 105(d) of the Demonstration Cities Act, 42 U.S.C. 3305(d), explicitly allows funds granted thereunder to the cities to be "used and credited as part or all of the required non-Federal contribution to projects or activities, assisted under a Federal grant-in-aid program," subject to certain qualifications which apparently are not here relevant. LEAA programs under section 301(c), as amended, are Federal grant-in-aid programs, as that term is defined by section 112 of the Demonstration Cities Act 42 U.S.C. 3312. Prior to July 1, 1972, the effective date of the "hard-match" provision, there was no question but that Model Cities funds might be used by cities to match LEAA grants. Since July 1, 1972, however, at least 40 percent of the non-Federal share of the funding must be "money appropriated" for the purpose of matching the grant. Since that date, whether Model Cities funds can be used by cities to match LEAA grants depends on a determination whether the allocation of Model

Cities funds by the recipient cities as matching funds for LEAA-assisted projects constitutes an "appropriation" of such funds, within the meaning of section 301(c), as amended.

Enclosed with the request for our decision on this question was a letter of October 10, 1972, to LEAA from the Assistant Secretary for Community Development of the Department of Housing and Urban Development (HUD) explaining the nature of the Model Cities program and the basic features of the funding process used therein. That letter reads, in pertinent part, as follows:

> The primary intent of Title I of the *Demonstration Cities and Metropolitan Development Act of 1966* (Model Cities Program) is to bring about a concentration and coordination of Federal, State and local public and private efforts and resources in a broad, comprehensive attack on social, economic and physical problems in selected slum and blighted areas. The idea is to demonstrate in these relatively few (147) yet broadly representative cities how blighted neighborhoods can be renewed both physically and in terms of the quality of life, through a concentration and coordination of Federal, State and local efforts and resources.
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> * * * * * * *
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> The statute provides for financial and technical assistance to be provided by HUD to the selected cities to enable those cities to plan, develop and carry out comprehensive local programs to improve locally identified social, economic and physical defects in the community. No such program could be truly *comprehensive* unless it addressed problems relating to criminal justice and each of the Model Cities comprehensive city demonstration programs contains a component dealing with criminal justice.
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> The funding philosophy of the statute is, basically, quite simple, yet it is at the same time unique. The statute does not intend for the Model Cities Program to be or to become another Federal categorical grant-in-aid program. *The idea is, instead, to use it as a vehicle to encourage and assist the selected cities to make use of other existing Federal, State and local resources, but in a more efficient and effective manner.*
>
> *The principal source of Federal funding contemplated by the statute is not Model Cities supplemental funds, but Federal grant-in-aid funds from programs other than Model Cities Program—such as LEAA.* It was recognized that one reason why local units of government fail to seek and receive the full benefits of some Federal grant programs is that they cannot afford to put up the required "match" for these programs in every instance.
>
> Congress recognized that a major purpose of the Model Cities experiment (i.e., more effective use of Federal grant programs by cities) was likely to be defeated unless the participating cities were able to obtain grants from other programs such as LEAA. *Accordingly, both to encourage and assist the cities in this respect, Section 105(d) of the statute expressly provides that Model Cities supplemental funds can be used to supply the required "match" for other Federal grant-in-aid programs.*
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> * * * * * * *
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> Each of the 147 Model Cities receives an annual block grant from HUD. This money is not earmarked by HUD for any particular projects or program areas. It is granted to the cities to assist them in carrying out their own locally devised comprehensive city demonstration programs. These programs consist of numerous projects in any number of program areas, including criminal justice.
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> * * * * * * *
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> * * * Out of its block grant from HUD, each city determines for itself how the funds shall be allocated. The governing body of the city (i.e., City Council) must take formal action to approve the city's comprehensive program and, where appropriate, any applications for assistance under the program. Thus, in the case where the comprehensive program includes criminal justice projects to be funded with LEAA funds and the "match" is to consist in whole or in part of Model Cities funds, these Model Cities funds are appropriated by the City

Council for that purpose. This action by the local governing body is a requirement of Section 103(a)(4) of our statute. [Italic supplied.]

Under the foregoing circumstances the express language of section 105(d) of the Model Cities Act, that Model Cities funds "may be used and credited as part or all of the required non-Federal contribution to projects or activities, assisted under a Federal grant-in-aid program," is, we conclude, dispositive of your question. Accordingly, Model Cities funds allotted by the grantees thereof to LEAA grant projects may be considered "money appropriated" for the purposes of the "hard-match" requirement of section 301(c), as amended.

Your third question is whether, when State and local units of government receive LEAA funds, and in turn subgrant them to non-governmental units for law enforcement projects, cash contributed by the non-governmental units may be counted as "hard-match" for these projects.

You explain that action grants to the States under part C of title I of the 1968 act, as amended:

> * * * must be spent for programs listed in Section 301(b). Generally, most of the funds spent in this manner go to local governmental units. [Section 303(2).] Of the portion which need not be granted to local units, an option exists for the State to make grants to private organizations. For programs related to Section 301(b)(9), and to some extent (3), there are non-profit non-governmental units providing important public services to the community (i.e., YMCA's, church groups, charitable foundations, and others). Section 301(b)(9) reads as follows:
>
> > (9) The development and operation of community based delinquent prevention and correctional programs, emphasizing halfway houses and other community based rehabilitation centers for initial preconviction or post-conviction referral of offenders; expanded probationary programs, including paraprofessional and volunteer participation; and community service centers for the guidance and supervision of potential repeat youthful offenders.
>
> In this area, LEAA funds are subgranted, by the State, to the non-governmental units, for improving and expanding the services that they offer. These non-profit groups have some cash available for the projects that they are involved in. The Congressional reports explained 301(b)(9) as follows, Senate Report 91-1253, page 30: "The Committee has added a new subparagraph (9) to Section 301(b) authorizing the use of Part C funds for the development of community-based delinquency prevention and correctional programs as an alternative to institutional confinement. The funding of such programs under the present law is permissible, but it is hoped that express authority will provide an incentive for the States and cities to develop and fund such programs." Nothing more was said of the provision.

Grants under section 301(b)(9) of the 1968 act, as amended, 42 U.S.C. 3731(b)(9), are governed by the "hard-match" requirement incorporated in section 301(c), 42 U.S.C. 3731(c). As indicated above, that requirement was enacted concurrently with, in words identical to, and for the same purposes as, the "hard-match" requirement of section 306 of the act, 42 U.S.C. 3736, and is therefore to be interpreted in the same way as section 306. Our explanation above of the meaning of the "hard-match" requirement of section 306 with respect to discretionary grants is consequently dispositive of the question now raised

concerninng the meaning of the "hard-match" requirement of section 301(c) with respect to block grants. That is to say, the "hard-match" requirement of section 301 is met when at least 40 percent of the cost of the non-Federal share thereof is in money, whether from private or public sources.

In reaching this conclusion, we find it particularly persuasive that, as you point out, if the "hard-match" requirement were interpreted so narrowly that only governmentally appropriated funds could satisfy it, the requirement could be met by private donors donating funds to a governmental unit which could then appropriate those same funds for the project. We do not believe that Congress intended that the "hard-match" requirement be met by such a cumbersome procedure and our holding herein avoids the need to resort to such procedure.

Finally, you ask whether funds appropriated by the Congress for expenses necessary for the administration of the Territory of American Samoa can be used by that territory to meet the "hard-match" requirements of the 1970 act.

You explain that:

> The Administration is authorized to fund Law Enforcement projects in territories by the definition of States in Section 601(c). We are currently funding projects in Puerto Rico, Guam, Virgin Islands and American Samoa. Because of the unique character of funding structures the problem of using Federal territorial funds as Hard Match has presented a problem only in American Samoa.
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> The statutory authority governing American Samoa is 48 USC 1661. Subject to this authority, the Secretary of Interior is responsible for the Administration of the territory. The current appropriation for the territory is found in P.L. 92-369, 1972 U.S. Code, Cong. and Admin. News, p. 3303. This law appropriates funds "For expenses necessary for the Administration of territories . . . including expenses of the office of the Governor of American Samoa . . . compensation and expenses of the judiciary in American Samoa as authorized by law (48 USC 1661(c)); and grants to American Samoa, in addition to local revenues for support of local governmental functions . . ." The Secretary of Interior promulgated regulations which describe the operation of the territory. These regulations are found in Department of Interior Manual 575 DM 1-3, dated October 8, 1971.
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> This manual describes the territorial procedure as follows, 575 DM 1-3.3A: "The legislature has appropriation authority with respect to local revenues and authority to review and make recommendations with respect to the budget submitted to the United States Congress for grant funds."

As indicated above, funds appropriated to the Department of the Interior to be granted by that Department to American Samoa are to be used by the government of American Samoa for support of local governmental functions as a supplement to local revenues. Under the circumstances these grants may be considered unconditional grants and when paid over to American Samoa and commingled with local revenues lose their character as Federal funds. *See* B-131569, June 11, 1957, and B-173589, September 30, 1971. Such funds may therefore be used by the territorial government to provide "hard-match" for LEAA grants, since improvement of law enforcement is unquestionably a "local government function."

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