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The decision format in these pamphlets reproduces the original except for address, salutation and complimentary close. As reflected in this pamphlet, the format has been modified in decisions issued since January 1, 1974, by substituting for the addressee a "Matter of" line.

[B-157759]

Uniforms—Military Personnel—Officers—Uniform Allowance—Requirements

Plaintiff in *Reale* v. *United States*, Ct. Cl. No. 334–65, July 16, 1969, who has accepted payment pursuant to court's judgment and record correction, is not entitled to additional amount for uniform allowance since he was not required to wear uniform (37 U.S.C. 417(c)). Also, under 28 U.S.C. 2517(b) and 2519 payment of judgment is full discharge to United States and further claim is barred, and under 10 U.S.C. 1552(c) acceptance of settlement pursuant to record correction "fully satisfies the claim concerned."

To Major Dante S. Reale, Department of the Air Force, Retired, May 1, 1974:

Reference is made to your letter dated October 9, 1973, requesting payment of a uniform allowance covering the period of August 1, 1961, to July 31, 1969, the period covered by the judgment of the Court of Claims in your favor in the case of *Dante S. Reale* v. *United States*, No. 334–65, decided July 16, 1969, and by the correction of your military record pursuant to the recommendation of the Air Force Board for the Correction of Military Records to show that you were not released from active duty in the Air Force on July 31, 1961, but were continued on active duty until July 31, 1969.

As you know, the decision of the Court of Claims in your case provided that you were entitled to recover "back pay, less appropriate offsets" for the period covered by the decision, August 1, 1961, to July 16, 1969. Pursuant to a motion for call allowed by the court in your case, this Office computed the amount due you under the court's decision based on active duty pay, basic allowance for quarters, and basic allowance for subsistence, less appropriate offsets, for a net amount due of $72,788.69. As you indicate, that computation did not include a uniform allowance.

The $72,788.69 as computed by this Office was further reduced by outside civilian earnings to $44,094.03, the amount entered in the judgment pursuant to the court's order dated December 24, 1969, and apparently accepted by you.

You now indicate that since under the court's decision and the subsequent correction of your military record you are shown as continued on active duty during the period of August 1, 1961, to July 31, 1969, you are entitled to a uniform allowance for that period. You indicate further that you are unaware of any directive that an officer must produce receipts showing that he had, in fact, purchased uniforms to be entitled to such an allowance, and you believe that all that is required is that he be on active duty.

The uniform allowance to which you refer is apparently one of those authorized under sections 415(a)–(c) and 416 of Title 37, U.S.

Code. In regard to the counting of periods of service for entitlement to those allowances 37 U.S.C. 417(c) specifically provides that an officer may count only that duty for which he is required to wear a uniform. During the period for which you claim uniform allowance, you were not required to wear a uniform.

However, that may be, this Office may not allow a claim for an additional amount for any period that is covered by a judgment of the Court of Claims involving such matter in view of the provision in 28 U.S.C. 2517(b) that payment of any judgment of the Court of Claims shall be a full discharge to the United States of all claims and demands arising out of the matter involved in the case, and provision in 28 U.S.C. 2519 that a final judgment of the Court of Claims shall forever bar any further claim, suit, or demand against the United States arising out of the matters involved in the case. *See* 42 Comp. Gen. 580, 582 (1963), and 40 *id.* 116, 119 (1960).

Also, 10 U.S.C. 1552(c), which authorizes the payment of claims arising from the correction of a military record under 10 U.S.C. 1552, provides that a claimant's acceptance of a settlement under that section "fully satisfies the claim concerned."

Accordingly, there is no action this Office may properly take on your request.

[B–178084]

Compensation—Wage Board Employees—Night Differential—Fractional Hours

The provisions of 5 U.S.C. 5343(f), as added by Public Law 92–392, state that shift differential is payable when prevailing rate employee works a majority of hours during certain hours of the day. Under that language, employee may be paid differential only when 5 or more hours of his regularly scheduled 8-hour shift occur during the hours specified since the phrase "majority of hours" must be given its obvious meaning—a number of whole hours greater than one-half.

Compensation—Wage Board Employees—Night Differential—Meal Breaks—Included

In determining whether prevailing rate employee works majority of hours during periods covered by night shift differential as provided in 5 U.S.C. 5343(f) meal breaks of 1 hour or less will be included. Employee's entitlement to differential and his entitlement to 7½ percent or 10 percent differential will be based on hours of his assigned shift including such breaks.

In the matter of night shift differential for certain employees, May 1, 1974:

The Chairman, United States Civil Service Commission, has requested a decision concerning the entitlement of prevailing rate employees to night differential authorized by 5 U.S. Code 5343(f), as enacted by Public Law 92–392, approved August 19, 1972, 86 Stat. 568.

Section 5343(f) of Title 5, U.S. Code, provides:

(f) A prevailing rate employee is entitled to pay at his scheduled rate plus a night differential—

(1) amounting to 7½ percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 3 p.m. and midnight; and

(2) amounting to 10 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 11 p.m. and 8 a.m.

A night differential under this subsection is part of basic pay.

The following specific questions are asked:

Question 1—Is a prevailing rate employee, regularly assigned to a night shift, entitled to a night shift differential for any period during which he is temporarily assigned to work a day shift? Also, would a prevailing rate employee who is regularly assigned to the 3rd shift be entitled to continue to receive a 10 percent differential when temporarily assigned to the second shift?

Question 2(a)—Which night shift differential rate, 7½ percent or 10 percent, would you pay an employee whose regularly scheduled hours of work do not constitute a majority of hours in either the 3 p.m. to midnight or 11 p.m. to 8 a.m. shift—i.e., a situation where four of the employee's eight regular working hours fall between 3 p.m. and midnight and four of his regular working hours fall between 11 p.m. and 8 a.m.?

Question 2(b)—In a similar vein, is a night differential payable in the following situation?

Hours of work—11:00 a.m. to 7:30 p.m.
Meal Break—3:00 p.m. to 3:30 p.m.

The Chairman refers to 52 Comp. Gen. 716 (1973), which held that in view of long-established pay practices and congressional intent, night differential should be included in basic pay of a prevailing rate employee for annual and sick leave purposes and that it is proper to include night differential in an employee's rate of pay for the purposes of computing his overtime pay. With respect to question 1 it is stated that a similar pay practice was followed under the Coordinated Federal Wage System (CFWS), i.e., a prevailing rate employee regularly assigned to a night shift continued to receive his regular night shift differential during a temporary assignment to the day shift or to another night shift having a lower night shift differential, including overtime hours of work. In accordance with the decision of April 17, 1973, the answer to both parts of question 1 is in the affirmative.

With respect to question 2, under previous instructions payment of a night differential was dependent upon whether "half or more of the regular scheduled hours" fell between specified hours rather than whether a "majority" of the hours fell between specified times. In this connection the night shift differential was paid for the entire shift when half or more of the regularly scheduled hours fell between 6 p.m. and 6 a.m. The Chairman indicates that it is assumed that the Congress' use of the term "majority" was deliberate. Accordingly, he feels that the most equitable and reasonable approach in answer to question 2(a) is to pay the employee a 7½ percent differential for the first 4 hours of work, and a 10 percent differential for the last 4 hours of work. On the same basis, in answer to question 2(b), he would pay the

employee a 7½ percent differential for the last 4 hours worked. In this connection he notes that, since overtime pay is paid for fractional hours worked in excess of 8 in a day or 40 in a week and since a night differential was paid for fractional hours worked under CFWS, it was apparently not the intent of Congress that "majority" should be construed in terms of full hours, i.e., require 5 hours of work in an 8-hour shift in order to be eligible for a differential.

Regarding the rate of differential to be paid, we find no authority in section 5343(f) nor its legislative history that would permit splitting the amount of differential. On the contrary the Senate report on the legislation, S. Report No. 92–791, 92d Congress, 2d session, contains the following statement on pages 4 and 5:

Shift Differential

Section 5343(f) authorizes the payment of uniform shift differentials to prevailing rate employees assigned to second or third shifts. A differential of 7.5 percent of the employees scheduled rate will be paid for the entire shift when a majority of the employee's regularly scheduled nonovertime work hours are between 3 p.m. and midnight. A differential of 10 percent will be paid when a majority of the regularly scheduled nonovertime work hours are between 11 p.m. and 8 a.m.

Identical language is found in the House of Representatives report on the legislation, H. Report 92–339, 92d Congress, 1st session, pages 15 and 16. Federal Personnel Manual Supplement 532–1, subchapter S8–4, paragraph c, states:

c. *Night shift differential.* A prevailing rate employee is entitled to pay at his scheduled rate plus a differential of seven and one-half percent of his scheduled rate for regularly scheduled nonovertime work when a majority of his work hours occur between 3 p.m. and midnight; or ten percent of his scheduled rate if the majority of his work hours occur between 11 p.m. and 8 a.m.

(1) *Shifts for which night shift differentials are payable.*

—An authorized night shift differential of seven and one-half percent will be paid for the entire shift when a majority of the employee's regularly scheduled nonovertime hours of work fall between the hours of 3 p.m. and midnight.

—An authorized night shift differential of ten percent will be paid for the entire shift when a majority of the employee's regularly scheduled nonovertime hours of work fall between the hours of 11 p.m. and 8 a.m.

Thus when entitlement occurs the applicable differential rate is payable for the entire shift.

With respect to the use of the term "majority" by the Congress, we concur that such use was deliberate. However, we believe that the phrase "majority of the hours" means whole hours. Under CFWS night differential was payable for work performed during the hours of 6 p.m. to 6 a.m. Under 5 U.S.C. 5343(f) night differential is payable for work performed during a longer period of time—3 p.m. to 8 a.m.—and there is an overlap of the 7½ percent period of 3 p.m. to midnight and the 10 percent period of 11 p.m. to 8 a.m. This results in a substantially different night differential system from that established under the instructions applicable to CFWS. In view of the substantial

liberalization of night shift differential in Public Law 92–392, we see no persuasive basis for giving a meaning to the phrase "majority of the hours" other than its obvious meaning in order to preserve one feature of CFWS which would have, if continued, afforded even greater benefits. Therefore, we conclude that a prevailing rate employee must work 5 hours of a scheduled 8-hour shift during the period covered by night differential in order to qualify for payment.

With reference to question 2(a) the hours of work are not shown; however, it would appear that the question contemplates a schedule where work is performed during the evening and early morning with a break of one hour taking place between 11 p.m. and midnight, the overlap hour. Thus, all hours of work would fall in the time period when a night differential is payable. We do not believe it reasonable to conclude that no night shift differential would be payable in such a situation even though a majority of hours would not be worked in either shift. For purposes of determining the applicable night differential rate, the meal period will be included in determining whether the majority of hours of the duty shift occurs before or after the 11 p.m. breakpoint. Therefore, we believe for the situation described in 2(a) as amplified above the employee is entitled to the night differential of 7½ percent for the entire shift unless 5 of his scheduled hours including any meal break occur between 11 p.m. and 8 a.m. in which case he would be entitled to the 10 percent rate for the entire shift. Question 2(a) is answered accordingly.

As a general rule we believe that meal breaks of one hour or less should be included for purposes of determining a prevailing rate employee's entitlement to night shift differential. This is considered reasonable because a meal break given during night shift differential hours does not allow the employee to complete or begin his work shift at an earlier or later hour, respectively. It is also considered appropriate in order to allow reasonable scheduling of breaks and to prevent administrative scheduling of breaks for the purpose of paying or denying night differential. Thus, using this rule and the majority of hours rule as stated above, an employee whose shift includes at least the 5 hours between 3 p.m. and midnight, e.g., 3 p.m. to 8 p.m., would be entitled to a 7½ percent night differential and an employee whose shift includes at least 5 hours between 11 p.m. and 8 a.m., e.g., 3 a.m. to 8 a.m., would be entitled to a 10 percent night differential regardless of scheduled breaks of one hour or less. Question 2(b) is answered in the negative since the majority of the hours scheduled does not occur between the hours of 3 p.m. to 11 p.m.

If in the application of the above rules specific situations arise in which employees appear to be denied appropriate night shift differential, the matter should be presented to us for consideration.

360-670 O - 74 - 2

[B-179115]

Pay—Retired—Annuity Election for Dependents—Survivor Benefit Plan—Two-Year Limitation—Effective Date

Retired member who marries subsequent to retirement but prior to effective date of Survivor Benefit Plan under Public Law 92-425 (September 21, 1972), may provide immediate coverage for his spouse regardless of 2-year limitation under 10 U.S.C. 1447(3)(A) provided election is made within the time limitation stated in section 3(b) of the act, as amended by section 804 of Public Law 93-155.

In the matter of the Survivor Benefit Plan, May 1, 1974:

This action is in response to a request for an advance decision from Chief, Accounting and Finance Division, Comptroller, Air Force Accounting and Finance Center, which was forwarded to this Office by letter dated July 3, 1973, from Headquarters, United States Air Force, concerning the propriety of making payment on a voucher in favor of Lieutenant Colonel William A. Burdick, USAF, Retired, SSAN 578 12 6104, representing deductions made from his retired pay for coverage for his wife under the provisions of the Survivor Benefit Plan, 10 U.S. Code 1447–1455, as added by Public Law 92-425, effective September 21, 1972, 86 Stat. 706, in the circumstances described. The request has been assigned Air Force Submission No. DO-AF-1196 by the Department of Defense Military Pay and Allowance Committee.

It is stated in the submission that the member retired from the United States Air Force on September 30, 1967, under the provisions of 10 U.S.C. 8911. On November 6, 1972, he submitted a "Survivor Benefit Plan Election Certificate—By Existing Retiree," by which he elected coverage for his wife and child, it appearing therein that Colonel Burdick married his present wife on August 19, 1971, and his election certificate does not show any children by this marriage. However, his certificate does list an unmarried dependent daughter, who was born on December 12, 1958. That election certificate was received at the Air Force Accounting and Finance Center on November 10, 1972, and deductions were made from Colonel Burdick's retired pay beginning December 1, 1972, which we understand were in the amount of $55.72 per month, representing a cost of $53.50 for his spouse, plus $2.22 for his child.

It is indicated that Colonel Burdick contends that the monthly deduction representing the cost of coverage for his wife should not be made during any period that his wife was not an eligible beneficiary under the Plan. Rather, that the deduction for the cost of her coverage should have begun effective the first day of the month fol-

lowing the month in which she became eligible for a Survivor Benefit Plan annuity.

The submission questions the propriety of such a procedure, indicating that there exists a lack of authority for delaying the cost of coverage until the beneficiary becomes eligible.

Colonel Burdick's contention appears to be based on the language contained in 10 U.S.C. 1447(3)(A) which limits eligibility of a widow to receive an annuity under the Plan to a widow who was married to a member for at least 2 years immediately before his death and the fact that since he did not marry his present wife until August 19, 1971, a date after he had retired and became entitled to retired pay and had no children by that marriage, his wife would not qualify as an eligible beneficiary under the Plan until she was married to him for 2 years, or until August 19, 1973.

Basically, the Survivor Benefit Plan, as enacted by Public Law 92–425, was to provide survivor protection to dependent families of members of the military service who would be retiring on and after the effective date of the Plan (September 21, 1972), and was to completely replace the then current survivor annuity programs for such prospective retirees, including the Retired Serviceman's Family Protection Plan. Coverage under the Plan, however, made available to military personnel who were retired prior to the effective date of the Plan by virtue of subsection 3(b) of Public Law 92–425, as amended by section 804 of Public Law 93–155 (10 U.S.C. 1455(b)), which provided that a person receiving retired pay on the effective date of the act may elect to participate in the Plan, if such election is made within 18 months of its effective date, or, by March 21, 1974.

In H. Report No. 92–481, Committee on Armed Services, House of Representatives, dated September 16, 1971, on pages 11 and 12, the following statement was made concerning participation by the then present retirees:

> The bill [H.R. 10670] provides that all present retirees could join the program regardless of age. Those presently on the retirement rolls would be given a year from the date of enactment of the legislation in which to elect to join the new plan.
> Retirees would begin immediate deductions from their retired pay but would not have to pay back any additional amount because of age or meet any minimum period of participation.

On page 14 of S. Report No. 92–1089, Committee on Armed Services, United States Senate, dated September 6, 1972, to accompany S. 3905, portions of which eventually became a part of Public Law 92–425, it is stated that, "Spouses and dependent children of members who are retired prior to the enactment of the bill are covered if the member chooses coverage for them within one year after enactment of the bill."

In connection with the above, subsection 3(e) of Public Law 92-425 (10 U.S.C. 1455(e)) provided in pertinent part:

(e) An election made under subsection (a) or (b) of this section is effective on the date it is received by the Secretary concerned * * *.

Based on the applicable language of section 3 of the act and its legislative history, it is our view that the limitation contained in 10 U.S.C. 1447(3), restricting the eligibility of a surviving spouse to receive an annuity under the Plan, does not apply to surviving spouses of subsection 3(b) participants, in cases where such spouse was married to the retired member prior to the effective date of the act. *Cf.* 53 Comp. Gen. 470 (1974). Therefore, since Mrs. Burdick was married to the member on August 19, 1971, she became an immediate eligible beneficiary under the Plan on the date that the member's election was received by the Air Force.

Accordingly, since it would appear that deductions were properly made from the member's retired pay, he would not be entitled to a refund of those amounts. The voucher enclosed with the submission will be retained here.

[B-180605]

Leaves of Absence—Lump-Sum Payments—Limitations—Removal

Government employee, who at time of retirement (Dec. 31, 1973) was paid a lump sum for 240 hours of accrued and unused annual leave, is entitled to be paid for additional 148 hours of annual leave because Public Law 93-181 which amends 5 U.S.C. 5551(a) removes limitation on amount of accumulated annual leave that can be carried over for payment purposes.

In the matter of lump-sum payment of annual leave under Public Law 93-181, May 1, 1974:

This action is in response to a letter dated February 4, 1974, from an authorized certifying officer in the United States Department of Commerce, Social and Economic Statistics Administration, requesting an advance decision concerning the entitlement of Mrs. Betty L. Wiseman, a former employee of the above-named agency, to receive a lump-sum payment for 388 hours of accumulated and unused annual leave at the time of her retirement on December 31, 1973. Mrs. Wiseman was given a lump-sum payment for 240 hours plus 8 hours for a holiday. She now asserts that the payment should have included an additional 148 hours under the provisions of 5 U.S. Code 5551(a) as amended by section 1 of the act of December 14, 1973, Public Law 93-181, 87 Stat. 705.

Title 5 U.S.C. 5551(a) as amended by Public Law 93-181 provides as follows:

§ *5551. Lump-sum payment for accumulated and accrued leave on separation.*

(a) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is separated from the service or elects to receive a lump-sum payment for leave under section 5552 of this title, is entitled to receive a lump-sum payment for accumulated and current accrued annual or vacation leave to which he is entitled by statute. The lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave. The lump-sum payment is considered pay for taxation purposes only.

That section no longer contains the restriction in effect prior to the 1973 amendment that lump-sum payments for accumulated and accrued annual leave upon separation are limited to 30 days or the amount of leave carried forward to the employee's credit at the beginning of the leave year, whichever is greater.

The legislative history to the Public Law 93–181 makes it clear that Congress intended to remove entirely the limitation on the number of hours of accumulated annual leave for which an employee may receive a lump-sum payment upon separation. This is indicated in H. Report No. 93–456, 93d Congress, 1st session, 6, as follows:

> The bill also provides for lump-sum payment for leave accrued above current maximums during the year of the employee's separation. Section 5551(a) of title 5 now limits this lump-sum payment to 30 days, unless an employee is carrying leave in excess of such maximum under prior legislation. This limitation is repealed by this bill.

The Civil Service Commission's explanation of the amendment to section 5551(a), as contained in an attachment to FPM Letter No. 630–22, January 11, 1974, states that the amendment deals only with the amount of accumulated leave that may be included in a lump-sum payment on separation, which consists of: (1) the regular carry-over balance from the previous leave year, if any; plus, (2) accrued and unused annual leave during the then current leave year, if any; plus (3) any unused restored annual leave maintained in a separate account.

It is our view that Public Law 93–181 has effectively removed the restriction on the number of hours in excess of 240 that an employee is entitled to as a lump-sum payment and that an employee is entitled to payment for all annual leave properly to his credit at the time of separation. The fact that the employee's annual leave in excess of the amount he could carry over into the next leave year is more than he could use between the date of retirement and the end of the leave year does not preclude a lump-sum payment for that leave.

Accordingly, since Mrs. Wiseman retired after the effective date of Public Law 93–181, a voucher for an additional lump-sum payment for 148 hours of unused and accrued annual leave may properly be certified for payment.

[B-180261]

Medical Treatment—Private—Park Police—Non-Service Connected Injuries or Diseases

Section 4-124 of District of Columbia Code provides for appointment of police surgeons, and for treatment of non-service connected injuries and diseases suffered by D. C. policemen and firemen. While section 4-206 of D. C. Code extends same benefits to U. S. Park Police, there is no authority for payment of physician services, other than by the appointment police surgeons, for treatment of non-service connected injuries or diseases suffered by U. S. Park Police officers since statute makes no provision for other physician services.

In the matter of medical treatment for United States Park Police, May 3, 1974:

We have been requested by the Secretary of the Interior to render a decision on whether Public Law 87-708, approved September 27, 1962, 76 Stat. 635, which amended Public Law 205, approved June 8, 1906, 34 Stat. 222, and is codified as section 4-124 of the District of Columbia Code, authorizes the payment of physician services provided for members of the United States Park Police for injuries received or diseases contracted not in the performance of duty while on official assignment outside of the District of Columbia.

Public Law 87-708 amended section 4-124 of the District of Columbia Code so that, in its present form, it provides:

> Police surgeons shall have actually and bona fide resided in the District of Columbia for at least two years next preceding the date of their appointment and shall be duly qualified according to law for the practice of medicine and surgery in said District and shall have actively been engaged in the practice of their profession for a period of at least three years next preceding the date of their appointment. Such police surgeons shall be subject to such laws, rules, and regulations as the Commissioners of the District of Columbia may from time to time make, alter, or amend. Such police surgeons shall attend, without charge, all members of said police force and of the fire department of said District *for any injury received or disease contracted (whether or not received or contracted in the performance of duty)*, examine applicants for appointment and retirement in and to said police force and said fire department, and attend such dependent sick and injured, and examine and attend such insane or alleged insane persons as may be taken in charge by said police, and shall perform such other duties as the said Commissioners may direct. [The language added by Public Law 87-708 is italicized.]

The above section governs the appointment of police surgeons to the Metropolitan Police and specifies the duties that they are to perform. Nothing in this section authorizes payment for services performed by any physician other than the police surgeons.

The creation of the United States Park Police is authorized by section 4-201 of the District of Columbia Code which provides that:

> The watchmen provided by the United States Government for service in any of the public squares and reservations in the District of Columbia shall, after August 5, 1882, be known as the "United States park police." They shall have and perform the same powers and duties as the Metropolitan police of the District.

It is noted that the powers and duties of the Park Police are equated with those of the Metropolitan Police, not other Federal officers. The comparability to the Metropolitan Police is continued by section 4–206 which is the basis for granting the United States Park Police the same right to free medical attendance as that received by the Metropolitan Police. That section was enacted by Public Law 83, approved April 26, 1902, 32 Stat. 152, and provides that:

> The park watchmen on April 28, 1902, provided by law and those that may therefore be provided for by law for service in any of the public squares and reservations in the District of Columbia, shall receive free medical attendance, the same as the Metropolitan police of said District.

We found nothing in the legislative history of this section which indicates that the Congress intended that the Park Police would receive any medical treatment, for non-service connected injuries or diseases, at Government expense beyond that rendered by the police surgeons.

The legislative history of the act of June 8, 1906, which originally provided for the appointment of police surgeons, was also reviewed. Again, nothing was found to indicate that the Congress intended to provide for any medical treatment for non-service connected injuries or diseases beyond that provided by the police surgeons. In this connection a portion of the debate in the House, which is found at 40 Cong. Record 4290, March 26, 1906, is set out below:

> Mr. MADDEN. Why do you provide surgeons for the department?
> Mr. CAMPBELL of Kansas. Because it is necessary to have surgeons to attend policemen and members of the fire department and to attend the insane who come within the jurisdiction of the policemen.

The emphasis is on the appointment of police surgeons to provide medical treatment for eligible officers.

This same emphasis is found in the most recent enactment in this area, Public Law 87–708. In the House report on the bill, Report No. 2174, August 10, 1962, the following history and explanation of the mechanics of the medical treatment benefits received by Metropolitan Police officers is provided:

> Medical care for policemen and firemen and their treatment for injuries and illnesses incurred both on and off duty has been in existence in the District for 100 years without interruption. It has served extremely well to maintain members of these Departments in the outstanding physical condition required in the proper performance of their jobs. In addition, this benefit has been widely used (and with great success) as an inducement for the recruitment of candidates for these jobs.
>
> The Board of Police and Fire Surgeons, which administers the medical care program, consists of 12 members of the medical profession—2 of whom are paid on a full-time basis by the District of Columbia and the remaining 10 being paid on a part-time basis (80 percent of a 40-hour week, or 32 hours). Members of the Board serve during regular clinic hours at the Police and Fire Clinic, located on the 3d floor of Engine Co. 16, District of Columbia Fire Department, 1018 13th Street NW., on weekdays, with a limited service available to department members on Sundays. These doctors are on call on a 24-hour basis for emergency treatment and attendance to members of the depart-

ments, and they are also available and do respond to the scenes of multiple alarms of fires, riots, etc., where policemen and firemen are serving in unusual numbers and under unusual conditions. In addition, Board members make regular visits to department members confined to homes and hospitals.

Enactment of this bill will neither add to nor will it detract from the medical care benefits now available to members of the Police and fire departments, and it will involve no additional costs whatsoever to the District of Columbia government. [Italic supplied.]

As stated in the same report, "The purpose of this bill is to clarify language in existing law * * *," not to increase any benefits.

Under Public Law 85–157, August 21, 1957, 71 Stat. 391, it is clear that the cost of any medical treatment required for service connected injuries or disease can be paid, even if the treatment is rendered by physicians other than police surgeons. However, neither Public Law 85–157, Public Law 87–708, nor any other provision of law of which we are aware, authorizes payment for medical treatment of non-service connected injuries or diseases, beyond those services rendered by the police surgeons.

While we do not question the authority of the Secretary of the Interior to assign members of the Park Police temporarily or on an emergency basis to duties outside of the District of Columbia, in light of the powers given to him regarding his law enforcement responsibilities in recent appropriation legislation, we have found no authority for the payment of physician services other than those performed by District of Columbia Police Surgeons, for the treatment of non-service connected injuries or diseases suffered by Park Police officers while working away from the District of Columbia. Accordingly, the question presented must be answered in the negative.

[B–162578]

Compensation—Removals, Suspensions, etc.—Deductions from Back Pay—Outside Earnings—Basis for Deduction

Where income was generated from part-time teaching, lecturing, and writing activities prior to unjustified separation action only the added increment from such activities during the interim period between separation and reinstatement need be deducted from backpay. The determination as to the amount of such added increment may be based upon a comparison of the amount of outside work performed on an hourly basis or frequency of occurrence, or upon income received prior to the separation with that of the interim period. Income from publication of a book during the interim period need not be deducted from back pay provided the employee was engaged substantially in writing a book prior to his separation and publication would probably have occurred even if he had not been separated.

General Accounting Office—Adversary Hearings—No Authority

Claimant's request that a hearing be held for the purpose of taking testimony from witnesses is denied because the General Accounting Office is not vested with authority to hold adversary hearings for the purpose of obtaining sworn testimony and therefore decisions of the Comptroller General must be made upon the evidence in the official record presented.

Interest—Claims Against United States—Rule

Claimant's request that interest be paid on backpay found due for the period of his separation is denied because payment of interest by the Government on its unpaid accounts or claims is permitted only when interest is provided for in legal and proper contracts or where the allowance of interest is specifically directed by statute.

In the matter of backpay entitlement upon reinstatement after unjustified separation action, May 6, 1974:

This decision is in response to a request by the Department of the Air Force arising out of the directive to it by the Civil Service Commission that Mr. A. Ernest Fitzgerald, whose employment had been terminated by reduction-in-force action on January 5, 1970, be reinstated as a civilian employee. The request concerns the amount of backpay which should be allowed Mr. Fitzgerald upon such reinstatement under the backpay provisions of 5 U.S. Code 5596.

It is reported that Mr. Fitzgerald was restored to duty effective December 10, 1973; his gross backpay for the period of separation was $139,907.84; deductions for retirement, lump-sum leave payment and severance pay have been established at $14,926.97; deductions, if any, for health insurance premiums for the separation period have not been established in the absence of an election by Mr. Fitzgerald under the provisions of 5 U.S.C. 8908; and his backpay before deduction for outside earnings as required by 5 U.S.C. 5596 is $124,980.87.

According to an affidavit dated November 16, 1973, Mr. Fitzgerald, subsequent to his erroneous separation on January 5, 1970, obtained employment with two committees of Congress—Joint Economic Committee and House Post Office and Civil Service Committee—and he secured a minimum amount of work as a management consultant. Mr. Fitzgerald takes the position that during the period January 6, 1970, through October 31, 1973, his income from employment engaged in to take the place of his Air Force employment totaled $49,661.31; $46,204.31 from his congressional contracts and $3,457 from management consulting including Director's fees. Additionally, Mr. Fitzgerald states:

> During the same period of time, I engaged in limited teaching, lecturing and writing activities which also generated some income. None of these activities was part of what had been my normal work function with the Department of the Air Force. These additional activities could have been performed outside of normal work hours and were not inconsistent with, nor did they take the place of, my employment with the Department of the Air Force.

The agency requests a decision as to the proper treatment of the interim earnings from the teaching, lecturing, and writing activities mentioned in the above quote.

Mr. Fitzgerald is entitled to backpay under 5 U.S.C. 5596 because he was reinstated in his former position on the basis of a timely appeal resulting in a finding by appropriate authority that he had

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undergone an unjustified or an unwarranted personnel action resulting in the withdrawal of his pay. However, backpay under that provision involves adjustments in the amount of backpay and other benefits due the employee. Regulations of the Civil Service Commission implementing that provision of law are found in sections 550.801–804 of title 5, Code of Federal Regulations (CFR). Subsection 550.804(e) which sets forth in part how the backpay due an employee is to be computed provides:

(e) In computing the amount of back pay due an employee under this section and section 5596 of title 5, United States Code, the agency shall deduct the amounts earned by the employee from other employment during the period covered by the corrected personnel action. The agency shall include as other employment only that employment engaged in by the employee to take the place of the employment from which the employee was separated by the unjustified or unwarranted personnel action.

Federal Personnel Manual Supplement 990–2, Book 550, subchapter 8, at subparagraph S8–5f, further explains the requirement of the above regulation as follows:

f. Amount of entitlement. When an employee has been separated from his position by an unjustified or unwarranted personnel action which is corrected, the amount of his entitlement is the difference between the amount his Government income should have been and the amount which he actually earned in an employment obtained to take the place of his Government employment. In this connection, an amount earned in employment obtained to take the place of Federal Government employment means "net earnings"—that is, gross earnings less losses and certain expenses incurred in connection with the interim employment or business. (See 35 Comp. Gen. 268.) * * * If the employee were already working in a part-time job at the time of his removal, suspension, or furlough from his Government employment as a result of the unjustified or unwarranted personnel action, the part-time job is not *other employment* within the meaning of section 5596 of title 5, United States Code, because it does not take the place of the Government employment (unpublished Comptroller General decision B–148637, January 29, 1968). If the employee were able to expand his part-time job to a full-time job, or were to take a second part-time job, as a substitute for Government employment, only those hours worked on the full-time job in excess of the aggregate of the hours worked on the part-time job, or only the hours worked on the second part-time job, as the case may be, are considered as other employment in place of Government employment. In other words, the only earnings from other employment that need not be deducted from back pay are earnings from outside employment the employee already had before the unjustified suspension or separation. (See unpublished Comptroller General decision B–148637, dated January 29, 1968.) An agency should obtain a statement or affidavit from the employee covering his outside earnings. In computing an employee's back pay, the law does not contemplate a daily or weekly comparison of the back pay with the employee's outside earnings, but rather the total amount of outside earnings is compared with the total amount of back pay otherwise due. (See 48 Comp. Gen. 572.)

In a memorandum of January 15, 1974, to the agency civilian personnel office, Mr. Fitzgerald, with further reference to his teaching, lecturing, and writing states:

1. I am an industrial engineer, specializing in management control systems and cost analysis, but for many years I have also engaged in teaching, lecturing and writing.

2. I was heavily engaged in teaching, lecturing and writing in the period immediately preceding my illegal firing by the Air Force. (See attachments 1 and 2.) [Not attached.]

3. While my firing was being appealed, I sought and secured alternative employment with Congressional committees and with private organizations. You have my affidavit on this. I also continued my teaching, lecturing and writing activities.

4. So long as the activities themselves and pay for them are allowable concurrently with Government employment, the amount and, to a large extent, the timing of receipts of money are immaterial to the question at hand. When the payer is non-Government, the rate of compensation for such allowable activities is the sole concern of buyer, seller and the Internal Revenue Service. As for the timing of receipt of money paid or advanced for the type of teaching I have been doing, for lecturing and for writing, earnings may be retained in publishers' or other agents' accounts for the benefit of the agents' principal and to be drawn at the discretion of the principal. This arrangement is permitted in recognition of the fact that there is little or no year-to-year correlation of work done and pay received in this type of work. A major book, for example, is usually the end product of years of experience and research, all of which must take place before the book is written and sold. Subsequently, years may pass before another product is marketed. Other writing and lectures for the purpose of teaching non-standard, unique subject matter have similar lead times. In such cases, the author and lecturer is, in effect, selling an accumulation of experience, research, analysis and insights. Certainly this was true of the work I have been doing along these lines.

The references to writing of a book are pertinent in view of the publication of "The High Priests of Waste" by A. Ernest Fitzgerald, W. W. Norton and Company, Inc., New York, copyright 1972.

By letter of March 12, 1974, Mr. Fitzgerald's attorney advised that net earnings from lecturing and writing—teaching activity is included in lecturing—during the period of Mr. Fitzgerald's separation up to October 31, 1973, totaled $47,975—$34,238 from lecturing and miscellaneous writing and $13,737 from his book.

In connection with our consideration of these activities our attention has been directed to Department of Defense Directive Number 5500.7, August 8, 1967, concerning standards of conduct which states in paragraph X.D. as follows:

DoD personnel are encouraged to engage in teaching, lecturing, and writing. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, or writing that is dependent on information obtained as a result of his Government employment, except when that information has been published or is available to the general public or will be made available on request, or when the agency head gives written authorization for the use of nonpublic information on the basis that the use is in the public interest. * * *

While we do not question Mr. Fitzgerald's affidavit the test which has been applied by this Office to determine whether income received is deductible from backpay is not whether the work which generated the income was compatible with the Government duties or whether the work could have been performed in addition to his Government duties. B–150550, January 28, 1963. Rather the determination is based upon a comparison of the outside work performed or income received prior to the improper separation and that performed after such separation. B–176048, February 28, 1973. *See also* Federal Personnel Manual Supplement 990–2, *supra.*

Since Mr. Fitzgerald engaged in lecturing and writing prior to his

separation as well as thereafter during the interim prior to his restoration, the amount received for lecturing during the period of his separation need not be deducted from his backpay to the extent that he is able to establish the volume of such lecturing and writing activities prior to his separation. This may be done on an earnings basis, on an hourly basis, or on the basis of the number of lectures given and articles written during a representative period prior to his separation. If it is shown that his activities in these fields did not increase substantially during his period of separation no deduction from backpay is required. If, on the other hand, he engaged in substantially more lecturing and writing activities after his separation, deduction should be made in an amount commensurate with the increase in such activity. Thus, if he gave twice as many lectures during the interim period half of his earnings from that source should be deducted. If Mr. Fitzgerald chooses to base the comparison on money earned, deduction should be made for the amount earned after separation which is in excess of his earnings prior to his separation.

Regarding earnings from writing a book no comparison along the above lines appears to be possible. It would be reasonable in the circumstances of this case not to deduct the earnings derived from the publication of the book provided Mr. Fitzgerald is able to furnish a notarized affidavit that he was engaged in preparing a book for a substantial period prior to his separation and that he would have published a book even if he had not been separated. If, however, the writing of the book resulted from his discharge no such affidavit could be furnished and the income received from the publication of the book should be deducted from backpay.

If and when Mr. Fitzgerald submits a comparison or comparisons and other evidence referred to above, payment of any amount clearly due him under this decision should be made. Any amount which remains in dispute should be referred here for disposition. In that connection we note that Mr. Fitzgerald is entitled to backpay from November 1 to December 10, 1973, for which period he has not submitted evidence of his outside earnings. Evidence of such outside earnings should be obtained before any payment is made.

By letter of January 23, 1974, Mr. Fitzgerald's attorney requested that, in the event an unfavorable decision were to be made on the basis of material submitted, Mr. Fitzgerald be given an opportunity to introduce further evidence in support of his position before such adverse decision is reached and that a hearing be held for the purpose of taking testimony from any witnesses that Mr. Fitzgerald or the Air Force may wish to call. The attorney was advised that this Office is not vested with authority to hold adversary hearings for the purpose of obtaining sworn testimony and therefore decisions of the Comptroller

General must be made upon the evidence in the official record presented. The opportunity was given, however, for the submission of any additional data and the record has been kept open for this purpose during the consideration of the matter.

By letter of February 4, 1974, Mr. Fitzgerald's attorney urged that interest be paid on the amount of backpay found due him for the period of his separation from the Department of the Air Force. It is well settled that such payment may not be made except when interest is provided for in legal and proper contracts or when allowance of interest is specifically directed by statute. See *Angarica* v. *Bayard*, 127 U.S. 251 (1888); *United States* v. *North American Transportation and Trading Co.*, 253 U.S. 330 (1920); *Seaboard Air Line Railway Co.* v. *United States*, 261 U.S. 299 (1923); *Smyth* v. *United States*, 302 U.S. 329 (1937); *United States* v. *Hotel Co.*, 329 U.S. 585 (1947).

The backpay due Mr. Fitzgerald is for determination in accordance with this decision.

[B–180726]

Contracts—Disputes—Settlement—Administrative—Under Disputes Clause

Construction contractor's request for equitable adjustment in price, based on delay in completion caused by reduced availability of site, should be resolved pursuant to "Disputes" clause procedure. Contract contained "Changes" clause and disputes arising under specific contract provision are for administrative resolution.

In the matter of Bradley Mechanical Contracting, Inc., May 6, 1974:

On May 19, 1971, contract No. J17C–2023 was awarded to Bradley Mechanical Contracting, Inc. (Bradley) by the Department of Justice, Bureau of Prisons, for the installation of air conditioning equipment in the maximum security wing of the Medical Center for Federal Prisoners in Springfield, Missouri.

Among the "General Requirements" of Bradley's contract was the following provision:

WORKING HOURS: Working hours within the buildings and on the grounds of the Institution shall be 7:45 A.M. to 4:15 P.M. on Mondays through Fridays. * * *

Bradley's contract also contained the standard "Disputes," "Changes," "Suspension of Work" and "Conditions Affecting the Work" clauses, contained in Standard Form 23–A (Oct. 1969 edition). The latter clause states:

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. The Gov-

ernment assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

Soon after work had commenced, Bradley and its subcontractors were directed by prison officials to leave the site by 4:00 p.m. daily in order that an inmate head count could be conducted. It is alleged that workmen had to stop and begin securing their tools no later than 3:45 p.m. in order to clear the security gates by 4:00 p.m. Bradley therefore claims that at least one-half working hour per day per man was lost as a result of this procedure.

After partially performing the contract under these conditions, Bradley requested that the initial 180-day completion schedule be extended by 47 days. The contracting officer granted this extension by letter in which he expressed agreement "that some time is lost each day due to the fact the West Gate must be secured at 4:00 P.M."

Shortly before final payment under the contract was to occur, Bradley requested on its own behalf and for its subcontractors, that the contracting officer issue a change order increasing the contract price by $12,426.29. The basis for this claim was that Bradley and its subcontractors were obligated to pay wages for an 8-hour day in exchange for which they received a 7½ hour day as a result of the denial of access to the site after 4:00 p.m.

The contracting officer denied Bradley's request for an equitable adjustment on the ground that the "Conditions Affecting the Work" clause, quoted above, obligated Bradley to ascertain the existence of the 4:00 p.m. head count procedure and Bradley's failure to do so did not relieve it from completing the work at its bid price. In this regard, there is apparently a dispute between Bradley and the procuring activity as to whether the 4:00 p.m. head count procedure existed at the time Bradley submitted its bid or was instituted after construction had begun.

Bradley subsequently resubmitted its request for an equitable adjustment in the reduced amount of $10,912.83, which reflected the decision of several subcontractors not to pursue the matter. Bradley advised the contracting officer that if "in your opinion the reduced claim is still not justified please furnish us with the necessary forms to file a claim as outlined in [the 'Disputes' clause]."

The contracting officer responded, in pertinent part:

We are still of the opinion that this is not a justified claim, for reasons as set forth in [the contracting officer's previous letter], and is therefore denied. If you so wish, you may file a claim with the United States General Accounting Office, Washington, D.C. There are no specified forms for this procedure.

Bradley accepted the contracting officer's advice and presented its claim to our Office, whereupon we obtained a report from the Bureau

of Prisons. The Bureau's position was that the "Conditions Affecting the Work" clause, and other provisions of a similar tenor in the IFB and resulting contract, placed upon Bradley the responsibility "to determine the working conditions and anticipate any problems he might encounter in movement into and through the working area." The Bureau also emphasized that in its opinion, Bradley had not met the requirements of the following portion of the "Disputes" clause:

> * * * The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. * * *

The threshold question is whether Bradley's claim is one for breach of contract over which our Office has jurisdiction, or is one for administrative determination pursuant to the procedure set forth in the "Disputes" clause of the contract. We think it is significant that paragraphs S–5A. and B. of the contract's "Supplement to the General Conditions" provided:

> Access to the site will be available during normal working hours except during institutional emergency.
> Normal hours of work will be regular Institution hours, Monday thru Friday; however, special arrangements can be made when necessary.

As we observed above, the contract also specifically defined "working hours" as "7:45 A.M. to 4:15 P.M. on Mondays through Fridays."

In view of these specific representations in Bradley's contract, we think directions to clear the site by 4:00 p.m. could be regarded as a change in the work. Since Bradley's contract contains a "Changes" clause and since there appear to be disputes of fact arising from the administration of the contract, we feel that Bradley's claim was erroneously referred to our Office for resolution. Rather, the request for an equitable adjustment should be decided pursuant to the procedures set forth in the "Disputes" clause of the contract.

In its report to our Office, the Bureau of Prisons takes the position that Bradley is now precluded from pursuing its remedy under the "Disputes" procedure because it failed to appeal within 30 days of receipt of either of the contracting officer's decisions. We offer the following observations concerning that argument.

Section 1–1.318–1(a) of the Federal Procurement Regulations provides:

> When a final decision of the contracting officer concerns a dispute that is or may be subject to the Disputes clause, a paragraph substantially as follows shall be included in the decision:
> This decision is made in accordance with the Disputes clause and shall be final and conclusive as provided therein, unless, within 30 days from the date of receipt of this decision, a written notice of appeal (in triplicate) addressed to the (Title of the head of the agency) is mailed or otherwise furnished to the Contracting Officer. The notice of appeal, which is to be signed by you as the contractor or by an attorney acting on your behalf, and which may be in

letter form, should indicate that an appeal is intended, should refer to this decision and should identify the contract by number. The notice of appeal may include a statement of the reasons why the decision is considered to be erroneous.

Neither of the two letters from the contracting officer to Bradley, now characterized as final decisions, contained such a paragraph. The first letter simply denied Bradley's request for an equitable adjustment in price. The second letter, which responded to Bradley's request for "the necessary forms to file a claim as outlined" in the "Disputes" clause, erroneously referred Bradley to our Office.

In *Roscoe-Ajax Constr. Co.* v. *United States*, 198 Ct. Cl. 133, 458 F. 2d 55 (1972), the Court of Claims stated with respect to a contracting officer's letter which was not clearly denominated a final decision and which did not advise the contractor of his appeal rights:

> * * * Accordingly, the failure of the agency to comply with its own regulation in this respect prevents the letter from constituting that kind of a final decision under the Disputes article from which the contractor is obligated to appeal within thirty days. *Bostwick-Batterson Co.* v. *United States*, 151 Ct. Cl. 560, 283 F. 2d 956, 959 (1960). * * *. (198 Ct. Cl. at 148, 458 F. 2d at 64.)

See also *Keystone Coat & Apron Mfg. Co.* v. *United States*, 150 Ct. Cl. 277 (1960), *cert. denied* 372 U.S. 942 (1963).

In view thereof, we believe the procuring agency may wish to reexamine its position concerning the finality of the contracting officer's decision and the availability to Bradley of a remedy under the "Disputes" procedure.

[B–179314]

Pay—Retired—Annuity Elections for Dependents—Survivor Benefit Plan—Cost Deductions and Coverage—Effective Date

Since 10 U.S.C. 1448(a) provides that coverage under Survivor Benefit Plan commences when individual becomes entitled to retired or retainer pay, persons retired under provisions of 10 U.S.C. 1331, who become entitled to retired pay when application for retired pay is filed with department concerned, receive coverage under Plan at that time and deductions from retired pay commence correspondingly with the inception of coverage.

In the matter of deductions under the Survivor Benefit Plan for retired reservists, May 7, 1974:

This action is in response to a request for advance decision from the Principal Deputy Assistant Secretary of Defense (Comptroller), on the question as to what is the effective date of coverage, and the date on which charges for Survivor Benefit Plan protection commence under the provisions of 10 U.S. Code 1447–1455, when a member of the Reserve submits his application for retired pay to an office other than the service finance center. Department of Defense Military Pay and

Allowance Committee Action No. 488 was enclosed with the letter transmitting the request for decision.

The Committee Action states that in a memorandum dated December 11, 1972, from the Counsel for the Department of Defense Military Pay and Allowance Committee to the Deputy Assistant Secretary of Defense (Military Personnel Policy), conditions of coverage under the Survivor Benefit Plan for members of the Retired Reserve were defined. In that memorandum it was stated that coverage is effective from the date such a member's application for retired pay is received at the finance center of the service concerned.

It is noted in the Committee Action that this determination was apparently based on the assumption that applications for retired pay from eligible reservists are submitted to the finance centers within all service organizations. However, it is indicated that Department of the Navy procedures require that applications for retired pay by Naval Reserve members be submitted to the Chief of Naval Personnel, where the applications are processed and orders are issued transferring the member to the retired list. It is reported that copies of the orders are then sent to the Navy Finance Center and are used to establish the member's retired pay account. However, since a time lag of several months may occur between service receipt of the member's application and receipt of his retirement orders at the Navy Finance Center, a decision has been requested which may uniformly be applied to all the services.

Subsection 1448(a) of Title 10, U.S. Code, provides in part that the Plan applies to a person who is married or has a dependent child at the time he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he becomes eligible for that pay. Thus, it will be seen that coverage under the Plan commences when an individual becomes entitled to retired or retainer pay.

Under the provisions of 10 U.S.C. 1331, which applies to non-Regular service personnel, a person is entitled to retired pay upon application to the Secretary of the military department for such pay, if he is at least 60 years of age, has performed at least 20 years of service computed under the provisions of 10 U.S.C. 1332 and met the other requirements of that section.

While it has been held that the right to retired pay accrues from the time the age and service requirements of 10 U.S.C. 1331 have been met, payment of retired pay is not made until application is made to the Secretary concerned. See *Seagrave* v. *United States*, 131 Ct. Cl. 790 (1955) and 37 Comp. Gen. 653 (1958).

Therefore, for the purposes of the Survivor Benefit Plan, subject, of course, to the conditions set forth in 10 U.S.C. 1448, and the limita-

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tions contained in 10 U.S.C. 1331, it is our view that coverage under the Plan commences when application for retired pay is made to the activity of the military department specifically designated to receive such application under regulations prescribed by the Secretary concerned. Deductions from retired or retainer pay should be made or payment of premiums should be made under 10 U.S.C. 1452, commencing on a date following such application which would correspond with the inception of coverage under the Plan.

[B–134763]

Agents—Government—Government Liability for Acts Beyond Authority—Erroneous Information

National Labor Relations Board (Board) may not use appropriated funds to pay claims for monies mistakenly deducted from backpay award to two discriminatees due to erroneous instructions of Board agent, since in absence of specific statutory authority United States is not liable for negligent or erroneous acts of its officers, agents, or employees committed in performance of official duties; but may pay discriminatees such amounts as Board may collect from employer. B–134763, Feb. 14, 1958, overruled.

In the matter of use of appropriated funds by National Labor Relations Board, May 8, 1974:

This decision to the National Labor Relations Board is in response to the request of its General Counsel. He requested our views as to whether the Board may use its appropriations to pay two claims against the Board arising from the settlement of an unfair labor practice charge, which alleged that two employees, Mr. Daniel P. Larkin and Mr. Michael C. Kany, were discharged by their employer, Buck Knives, Inc., because of their activities in support of a union. *Buck Knives, Inc.*, Case No. 21–CA–10629.

Under the terms of the settlement agreement, the two employees were to be made whole by their employer for any monies lost as a result of their illegal discharges. In computing this loss the Board agent assigned to the case instructed the employees to deduct as interim earnings monies received from unemployment compensation during the backpay period; however, this instruction was contrary to well-established Board precedents and standard operating procedures (see paragraph 10604 of the National Labor Relations Board Internal Instructions and Guidelines Manual), and the holding of the Supreme Court in *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361 (1951). The employer subsequently complied with the agreement and the Board closed the case on June 23, 1972.

On February 23, 1973, the employees informed the Board that the Unemployment Insurance Board of the State of California demanded repayment of the unemployment compensation which they had received during the backpay period. Upon examination, the error of the

Board agent was discovered. Board efforts to resolve this matter with the Unemployment Insurance Board and the State Unemployment Insurance Appeals Board have resulted in a final determination by the State that the employees must repay the amount in controversy.

By letter dated March 19, 1974, the Board informed the employer of the erroneous instruction and the Board demanded that the employer pay to it the sum of $697 on behalf of Mr. Larkin and $650 on behalf of Mr. Kany, in order that the Board could remit these amounts to the Unemployment Insurance Board of the State of California on behalf of these employees.

It is the wish of the Board to close this matter. To do so, it proposes to pay the Unemployment Insurance Board of the State of California $697 and $650 on behalf of Mr. Larkin and Mr. Kany respectively from its appropriated funds and endeavor to recover that sum from the employer. However, for the reasons discussed below, we cannot approve the use of appropriated funds for this purpose merely because a mistake was caused by a Government agent.

We have consistently held that the receipt by one dealing with a Government official of erroneous information, which was relied upon by the recipient to his detriment, does not afford a legal basis for a payment from appropriated funds. It is well established that in the absence of specific statutory authority, the United States is not liable for the negligent or erroneous acts of its officers, agents, or employees, even though committed in the performance of their official duties. See *Hart* v. *U.S.*, 95 U.S. 316, 318 (1877); *Robertson* v. *Sichel*, 127 U.S. 507, 515 (1888); *German Bank of Memphis* v. *U.S.*, 148 U.S. 573, 579 (1893); *Federal Crop Insurance Corporation* v. *Merrill*, 332 U.S. 380 (1947); 19 Comp. Gen. 503 (1939); 22 *id.* 221 (1942); 44 *id.* 337 (1964); 46 *id.* 348 (1966); B–176040, June 30, 1972; B–176982, December 14, 1972. While it is regrettable that the two employees may have been misled by the erroneous information, that fact is insufficient to authorize a payment from appropriated funds. To the extent that this conflicts with B–134763, February 14, 1958, that decision will no longer be followed.

Of course, in the event that the Board is successful in collecting the amounts in question from Buck Knives, Inc., the Board may then pay such amounts to or on behalf of Mr. Larkin and Mr. Kany. In this connection, Mr. Larkin's letter to this Office dated January 20, 1974, states that he has paid the Unemployment Insurance Board of the State of California. Thus, if the Board effects recovery from Buck Knives it should take appropriate action to ensure that any payments of the recovered amounts are made to the proper parties, i.e., that Mr. Larkin, Mr. Kany, and the Unemployment Insurance Board of the State of California receive only the amounts to which they are entitled.

[B-180639]

Officers and Employees—Transfers—Relocation Expenses—Effective Date—Temporary *v.* Permanent Assignment

Employee who, incident to a detail under IPA of 1970, transferred her household goods, sold her house and purchased a home at the station to which detailed when neither her travel order nor Assignment Agreement authorized reimbursement of such expenses, may not be reimbursed for such expenses upon a subsequent permanent change of station to the place where she was on detail.

In the matter of certain payments made under Intergovernmental Personnel Act of 1970, May 8, 1974:

By letter of December 13, 1973, an advance decision was requested as to whether vouchers in the amounts of $2,479.15 and $734.90, representing transportation of household goods, temporary quarters allowance, and other relocation expenses incurred by Ms. Michelina M. Lofft may be certified for payment under the circumstances stated below.

The record shows that Ms. Lofft, an employee of the Economic Development Administration (EDA), Department of Commerce, whose duty station was Washington, D.C., was detailed on a temporary basis to the Colorado Rural Development Commission, Denver, Colorado, under the Intergovernmental Personnel Act (IPA) of 1970 in June 1972. Travel Order No. 12–EDA–958, approved June 5, 1972, authorized travel costs and per diem for the employee from Washington, D.C., to Denver, Colorado. The IPA Assignment Agreement in part IX stated "EDA will pay for travel to and from assignment." The initial assignment of the employee to the Colorado Rural Development Commission was for a 6-month period—June 12, 1972, to December 12, 1972—but this assignment was later extended to January 31, 1973. Ms. Lofft was on leave for the period February 1 through February 14, 1973. A new assignment to the Colorado Land Use Commission in Denver started February 15, 1973, and ended June 29, 1973. At the completion of her IPA assignment with the Colorado Land Use Commission, Ms. Lofft was detailed to EDA's Rocky Mountain Regional Office from June 30, 1973, through August 18, 1973. Her permanent duty station was changed from Washington, D.C., to Denver, Colorado, effective August 19, 1973.

Travel Order No. 12–eda–958A, issued August 14, 1973, authorized transportation for the employee's husband, miscellaneous expenses of $200, 30 days temporary quarters, shipment of household goods, and allowances in connection with real estate transactions. The record shows that Ms. Lofft sold her residence in Washington, D.C., June 9, 1972, and purchased a new residence in Denver July 24, 1972, in which she is now apparently residing. A bill of lading shows that part of her household goods was picked up from her Washington, D.C. residence June 8, 1972, for delivery to her new residence in Denver. On June 15,

1972, the balance of her household goods was picked up from a storage company in Rockville, Maryland, for delivery to an apartment in Denver. Thus it is apparent that Ms. Lofft relocated her residence in Denver at the beginning of her IPA assignment.

All of the expenses involved in Ms. Lofft's relocation were incurred prior to the effective date of her transfer to Denver (August 19, 1973). We have held that reimbursement of moving and relocation expenses incurred prior to and in anticipation of a transfer of official duty station may be allowed if the travel order subsequently issued includes authorization for the expenses on the basis of a "previously existing administrative intention, *clearly evident at the time the expenses were incurred by the employee*, to transfer the employee's headquarters." 48 Comp. Gen. 395 (1968). What constitutes a clear intention to transfer an employee depends on the circumstances in each case.

With respect to Ms. Lofft's claim for reimbursement of the transportation expenses of her household goods to Denver and other relocation expenses, there is no evidence in the present record of an administrative intention to transfer Ms. Lofft at the time these expenses were incurred. Rather the record indicates that EDA did not make a determination to transfer Ms. Lofft to Denver until the completion of her IPA assignment on June 29, 1973, when it was determined that her services could be more effectively utilized in Denver than in Washington, D.C. Therefore, since the transportation and relocation expenses for which reimbursement is claimed were incurred at the time Ms. Lofft was assigned to Denver under the original IPA detail, instead of after she was definitely advised she was to be transferred, she is not entitled to reimbursement of the expenses involved.

Section 3375 of Title 5, U.S. Code, authorizes reimbursement of certain expenses to employees assigned to a State or local Government under IPA. Under that section the appropriations of an Executive agency are available to reimburse an employee on such assignment at the discretion of the agency under regulations prescribed by the President. By Executive Order 11589 of April 1, 1971, the President delegated to the Civil Service Commission the authority granted him to issue regulations necessary to administer the act. The Commission regulations which appear in part 334 of title 5, Code of Federal Regulations, do not contain any provisions relating to travel and transportation expenses. However, subchapter 1-7b of Chapter 334 contains instructions with respect to travel and transportation expenses which indicate that an Executive agency may at its discretion use its appropriations to pay for certain relocation expenses such as the transportation of the household goods and personal effects of an employee to and from the assignment. Under the controlling law and regulations it is clear that the agency could have authorized such allowances. How-

ever, neither of the Assignment Agreements, copies of which are on file, authorizes anything more than reimbursement by EDA of the travel to and from the assignment. Also, the travel order dated June 5, 1972, authorizing the travel of Ms. Lofft from Washington, D.C., to Denver, Colorado, does not authorize the transportation of the household goods and personal effects. In this connection the record indicates that the IPA agreement did not include an allowance for relocation expenses because of the short duration of the assignment.

Accordingly, since the transportation of Ms. Lofft's household goods and personal effects was not authorized in the travel order of June 5, 1972, or in the Assignment Agreements, she is not entitled to reimbursement of relocation expenses in connection with her detail under IPA provisions.

In view of the above the vouchers may not be certified for payment.

[B–178379, B–178163]

Contracts—Negotiation—Modification of Contract—Change Within Scope of Contract

Amendment of contract shortly after award to cover a more expensive superior article (which had been offered as an alternate) than the one accepted at the lowest offered price raises question whether major purpose of procurement system was thwarted by that action and whether change was within general scope of contract.

Contracts—Specifications—Adequacy—Negotiated Procurement

Allegations of favoritism to awardee on bases that (1) delivery schedule was unnecessarily short; (2) technical specifications were overly restrictive; and (3) procuring activity failed to give protester time to respond to protest by another offeror are without merit since (1) there was urgent need for item; (2) establishment of specifications is responsibility of procuring activity; (3) issues are questions of fact and administrative position is supported by a preponderance of the evidence; and (4) because protester failed to supply information to DCASD to refute allegations by other offeror that protester was not responsible.

In the matter of the A & J Manufacturing Company, May 10, 1974:

A & J Manufacturing Company (A & J) has protested the award by the Naval Electronics Supply Office (ESO) of two contracts, numbers N00126–73–C–0941 and N00126–73–D–0075, to General Kinetics, Inc. (GKI). While the issues under both contested contracts are somewhat similar, we will treat each separately.

Contract 0941

In the latter part of December 1972, request for proposals (RFP) N00126–73–R–3N1453, which resulted in contract 0941, was issued by ESO and called for the furnishing of 12 type CY 4516B/S single bay environmental cabinets to be manufactured in accordance with

GKI part number A3B75B312 or equal. Certain salient characteristics of the cabinet deemed to be essential to satisfy the Government's needs were listed as part of the item description. A & J offered a price of $1,600 per unit, while GKI offered a price of $945 per unit. GKI also submitted an alternate offer of $2,575 per unit for a modified and better quality cabinet exceeding the descriptive requirements outlined in the solicitation. Contract 0941 was formally awarded to GKI on January 3, 1973, on the basis of it furnishing the $945 unit. However, subsequent to award GKI requested reconsideration of its $2,575 unit. The contracting officer states that after review of the unit's technical specifications, it was determined that it would better serve the Government's needs. Consequently, a telegraphic amendment to the contract was issued on January 18, 1973, incorporating the additional technical requirements and increasing the contract price.

By letter of March 7, 1973, A & J protested the award alleging that (1) GKI was not the low offeror and its (A & J's) price of $1,600 per unit was $975 per unit lower than that of GKI; (2) GKI was awarded the contract on a sole source basis without a public hearing; (3) the real reason A & J was not awarded the contract was its inability to meet the solicitation's overly restrictive delivery schedule; and (4) the procurement as a whole was characterized by favoritism towards GKI which violated section 1–113.1 of the Armed Services Procurement Regulation (ASPR) which states, in pertinent part:

> All governmental personnel engaged in procurement and related activities shall conduct business dealing with industry in a manner above reproach in every respect. Transactions relating to expenditure of public funds require the highest degree of public trust to protect the interests of the Government * * *.

We note that A & J's letter of March 7, 1973, protesting the award of contract 0941, was not filed within the time required by section 20.2(a) of Volume 4 of the Code of Federal Regulations (CFR). However, we will consider the issues raised therein under the authority of 4 CFR 20.2(b) since we believe they involve significant procurement procedures.

A & J's contention that GKI was not the low offeror is based on a comparison of A & J's price of $1,600 per unit and GKI's alternate unit price of $2,575 which was substituted for GKI's $945 unit award price by amendment to its contract. It is true that under the contract "Changes" clause the contracting officer has the right to make changes to the specifications which are within the general scope of the contract and to adjust the price equitably if the cost of performance is affected. B–176745, May 10, 1973. However, the competition to be achieved in the award of Government contracts must be held to the work actually to be performed. Thus, a contracting officer may not award a contract completed under a given specification with the intention to

change to a different specification after award. Otherwise, a major purpose of the Federal procurement system would be thwarted. *Cf.* 37 Comp. Gen. 524 (1958); 46 *id.* 281 (1966).

The short period between contract award to GKI and the amendment inevitably gives rise to questions concerning the possibility that the change was contemplated prior to award, particularly since the item called for by the amendment had been offered as a higher priced alternate in GKI's proposal. We also question whether the specification change was within the general scope of the contract in view of the nearly threefold increase in price. *Cf.* 50 Comp. Gen. 540 (1971).

While practical considerations foreclose any corrective action, the facts of record do nothing to increase confidence in the integrity of the procurement system. We are, therefore, pointing out to the Secretary of the Navy the importance of anticipating specification changes of this character so that they might be considered in the competition.

A & J further contends that the contract delivery requirements were unduly restrictive and designed to favor GKI. With regard to delivery schedules, ASPR 1-305.2(a) provides:

> * * * Delivery and performance schedules shall be designed to meet the requirements of the particular procurement, with due regard to all relevant factors, and must be realistic. Delivery and performance schedules which are unreasonably tight or difficult of attainment are inimical to full competition, inconsistent with small business policies * * * and may result in higher contract prices. Therefore, prior to issuing an invitation for bids or request for proposals, the contracting officer shall question any delivery requirement which appears unrealistic, and, if necessary, initiate action to make appropriate adjustments, with due attention to relevant factors such as * * * those listed below:
> (i) urgency of need for supplies or services * * *

In B-169370, August 12, 1970, we held, with regard to the establishment of delivery schedules, that:

> * * * Our Office has consistently held that establishment of specifications to reflect the actual needs of the Government is primarily the responsibility of the administrative agency * * *. In the instant case, the administrative report shows that the supply stock of the aircraft brake kits was at a critical level, and that the C-141 aircraft might be grounded if additional supplies of the kits were not obtained as expeditiously as possible. Since it appears that the short delivery requirements were based on a bona fide determination of the actual needs of the Air Force in the present case, we cannot conclude that the delivery schedule was unduly restrictive under the circumstances.

Moreover, we have also stated that:

> It is well established that the Government does not violate either the letter or the spirit of the competitive bidding statutes merely because only one firm can supply its needs, provided the specifications are reasonable and necessary for the purpose intended. 45 Comp. Gen. 365 (1965).

In the instant case, the contracting officer stated:

> * * * Proposals were solicited from the only two suppliers previously supplying the item to the Government and deemed to be capable of meeting the required delivery date of 30 January 1973. Such required delivery was necessary as the cabinets were needed at the Naval Shipyard, Bremerton, Washington, by 31

January 1973 for ship overhaul. In order to insure completion of such overhaul by assigned deployment dates, a priority designator number 6 was assigned to the procurement of the cabinets.

Accordingly, we cannot conclude that the reasons for the tight delivery schedule were other than bona fide.

A & J's last contention with regard to contract 0941 was that the Naval procurement personnel blatantly favored GKI throughout negotiations by setting tight delivery schedules, initiating negotiations with GKI more than one month prior to negotiating with A & J; and refusing to consider A & J's open-rack cabinet design. Therefore, A & J argues, both ASPR 1–113.1 and 1–403 were violated, the contract should be terminated, and award should be made to A & J.

A & J, however, proffers no concrete evidence of favoritism. The report of the contracting officer states that A & J's open-rack design was considered and rejected. Moreover, he specifically stated:

> * * * as to the inference by A & J that Government personnel did not deal on an equal basis with all entities competing for the questioned award, no information was furnished by this office to any unauthorized persons either prior to the issuance of the solicitation or during evaluation of offers. All competing offerors were treated alike on the same impartial basis.

We cannot base a finding of favortism solely on inferences and allegation. Rather, such a finding must be based upon presentation of clear and convincing evidence. No such evidence has been presented here, and the administrative position is supported by a preponderance of the evidence.

Accordingly, we find no legal or factual basis to support this claim and A & J's request for cancellation of contract 0941 is denied.

Contract 0075

As mentioned earlier, A & J also protested against the award of contract 0075 to GKI. RFP N00126–74–R–3N3106, which resulted in the referenced contract, was issued on December 29, 1972, by ESO and requested proposals for the furnishing of 132 cabinets "Type CY–4516B/S per General Kinetics P/N A3B75B312 or Equal, G.K.I. Dwg. M3000 applies * * *" and 140 cabinets "Type CY–4516 A/S per General Kinetics P/N A3B72B312 or Equal, G.K.I. Dwg. M3000 applies * * *." The solicitation called for delivery of 12 of the first type no later than March 10 and 21 of the second type no later than March 15. However, on January 10, after protest by A & J of the "Brand-Name or Equal" nature of the procurement, Navy, in amendment 001, substituted standard military specifications for the Brand-Name or Equal description. On January 26, the specifications were again changed and the closing date was extended. On January 30, both A & J and GKI submitted final proposals as follows:

Item No.	Offeror	With First Article	Without First Article
0001	GKI	$1,609.00	$1,351.00
	A & J	1,200.00	1,200.00
0002	GKI	1,609.00	1,351.00
	A & J	1,250.00	1,250.00

However, contemporaneous with its offer, GKI lodged a preaward protest (1) protesting award to any other supplier and (2) questioning A & J's ability to perform in compliance with the requirements of the solicitation.

The Defense Contract Administration Service District (DCASD) at Anaheim, California, conducted a preaward survey of A & J's capabilities. On February 21, 1973, it issued a negative recommendation based on the following:

(1) A & J had an unsatisfactory past performance record (late delivery on a prior contract);

(2) A & J could not meet the required delivery schedule (blower motor assemblies could not be obtained from a subcontractor in a timely fashion and the proposed subcontractor for first article testing had stated such testing would be delayed in the event the test facility was not available when required); and

(3) A & J's financial condition was unsatisfactory (A & J failed to submit financial statements to DCASD for evaluation even though repeatedly requested to do so).

The contracting officer received oral notification of DCASD's recommendation on February 16. Based on its report, he issued a Determination and Findings (in which he found A & J to be non responsible) and made preliminary award to GKI. A & J submitted its letter of protest on March 7, 1973, one day after the date of formal contract award.

A & J alleges: (1) that the technical specifications contained in the RFP, when taken together with the tight delivery schedule, were unduly restrictive of competition and were deliberately designed to favor GKI; (2) that GKI's ability to meet the delivery schedule (when A & J could not) is evidence that GKI had received advance information in violation of ASPR 1-104 and 3-507.2; (3) that the contracting officer denied A & J due process of law in connection with his award of the contract to GKI; and (4) that these facts when viewed in connection with the sole source award (in March 1973) of contract N00123-73-C-1946 for electronic equipment installation kits to GKI (which kits go into the cabinets before installation on board

ships) demonstrate that a "collusive thread" existed throughout the procurement process and that the award, made in violation of ASPR 1–113.1 and 1–403 is null and void.

In regard to its first allegation A & J states that the amendment to the solicitation deleting the "brand name or equal" product description actually preserved the technical advantage originally given GKI by use of that description since the techical specifications remained substantially the same despite the amendment and this coupled with the tight delivery schedule precluded A & J from effectively competing for the award.

ASPR 1–304.2(b) permits the use of brand name or equal descriptions when "the Government desires to purchase privately developed items but does not have the necessary data with unlimited rights for use in a specification for competitive procurement." In the instant case, GKI had been the Navy's primary supplier of single bay cabinets. The existing specification MIL–C–24056 was not well defined and was in the process of being rewritten; hence, a brand name or equal description was used initially.

To make the procurement more competitive, Navy deleted the brand name or equal description and replaced it with a modified version of the standard specifications. The contracting officer asserts that the specification description contained in the solicitation was not confined to products of GKI. Further, in his letter of July 13, 1973, the Commander, Naval Ships Systems Command stated that:

> f. The additional technical requirements provided ESO were items that were under csonsideration at the time for inclusion in the re-write of the specification on environmental cabinets. These items were worked out and agreed to by the Naval Electronics Systems Command who had the responsibility for rewriting the subject specification. The new specification [issued June 18, 1973] (MIL–C–28794 (EC)) does contain many of the same requirements identified to ESO * * *.

We have consistently held that the establishment of specifications reflecting the actual needs of the Government is primarily the responsibility of the administrative agency, and our Office will not question the determination of the agency in this regard in the absence of evidence of a lack of a reasonable basis for the determination. Thus, in the instant case, the solicitation's specifications appear to have been based on a bona fide determination of Navy's needs. Furthermore, Navy did not arbitrarily reject A & J's alternate "open rack design." In his letter of July 13, 1973, the Commander of Naval Supply Systems Command stated:

> e. NAVSHIPs did consider the use of open modular rack design as an alternate to CY–4516 cabinet but found it to be an unacceptable alternative. The electronic environmental cabinet permits high density installation of electronic equipment and still provides adequate cooling through the use of an internal blower assembly. The communications package being installed on DDG2 class ships via SHIPALT DDG2–312 is a high density installation of wall to wall

equipment requiring the use of environmental cabinets. NAVSHIPs review revealed that the high density and adequate cooling requirements could not be achieved with the open rack design.

Moreover, we cannot accept A & J's contention that the delivery schedule, in view of the "additional technical requirements" was unreasonable or that it was designed to insure "that no manufacturer other than General Kinetics could possibly meet the delivery schedule * * *." We hold this view despite A & J's assertion that the "additional technical requirements" required a special blower motor which is not of the type a manufacturer would normally keep in inventory but rather one which must be specially procured and such procurement requires considerable lead time.

As heretofore stated, it is the responsibility of the procuring agency to establish technical specifications and delivery schedules for a given procurement. In the instant procurement, lots of 12 cabinets were required for delivery to Long Beach Naval Shipyard by March 10 and April 15 for installation respectively, aboard the USS Robison and USS Towers. Since we find no evidence of record to overcome the presumption of reasonableness inherent in the agency's determination, we cannot find that either the technical specifications or delivery schedules were based on other than a legitimate determination of Government need. Nor can we find, based on the evidence before us, that the sole reason GKI could meet the delivery schedule was that it had received advance information.

A & J next alleges that it was denied due process in connection with the award of the contract to GKI. Specifically it states that the contract was awarded without giving it an opportunity to answer allegations concerning its responsibility and that it was denied access in violation of the Freedom of Information Act, to that information which was the basis for the contracting officer's determination of nonresponsibility.

On February 6, in a supplement to its letter of protest filed on January 30, GKI contested A & J's ability to perform in accordance with the requirements of the solicitation. A & J states in its letter of April 11, 1973, that it was notified, by a letter dated February 13, of GKI's protest and told that it could submit views and relevant information concerning its protest to both the contracting officer and GAO. The communique specifically stated that: "Such data should reach the contracting officer prior to 20 February 1973"—a time period reasonable, given the exigencies of the procurement, within the meaning of ASPR 1-905(b).

A & J's letter of February 14, responding to GKI's allegations, did little more than make a general denial of GKI's allegations and give assurance of compliance with the specifications. While A & J

stated in its February 14 letter that it had arranged financial resources more than adequate to perform the contract, the DCASD preaward survey, conducted during the same period, indicates that A & J was requested to submit a cash flow projection, but failed to do so and that A & J did not attempt to clarify its financial capabilities with the DCASD financial team. A & J's only written communication with DCASD consisted of a letter dated February 16 which stated "Upon being awarded a DOD contract, all requirements and specifications of MIL-C-45662A and MIL-I-45208A (relating to quality control procedures) will be met by A & J Manufacturing Company."

On February 16, DCASD orally notified the contracting officer that A & J could not meet the delivery requirements and would receive a negative recommendation. On that same date the contracting officer determined A & J to be nonresponsible. A & J cites this procedure as being unfair since award was made prior to the expiration of its answering time.

ASPR 1-905.4(b) provides that:

A pre-award survey shall be required when the information available to the purchasing office * * * is not sufficient to enable the contracting officer to make a determination regarding the responsibility of a prospective contractor * * *.

ASPR 1-905.1 provides that:

(a) Before making a determination of responsibility * * * the contracting officer shall have in his possession or obtain information sufficient to satisfy himself that a prospective contractor currently meets the minimum standards set forth in 1-903 * * * [and]

(c) * * * When a contract administration office is requested to perform a pre-award survey and it has been notified of the existence of unfavorable information relative to the contractor, it shall obtain the details including full supporting information * * * The purchasing office shall give full consideration to such advice in determining whether award should be made.

The record indicates that DCASD, Anaheim, California, attempted to gather all data relating to A & J's capabilities and that A & J failed to supply requested financial information. While A & J replies, in effect, that its failure was due to the fact that award was made prior to the expiration of its answering time, we find no evidence to show that A & J attempted to supply this information to DCASD during the period between February 16 and February 20.

In his Determination and Findings, the contracting officer clearly based his decision on the DCASD report. Moreover, the provisions of 4 CFR 20.4 permit the making of an award prior to the disposition of a protest, if the items being procured are urgently required, the award has been approved at a level above that of contracting officer, and a notice of intent has been furnished the Comptroller General. In the present case, the Determination and Findings was signed by the Commanding Officer, Naval Electronics Supply Office, and was sent to

GAO shortly thereafter. Thus, although A & J's answering time was shortened, we cannot find that A & J was denied an opportunity to be heard.

By letter of January 18, 1974, A & J forwarded to this Office a copy of a Defense Supply Agency inter-office memorandum dated February 20, 1973, written by what appears to be a member of the preaward survey team, or at least someone who participated in the survey. This memorandum states that the survey indicated that A & J has adequate technical capabilities for the fabrication of the RFP required cabinets and is fully aware of the technical problems involved. The member also expressed the view that the cabinet design proposed by A & J was superior to that called for by the RFP. He further stated that in his opinion the functional requirements reflected in MIL-C-24056C and those listed as "additional requirements" in the bid package are unrealistic and conflicting.

It should be pointed out that the preaward survey found A & J's technical capability to be satisfactory but, as indicated above, based its "no award" recommendation on its unsatisfactory findings in connection with A & J's financial capability, performance record and ability to meet the required schedule.

However, on the record, the fact remains that A & J's design was rejected by NAVSHIPS, presumably on the basis of competent advice. As previously pointed out, our Office has taken the position that the establishment of specifications which reflect the minimum needs of the Government and the determination of whether products offered meet the specifications are matters primarily for determination by the administrative agency, 44 Comp. Gen. 302, 304 (1964); 38 *id.* 190, 191 (1958). In the present case, while there may have been some technical disagreements in regard to the merits of A & J's cabinet, as opposed to the cabinet called for by the RFP, we have no reason to believe that the procuring activity's decision to procure the cabinet called for by the RFP, rather than A & J's cabinet, was improper.

A & J also points out in its letter of January 18, 1974, that some of GKI's cabinets delivered under contract 0075 did not meet specification requirements. In this regard, we have held that it is the responsibility of the contracting agency and not this Office to ensure that GKI complies with the terms of the contract, i.e., furnish supplies which conform to the specification requirements. B-179505, March 8, 1974; B-177876, July 19, 1973.

With regard to A & J's further contention that the Navy Electronics Supply Office withheld information relevant to its disqualification in violation of the Freedom of Information Act, the resolution of that issue is beyond the jurisdiction of our Office. Disputes concerning the right to receive agency information are matters of adminis-

trative procedure cognizable under agency regulations, subject to review by the courts under 5 U.S. Code 552.

Finally, A & J alleges that a "collusive thread" existed throughout the procurement, and that it becomes particularly apparent when one views the procurement of the electronic equipment cabinets (Contract 0075) and of the equipment installation kits (Contract No. N00123–73–1946) as a single process. A & J contends that the net effect of awarding contract 1946 to GKI was " * * * to extend the delivery date of the first twenty-four cabinets required forty-one days * * * [and, that had] the additional forty-one days allowed by this contract been included in the schedule for the cabinet procurement, A & J Manufacturing would have been able to procure the blower motors and meet the contract delivery schedule despite their scarcity."

In his response to A & J's protest of the award of contract N00123–73–C–1946, the contracting officer states:

It is difficult to trace the logic of the protestor concerning the alleged 41 day extension in delivery that it imagines was the result (and presumably the original intention) of the separation of the procurements of the environmental cabinets and the installation kits. Initially, the protestor states that the procurements cannot be logically separated. In fact, it is almost mandatory that such procurements are separable, based upon the intended use of the cabinets. The cabinets hold several units of electronic equipment each. The installation kits are individually designed to comport with the specific equipment to be installed. Each vessel will have a different configuration of electronic equipment to be installed in the cabinets. Consequently, each set of installation kits must be ordered after the needs of the specific vessel involved have been determined.

There was no relaxation of delivery requirements in the basic cabinet contracts caused by the additional contractual requirements under the installation kits contract. The only change made to those prior contracts was a requirement to have the cabinets "shipped in place" so that they could be provided as GFE [Government Furnished Equipment].

Accordingly, A & J's protests are denied.

[B–179018]

Pay—Retired—Survivor Benefit Plan—Election Status—Recalled to Active Duty

In the case of a service member who is retired after the passage of the Survivor Benefit Plan, 10 U.S.C. 1447–1455, is immediately recalled to active duty and then dies while serving on that duty, entitlement to a survivor benefit annuity would accrue only under the provisions of 10 U.S.C. 1448(d).

Pay—Retired—Survivor Benefit Plan—Effect of Veterans Administration Benefits

Where a surviving spouse is eligible to receive a survivor annuity under 10 U.S.C. 1448(d), such language contained therein which relates to the eligibility of a spouse to receive DIC payments from the Veterans Administration, when considered in conjunction with the other portions of subsection (d), must be

construed only as prohibiting payment of a SBP annuity where the amount of VA benefits under 38 U.S.C. 411(a) exceed the maximum annuity otherwise payable under 10 U.S.C. 1448(d).

Pay—Retired—Survivor Benefit Plan—Limitations—Spouse

Where entitlement to a survivor benefit annuity accrues under 10 U.S.C. 1448(d) and that is the only basis for coverage under the Plan, by virtue of the limitations contained therein, only the otherwise eligible surviving spouse would be entitled to an annuity and such annuity would terminate upon that spouse's death or loss of eligibility.

Pay—Retired—Survivor Benefit Plan—Election Status—Recalled to Active Duty

Where a service member elects to provide coverage under the Survivor Benefit Plan for spouse and children, is retired and recalled to active duty after a break in service after contributing to the Plan and then dies while serving on that duty, the eligible spouse has a basic right to the coverage elected by the member under 10 U.S.C. 1448(a) and payment under 10 U.S.C. 1450(a)(1) and upon the death of the spouse the surviving dependent children would have a basic continuation right to payment under 10 U.S.C. 1450(a)(2) during the remaining period of their dependency as defined in 10 U.S.C. 1447(5).

Pay—Retired—Survivor Benefit Plan—Children

Where a member who after retirement has contributed to the Plan and after a break in service is recalled to active duty and dies while serving on that duty, the surviving spouse who is eligible to receive the annuity elected under 10 U.S.C. 1448(a) would have alternate right to receive the annuity authorized under 10 U.S.C. 1448(d), if such annuity would provide the greater benefit.

In the matter of coverage under the Survivor Benefit Plan for certain classes of survivors, May 10, 1974:

This action is in response to letter dated April 12, 1974, from the Assistant Secretary of Defense (Comptroller), requesting a decision concerning the coverage for a wife and children, or children only, under the provisions of the Survivor Benefit Plan, 10 U.S. Code 1447-1455, in the circumstances discussed in Department of Defense Military Pay and Allowance Committee Action No. 503, enclosed with the request.

The first question posed in the Committee Action is:

In the case of a member who retired after passage of the Survivor Benefit Plan (SBP) and was immediately recalled to active duty, and who on retirement elected coverage for wife and children or children only, would entitlement to the annuity accrue under 10 U.S.C. 1448(a) or 10 U.S.C. 1448(d), should the member die during such services?

The discussion in the Committee Action states that 10 U.S.C. 1448(a) and paragraph 201a of Department of Defense Directive 1332.27, January 4, 1974, specify that a member with dependents is automatically covered under the Plan when he becomes entitled to retired pay, unless he elects not to participate before the first day for which he is eligible for that pay. Further, that under that concept it would appear that the children of a member who upon retirement elected coverage for his wife and children or children only, would continue to have coverage upon his recall to active duty.

Doubt is expressed in the Committee Action, however, when consideration is given to the provisions of 10 U.S.C. 1448(d). In this regard, the discussion states that much can be found in the legislative history concerning members who are eligible to retire and who die while serving on active duty, but, nothing is contained therein relative to the purpose for including in that subsection members who die on active duty after they become entitled to retired pay.

The Survivor Benefit Plan, as enacted by Public Law 92–425, was to establish a new system of survivor protection for dependent families of members of the military service who are present and future retirees as well as active duty members who are retirement eligibles. Additionally, it was to provide a guaranteed minimum annual income to widows of military members who retired and died prior to the enactment of Public Law 92–425.

Subsection 1448(d) of Title 10, U.S. Code, provides:

> (d) If a member of an armed force dies on active duty after he has become entitled to retired or retainer pay, or after he has qualified for that pay except that he has not applied for or been granted that pay, and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it had applied to the member when he died, the Secretary concerned shall pay to the spouse an annuity equal to the difference between that amount of compensation and 55 percent of the retired or retainer pay to which the otherwise eligible spouse described in section 1450(a)(1) of this title would have been entitled if the member had been entitled to that pay based upon his years of active service when he died.

In discussing subsection 1448(d) on the floor of the House of Representatives, Representative Pike stated in part:

> A special section of the bill provides that in the case of personnel still on active duty who are eligible for retirement on length of service whose potential survivor annuity would be more than the dependency and indemnity compensation paid to survivors of active-duty personnel of like grade and years of service, a supplemental annuity payment sufficient to make up the difference would be paid * * *. *We added this section because we did not want a situation to occur where one who remains on active duty earns less survivor benefits than somebody who retired at the same grade and with the same years of service.* [Italic supplied.]

See Congressional Record of October 21, 1971, page H 9871.

The legislative history of Public Law 92–425 has clearly shown a delineation of the types of coverage available under the Plan and that it was the express intent of Congress to insure the fact that spouses of all active duty personnel shall automatically have coverage in the event of the member's death while serving on active duty. Subsection 1448(a), by its own limiting language is applicable only after a member becomes "entitled to retired or retainer pay," and a member who immediately is recalled to active duty following his retirement, although qualified for retired pay, has no present entitlement thereto. On the other hand subsection 1448(d) in part provides coverage where a member of an armed force dies while serving on active duty after

qualifying for such pay. Thus, in a situation where a member is retired and immediately recalled to active duty without a break in service and thereafter dies while serving on that duty, the more reasonable conclusion is that entitlement to a survivor benefit annuity would accrue only under the provisions of 10 U.S.C. 1448(d). Question 1 is answered accordingly. *Cf.* 53 Comp. Gen. 470 (1974).

The second question asked is:

> If the answer to question 1 is 10 U.S.C. 1448(d), would the answer be the same if the spouse is not eligible for dependency and indemnity compensation (DIC) under section 411(a) of title 38, U.S. Code?

The discussion in the Committee Action expresses the view that a strict interpretation of 10 U.S.C. 1448(d) would seem to require a determination that a spouse must be eligible for DIC before entitlement to a survivor annuity can accrue. However, doubt is expressed as to the validity of such an interpretation when the legislative history of that subsection is considered.

The portion of subsection 1448(d) which gives rise to the question is as follows:

> * * * and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it had applied to the member when he died * * *.

The legislative history of the Survivor Benefit Plan, particularly with regard to subsection 1448(d), indicates congressional awareness that most if not all survivors of active duty personnel receive some survivor benefit payments through the dependency and indemnity compensation program of the Veterans Administration. However, it was recognized that such VA program is weighted in terms of low-ranking and short-term personnel and that in cases of senior enlisted and officer grades of longer years of service, the level of benefits falls off sharply in terms of their value as an income replacement.

In Senate Report No. 92–1089, Committee on Armed Services, United States Senate, dated September 6, 1972, on page 15, it is stated that:

> * * * the spouse of a service member, who is eligible to retire for longevity (after 20 years of service) but dies on active duty, will be paid 55 percent of the member's earned retired pay. The payment will recognize that DIC *may* be payable by the Veterans Administration (VA) by offsetting the DIC payment from the 55 percent of retired pay. * * * [Italic supplied.]

Similar wording is contained on page 51 of the same report.

The basic concept of the Survivor Benefit Plan was to insure protection to survivors of military personnel up to 55 percent of their otherwise earned retired pay if they should die while serving on active duty. Therefore, when the before-quoted language of subsection (d) is considered in conjunction with other portions of the same subsection, particularly that portion which mandates that the Secretary concerned

"shall pay to the spouse an annuity equal to the difference between that amount of compensation and 55 percent of the [member's] retired or retainer pay * * * based upon his years of active service when he died" and on the assumption that the spouse is not otherwise ineligible for an annuity under the Plan, it is our view that such language should be construed only as prohibiting payment of a survivor benefit annuity to a spouse where the amount of benefit payable under 38 U.S. Code 411(a) would exceed the maximum amount of annuity otherwise payable under subsection 1448(d). Question 2 is answered accordingly.

The third question asked is:

> If entitlement to the annuity accrues under 10 U.S.C. 1448(d), would the children continue to receive SEP coverage?

The discussion in the Committee Action states that on the face of subsection 1448(d) an annuity is provided only to the eligible spouse. However, the opinion is expressed therein that 10 U.S. Code 1450 refers to all of section 1448 and provides that an annuity shall be paid to the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible." The discussion also points out that while the legislative history shows that it was intended that the surviving spouse of a member who dies on active duty should not receive fewer benefits than the surviving spouse of a member in retirement, no mention is made of providing an annuity to surviving dependent children where such surviving spouse dies or otherwise becomes ineligible, nor is mention made of providing an annuity to surviving dependent children where the member dies without a spouse while serving on active duty. In this regard, the discussion indicates that it would appear that in order to be consistent with the intent of Congress in enacting subsection 1448(d) the payment of an annuity to the surviving dependent children in the latter case would be called for and that in the case of a member who, in his election, had specifically provided coverage for his children, effect should be given to the member's intention.

In our decision 53 Comp. Gen. 470 (1974) with regard to subsection 1448(d), we said:

> * * * it was the express intention of Congress to insure the fact that the spouses of all active duty personnel shall automatically be provided with coverage in the event of the member's death while serving on active duty, without the necessity of having to specifically elect that coverage.

Thus, it is our view that since the level of survivor benefit coverage under subsection 1448(d) is specifically set at the maximum level available under the law, and such payment is automatic, the existence or nonexistence of an election is not determinative of the right of an eligible survivor to receive an annuity under this subsection.

It is to be observed that specific reference is made in subsection 1448(d) to coverage for a surviving spouse of a member who dies while serving on active duty, however, no mention is made of coverage for a "child" or "children" similarly situated. In this regard, page 14 of Senate Report No. 92–1089 contains a list of those who are and are not to be covered under the Plan. Item 2 of the list states:

> Widows of retirement-eligible members who die on active duty after enactment of the bill are covered automatically. * * * Dependent children of retirement-eligible members who die or died on active duty are not covered.

It is therefore our view that in the factual situation described in question 1, where the only basis for coverage under the Plan is by virtue of 10 U.S.C. 1448(d), only the eligible surviving spouse would be entitled to an annuity. Accordingly, question 3 is answered in the negative.

The fourth question presented is:

> Would the answers be the same for a member who was recalled after a break in service after contributing to the plan?

The Committee Action suggests that the provisions of 10 U.S.C. 1452(d), which provide for waiver of payment of costs of coverage when the member is returned to active duty for a period of more than 30 days, may have some bearing on the matter.

Subsection 1448(a) provides that the Plan applies to a person who is married or has a dependent child "when he becomes entitled to retired or retainer pay." Thus, in a situation where a member retires and is in an inactive status having previously elected to participate in the Plan and becomes entitled to retired or retainer pay, the basic coverage under the Plan for the eligible survivors is by virtue of the provisions of 10 U.S.C. 1448(a), with payment to be made in accordance with 10 U.S.C. 1450, which provides in pertinent part:

> (a) * * * a monthly annuity under section 1451 of this title shall be paid to—
> (1) the eligible widow or widower;
> (2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section;

The above-quoted provisions clearly establish the basic minimum annuity rights which exist in the eligible surviving spouse. Further, that upon the spouse's death or loss of eligibility, and on the assumption that the member elected to provide coverage for his children, the then surviving dependent child or children would be entitled to succeed to the annuity elected by the member.

However, since the Survivor Benefit Plan was enacted for the purpose of providing a new and more comprehensive system of survivor protection to dependent families of members and to completely replace the then current survivor annuity programs, the entire scheme of the law must be considered and construed in a manner that would

support that purpose, except where specific congressional constraints are imposed.

Thus, in a situation where a member who is retired after having elected to participate in the Plan has been in receipt of retired pay and is subsequently recalled to active duty, should he die while serving on that duty, it is our view that while the eligible surviving spouse has a basic right to coverage by virtue of 10 U.S.C. 1448(a), since the member died while serving on active duty after becoming entitled to that retired pay, alternative coverage under 10 U.S.C. 1448(d) would be available to that surviving spouse during the period of such eligibility should the elected coverage under subsection (a) be less than that statutorily mandated under subsection (d).

If payment is made under subsection (d) as outlined above, and the member had previously elected to provide coverage for his surviving dependent child or children under 10 U.S.C. 1448(a), should such eligible spouse die or otherwise become ineligible, the surviving dependent child or children may begin to receive the annuity as prescribed in 10 U.S.C. 1450(a)(2), at the rate previously elected by the member, during the remaining period of their dependency as defined in 10 U.S.C. 1447(5). See in this connection decisions of December 6, 1973, 53 Comp. Gen. 420, and January 10, 1974, 53 Comp. Gen. 461.

Your fourth question is answered accordingly.

[B-159511]

Subsistence Allowance—Military Personnel—Increase—Public Law 90-207

Although section 8 of the act of December 16, 1967, Public Law 90-207, 81 Stat. 654, provided for automatic increases in military basic pay based on a percentage applied to "regular compensation" which includes subsistence allowance, neither that law nor any other law specifically or impliedly repealed the provisions of 37 U.S.C. 402(b) which require that basic allowance for subsistence for enlisted members who are on leave, or are otherwise authorized to mess separately, shall be equal to the cost of the ration as determined by the Secretary of Defense, and, adjustments made in such allowance are proper.

In the matter of increasing basic allowance for subsistence, May 13, 1974:

This action is in response to letter dated March 15, 1974, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to the legality of the increases made by the Department of Defense in the basic allowance for subsistence pursuant to 37 U.S. Code 402(b) subsequent to the enactment of section 8 of the act of December 16, 1967, Public Law 90-207, 81 Stat. 654, 37 U.S.C. 203 note. The Assistant Secretary's letter indicates that such question was raised during the March 13, 1974 hearing on the supplemental budget request for fiscal

year 1974 before the Subcommittee on Department of Defense Appropriations of the Committee on Appropriations, House of Representatives.

Section 402(b) of Title 37, U.S. Code, which was derived from section 301 of title III of the Career Compensation Act of 1949 (37 U.S.C. 403 note), Ch. 681, 63 Stat. 802, 812, as amended, provides in part that an enlisted member is entitled to the basis allowance for subsistence, on a daily basis, of one of the following types--

(1) When rations in kind are not available;
(2) When permission to mess separately is granted; and
(3) When assigned to duty under emergency conditions where no messing facilities of the United States are available.

For the allowances authorized by clauses (1) and (3) above, section 402(d) provides statutory amounts of $2.565 a day and not more than $3.42 a day, respectively. No such specific statutory amount is provided for the allowance authorized in clause (2) of section 402(b) or for members on leave. Instead, as the Assistant Secretary's letter states, section 402(b) provides in part as follows:

* * * The allowance for enlisted members who are on leave, or are otherwise authorized to mess separately, shall be equal to the cost of the ration as determined by the Secretary of Defense. * * *

Similar temporary provisions appeared in the Department of Defense appropriation acts for 1951, 1952, and 1953. Section 617 of the Department of Defense Appropriation Act, 1954, ch. 305, 67 Stat. 352, enacted similar language as permanent legislation which, as is indicated above, is now codified in 37 U.S.C. 402(b).

As the Assistant Secretary's letter also points out, the legislative history of those provisions indicates that Congress intended that such basic allowance for subsistence be equal to the cost of the ration, as determined by the Secretary of Defense, whether such cost increases or decreases. See in this regard House of Representatives Report No. 790, 82d Congress, 1st session, to accompany H. Report 5054 (which became the Department of Defense Appropriation Act, 1952) on page 146 of which it states as follows:

The wording of section 620, covering the rate of commutation of rations to enlisted personnel on leave or messing separately, has been clarified so as to leave no doubt that such enlisted personnel should receive an amount equivalent to the cost of the ration. This rate of reimbursement is normally prescribed annually by the Secretary of Defense.

The Assistant Secretary's letter indicates that, accordingly, near the end of each calendar year as a part of the Department of Defense budget review, the Secretary of Defense has conducted a review of the average cost of the ration and, when necessary, adjusted the basic allowance for subsistence at the beginning of the next calendar year. It is stated that the cost basis used is the cost of the ration to the Gov-

ernment, which is substantially below retail cost, and excludes the cost of food preparation and handling. It is also stated that the adjusted basic allowance for subsistence rates form the basis for the Department of Defense budget requests for funds for the purchase of rations and the payment of basic allowance for subsistence and are provided to the Congress.

Under the provisions of 37 U.S.C. 402(b), standing alone, as discussed above, payment of the basic allowance for subsistence to enlisted members on leave or otherwise authorized to mess separately clearly must be in an amount "equal to the cost of the ration as determined by the Secretary of Defense." Also, the annual review of such allowance and any resulting necessary adjustment to maintain equality between the cost of the ration and the amount of the allowance would seem fully justified, in fact required, by the statute.

The question raised at the March 13, 1974 hearing relates to the legality of adjustments in such allowance subsequent to the enactment of section 8 of Public Law 90–207 which provides as follows:

(a) Effective January 1, 1968, and unless otherwise provided by law enacted after the date of enactment of this Act, whenever the General Schedule of compensation for Federal classified employees as contained in section 5332 of title 5, United States Code, is adjusted upwards, there shall immediately be placed into effect a comparable upward adjustment in the monthly basic pay authorized members of the uniformed services by section 203(a) of title 37, United States Code.

(b) Adjustments in the various tables establishing the rates of monthly basic pay for members of the uniformed services as required by the preceding paragraph shall have the force and effect of statute, and such adjustments shall:

(1) provide all personnel of the uniformed services with an overall average increase in regular compensation which equates to that provided General Schedule employees, and

(2) carry the same effective date as that applying to the compensation adjustments provided General Schedule employees.

(c) For the purposes of this section, "regular compensation" means basic pay, quarters and subsistence allowances (either in cash or in kind), and the tax advantage on those allowances.

Since the enactment of section 8, military basic pay has been increased seven times in accordance with its provisions. As required by that statute, such basic pay increases were based on overall average increases in "regular compensation" equal to that provided General Schedule Federal employees with such regular compensation including "subsistence allowances (either in cash or in kind)."

In addition to and separately from the basic pay increases under section 8, subsequent to the enactment of that section the following adjustments have been made under the authority of 37 U.S.C. 402(b) in the basic allowance for subsistence for enlisted members on leave or otherwise authorized to mess separately:

YEAR	BAS	ADJUSTMENT
1968	$1.32	+$.02
1969	1.32	.00
1970	1.39	+.07
1971	1.52	+.13
1972	1.46	−.06
1973	1.65	+.19
1974	2.28	+.63

The question as to the legality of such separate increases in the allowance subsequent to the enactment of section 8 of Public Law 90-207 apparently stems from the fact that increases in basic pay under section 8 are based on a percentage applied to regular military compensation, including subsistence allowances.

Neither Public Law 90–207 nor any other law has specifically repealed 37 U.S.C. 402(b). Accordingly, in order for the specific provisions of section 402(b), relating to equating the subsistence allowance to the cost of the ration, to no longer be in effect, it must be concluded that they have been repealed by implication.

It is a cardinal rule of statutory construction that repeal by implication is not favored. The courts will not adjudge a statute to have been repealed by implication unless a legislative intent to repeal or supersede the statute plainly and clearly appears. The implication must be clear, necessary, irresistable, and free from reasonable doubt. An act is not impliedly repealed because of conflict, inconsistency, or repugnancy between it and a later act unless the conflict, etc., is plain, unavoidable, and irreconcilable, and the two acts cannot be harmonized or both cannot stand, operate, or be given effect at the same time. If it is possible to do so, by any fair and reasonable construction, two seemingly repugnant acts should be harmonized or reconciled, so as to permit both to stand and be operative and effective and thereby avoid a repeal of the earlier act by implication. *See* 44 Comp. Gen. 424, 425 (1965) and 38 *id.* 458 (1958).

While, as is indicated above, the automatic basic pay increase provisions of section 8 of Public Law 90–207 are based on regular compensation which is defined to include the subsistence allowance (either in cash or in kind), there is no clear indication in the statute or its legislative history that it was intended to repeal the specific provisions of 37 U.S.C. 402(b) providing for equality between the subsistence allowance and the cost of the ration. Furthermore, as the Assistant Secretary's letter points out, to conclude that section 8 of Public Law 90–207 was intended to repeal that provision of 37 U.S.C. 402(b) would be inequitable since those members receiving rations in

kind for which the cost had increased would be receiving the benefit of such cost increase while those for whom rations in kind were not available would not receive the increase.

Accordingly, it is our view that section 8 of Public Law 90–207 did not repeal the provisions of 37 U.S.C. 402(b) requiring that the basic allowance for subsistence for enlisted members who are on leave, or are otherwise authorized to mess separately, shall be equal to the cost of the ration as determined by the Secretary of Defense. Therefore, we believe that the provisions remain in effect and that the adjustments made by the Department of Defense in the subsistence allowance since the enactment of Public Law 90–207 appear to be legally proper. The Assistant Secretary's question is answered accordingly.

[B–178931]

Pay—Retired—Survivor Benefit Plan—Survivor Benefit Plan *v.* Civil Service Retirement Survivorship Plan

Under provisions of 10 U.S.C. 1450(d), Survivor Benefit Plan annuity elected by retiree who waives military retired pay for use of military credits to increase his Civil Service retirement benefits, is not payable unless retiree elects not to participate in Civil Service retirement survivorship plan; nor is it required under provisions of 10 U.S.C. 1452(e) that deposits be made under Survivor Benefit Plan in such circumstances unless retiree elects not to participate in Civil Service retirement survivorship plan.

In the matter of eligibility to receive both military and Civil Service survivor benefits, May 13, 1974:

This action is in response to letter dated June 13, 1973, from the Acting Assistant Secretary of Defense (Comptroller) requesting an advance decision concerning the amounts of survivor coverage under the new Survivor Benefit Plan, authorized by Public Law 92–425, approved September 21, 1972, 86 Stat. 706, 10 U.S. Code 1447–1455, in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 479.

The question presented in the Committee Action is as follows:

Is a retiree who waives retired pay for use of military credits to increase his Civil Service retirement benefits, eligible for Survivor Benefit coverage in an amount which, when combined with the Survivor coverage elected from his civilian retirement, exceeds the amount of coverage that would otherwise be applicable had he elected the maximum coverage from his Civil Service retirement?

The discussion contained in the Committee Action indicates that under the provisions of 10 U.S.C. 1450(d) and 10 U.S.C. 1452(e) a Survivor Benefit Plan annuity shall not be payable and the retiree is not required to make deposits of Survivor Benefit Plan coverage elected when he has survivor coverage from his civilian retirement.

The Committee Action states that the Counsel for the Department of Defense Military Pay and Allowance Committee, by memorandum dated January 5, 1973, addressed to the Deputy Assistant Secretary of Defense (Military Personnel Policy), advised that the provisions of the Survivor Benefit Plan referred to above, are applicable only when coverage under the Civil Service plan equals or exceeds those benefits elected under the Survivor Benefit Plan. It is further stated that as a result, a retiree may have coverage under both the civilian and military retirement plans when coverage under the military exceeds coverage under the civilian. It is indicated that support for this position comes from Senate Report No. 92–1089, at page 26. However, it is also indicated that the same page of the Report contains the statement that S. 3905 would not allow a duplication of survivor benefits based on the same years of service.

The discussion in the Committee Action points out that if it is intended that there should not be a duplication of benefits based on the same years of service, then it would seem that where a retiree has waived military retired pay for Civil Service annuity purposes and has elected Survivor Benefit coverage from both retirement systems (with the military plan providing greater coverage than the civilian plan), that the combined coverage from both plans should not exceed the maximum coverage that would be available from the civilian plan. To do otherwise would produce a duplication of benefits based on the same years of service.

Our review of a copy of the memorandum of January 5, 1973, cited in the Committee Action, reveals that the subject of that memorandum was whether Public Law 92–425 and its legislative history provided any basis for stipulating a required amount of survivor coverage under the Civil Service retirement plan when a waiver was in effect. No mention of entitlement to both annuities is contained therein.

Subsection 1450(d) of Title 10, U.S. Code, provides as follows:

(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(i) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title.

Subsection 1452(e) of Title 10, U.S. Code, provides as follows:

(e) When a person who has elected to participate in the Plan waives his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, he shall not be required to make the deposit otherwise required by subsection (d) as long as that waiver is in effect unless, in accordance with section 8339(i) of title 5, he has notified the Civil Service Commission that he does not desire any spouse surviving him to receive an annuity under section 8341(b) of title 5.

Subsection 1450(d) precludes the payment of an annuity under the Survivor Benefit Plan when a retired member has in effect a waiver

of retired pay for the purpose of including his military service in the computation of his Civil Service annuity, unless he specifically notifies the Civil Service Commission that he does not desire a survivor annuity under the Civil Service retirement system. Also, under the provisions of 10 U.S.C. 1452(e) while a retired member has a waiver of retired pay in effect and has not notified the Civil Service Commission that he does not desire coverage under the Civil Service survivor annuity plan, premium deposits are not necessary under the Survivor Benefit Plan. This in effect provides coverage for his survivor under the Civil Service program.

On page 26 of Senate Report No. 92–1089, September 6, 1972, referred to in the Committee Action the following is set forth:

> Military retirees who, after retirement, work in the Federal civil service and subsequently become eligible to retire from the civil service may waive their military retired pay and use their military years of service to increase their civil service benefits. S. 3905 would not allow a duplication of survivor benefits based on the same years of service. However, while the waiver of military retired pay is in effect, the military member would be required to continue contributing to the military survivor benefit plan even though these same years of service are used as the basis for contributions in the civil service survivor benefit plan. This provision in S. 3905 requires the member to contribute to two plans based on the same years of service while prohibiting benefits from flowing from the two plans based on these same years of service.
>
> The committee agrees that duplication of benefits should be precluded; however, it further believes that duplication of contributions should also be precluded. To achieve the objective, the committee recommends a revision to S. 3905. When a military retiree waives his military retired pay to increase civil service retirement benefits and elects to join the civil service retirees survivor benefit plan, he would cease to contribute to the military plan during the time his waiver is in effect. The committee intends that the waiver of contributions be effective only if the member joins the civil service survivor benefit plan at least at the same level of survivor protection as he was carrying under the military plan.

Furthermore, on page 52 of Senate Report No. 92–1089 a definitive statement concerning the legislative intent of 10 U.S.C. 1450(d) is set forth, which is as follows:

> *Subsection (d)* provides that if a member who had elected participation in the Plan becomes a Federal civil service employee and retires from civil service using his military service in computing his civil service retirement annuity, an annuity under the proposed Survivor Benefit Plan shall be payable only if the member does not elect to participate in the civil service retirement-survivorship plan.

The express language of 10 U.S.C. 1450(d) as well as the explanation of that section in Senate Report No. 92–1089 clearly precludes payment of a Survivor Benefit Plan annuity where there is in effect a waiver of retired pay for the purpose of increasing Civil Service retirement benefits unless at the time of civilian retirement the employee elected not to provide an annuity for his spouse in accordance with 5 U.S.C. 8341(b). The question presented is answered accordingly.

[B-178001]

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Deficiencies in Proposals

Rule in 53 Comp. Gen. 593 (1974), requiring that opportunity be given offeror to submit revised proposal before its proposal initially in competitive range can be eliminated from consideration, is modified to allow elimination from competitive range of proposals included because they might have been susceptible to being made acceptable or because there was doubt as to whether they were in competitive range and discussions relating to ambiguities or omissions make clear that proposals should not have been included in competitive range initially. Otherwise proposals initially determined to be within competitive range should not be rejected without providing offerors an opportunity to submit revised proposals.

In the matter of Operations Research, Inc., May 14, 1974:

The Navy has requested reconsideration of our decision 53 Comp. Gen. 593 (1974), in which we concluded that Operations Research, Inc. had been improperly denied an opportunity to submit a revised proposal after it had been found to be in the competitive range. The basis for that conclusion was our holding that once an offeror is determined to be in the competitive range, the offeror must be given an opportunity to submit a revised proposal before it can be eliminated from the competitive range. The Navy urges that we clarify and revise this holding in view of Armed Services Procurement Regulation (ASPR) 3-805 as revised by Defense Procurement Circular (DPC) #110.

The new ASPR 3-805.2(a) provides that:

> * * * When there is doubt as to whether a proposal is within the competitive range, that doubt shall be resolved by including it. The initial number of proposals considered as being within the competitive range may be reduced when, as a result of the written or oral discussions, any such proposal has been determined to no longer have a reasonable chance of being selected for award.

Although the procurement involved in this case occurred prior to the effective date of DPC #110, the Navy argues that our holding cannot be applied prospectively without coming into conflict with the revised ASPR 3-805.2(a), which does not explicitly require submission of a revised proposal as a condition precedent to eliminating an offeror from the competitive range.

We understand that ASPR 3-805.2(a) was promulgated partially in response to our decision reported at 52 Comp. Gen. 198 (1972), in which we held that a contracting agency should not be required to hold discussions with an offeror once it is determined that the offeror's proposal, initially within the competitive range, is no longer within the acceptable range. However, as we pointed out in our prior decision in this case, it was the examination of the protester's *revised proposal* which revealed serious deficiencies and which led the contracting agency to view the proposal as no longer in the competitive range. We did not hold then, nor do we believe now, that contracting officials in

general should be free to reject proposals once considered acceptable without providing the offeror an opportunity to submit revised proposals.

However, in view of DPC #110, we agree with the Navy that under certain circumstances it would not be inappropriate for contracting officers to eliminate proposals from the competitive range without the benefit of submission of revised proposals. We are in favor of the broad approach expressed in DPC #110, which calls for the resolution of doubts in favor of allowing proposals into the competitive range, because it tends to maximize competition. Under this approach, we understand that proposals may be considered to be in the competitive range because they may be susceptible to being made acceptable or because doubts as to whether the proposals should be in the competitive range are to be resolved in favor of the proposals. However, in the course of written or oral discussions, it may well become clear that the proposals do not belong in the competitive range. As the Navy points out, "the discussion process itself is frequently far more revealing than a bare reading of technical proposals, and can demonstrate that a determination to include a given proposal within the competitive range was erroneous * * *." Accordingly, in those situations where discussions relating to an ambiguity or omission make clear that a proposal should not have been in the competitive range initially, we believe it would be proper to drop the proposal from the competitive range without allowing the submission of a revised proposal. In all such cases, the reasons for the revised determination should be made clear to the offerors whose proposals are eliminated. To the extent of the foregoing, our decision at 53 Comp. Gen. 593 (1974) is modified.

However, we remain of the view that in general a proposal initially included in the competitive range should not be rejected without giving the offeror an opportunity to submit a revised or best and final proposal to serve as the basis for award or establishing a new competitive range.

[B–179686]

Foreign Service—Travel Expenses—Hotel Expenses—United States

Hotel expenses incurred in the U.S. incident to a move to a post of assignment abroad cannot be reimbursed under the transfer allowance authority of 5 U.S.C. 5924(2). While the Congressional intent to extend the transfer allowance to cover temporary lodging expenses incurred incident to an employee's establishing himself at a post in the U.S. between foreign assignments is clear, we find no such intent with regard to temporary lodging expenses incurred in the U.S. incident to assignments abroad.

In the matter of reimbursement of hotel expenses, May 14, 1974:

The Department of State has requested our opinion as to whether an allowance for hotel expenses incurred in the United States by an employee prior to departure to a post of assignment overseas may be paid under the authority of 5 U.S. Code 5924(2).

Section 5924(2) states:

> The following cost-of-living allowances may be granted, when applicable, to an employee in a foreign area:
>
> * * * * * * *
>
> (2) A transfer allowance for extraordinary, necessary, and reasonable expenses, not otherwise compensated for, incurred by an employee incident to establishing himself at a post of assignment in—
>
> (A) a foreign area, or
>
> (B) the United States between assignments to post in foreign areas.

With respect to the location at which these expenses can be incurred, the Department has suggested that the above language may be interpreted in either of two ways. The phrase "in foreign area" in subsection (2)(A) may be viewed as modifying the language "incurred by an employee incident to establishing himself at a post of assignment in," as a whole thereby permitting reimbursement regardless of where the expenses are reimbursable if "incurred * * * in a foreign area" or incident to establishing himself at a *post* in a foreign area." On the other hand, the phrase in question may be read as modifying either the word "incurred" or the word "employee." Under this interpretation, expenses are reimbursable if "incurred * * * in a foreign area" or by an "employee * * * in a foreign area" and, therefore, hotel expenses incurred in the United States would not qualify.

The Department contends that the former interpretation is the correct one and that our decision, 29 Comp. Gen. 461 (1950), supports their view. The Department cites our decision as holding that section 901(2)(ii) of the Foreign Service Act of 1946, the language of which was similar to the present section 5924(2), authorized payment of a transfer allowance to a new employee for expenses incurred because of the unavailability of steamship accommodations to Manila. The Department further states:

> * * * The facts of the case are not set out fully in the opinion but it appears that the employee was reimbursed for expenses incurred in the United States prior to his departure for Manila.

Our decision at 29 Comp. Gen. 461 does not stand for nor does it support this proposition. This decision involved a newly appointed employee who was transferred from Brooklyn, New York, to Manila, P.I. His travel was to have begun on or about October 18, 1948, but because of the unavailability of steamship accommodations he did not commence traveling until December 20, 1948, arriving in Manila on January 10, 1949. The delay was important not because it may have

resulted in the employee's having incurred expenses in the United States, but because as a result the employee arrived in the foreign area after January 2, 1949, the effective date of the Standardized Government Civilian Allowance Regulations (Foreign Areas). In that decision, our opinion was requested in regard to two questions: (1) whether the employee's claim for a transfer allowance must be disallowed on the ground that he was a new appointee, as distinguished from a transferee; and (2) whether an employee whose travel was begun prior to the effective date of the regulations was eligible for the transfer allowance. Our decision held that the newly appointed employee was entitled to receive a transfer allowance incident to his initial assignment abroad to the same extent as an employee transferred from one post to another and that he was eligible for the transfer allowance if the regulations were in effect at the foreign duty station at the time of his arrival.

Although that decision does not support the proposition that certain expenses incurred in the United States are reimbursable under section 5924(2), based on the legislative history of this section it is our view that Congress did not restrict payment of the transfer allowance based on the location at which expenses are incurred. It is our further view, however, that Congress intended this allowance to cover only certain types of expenses and that the cost of hotel accommodations was not one of the expenses intended to be covered.

At page 6 of S. Report 1647 on H.R. 7758, 86th Cong., 2d Sess., (1960), examples of the types of expenses covered by the transfer allowance as "extraordinary, necessary, and reasonable" are enumerated, as follows:

> The transfer allowance is intended to reimburse partially an employee for the additional expense incurred because of the necessity for *changing types of clothing, providing insurance on shipments of household goods, and replacing furniture and household equipment* as necessary because of transfer to a new environment. [Italic supplied.]

At page 13 of the report of House Committee on Post Office and Civil Service, on H.R. 7758, H. Report No. 902, 86th Cong., 1st Sess., (1959), further mention is made of the types of expenses included as part of the transfer allowance:

> This transfer allowance will cover, for example, initial costs and unusual out-of-pocket expenses in connection with transfer to a post of assignment in a foreign area where, for example, *a different type of clothing* is required or *electrical equipment of a different voltage* is necessary. [Italic supplied.]

As explained in the Senate and House Reports quoted above Congress intended that an employee be partially reimbursed for additional expenses incurred, for example, because of the necessity for a different type of clothing in his new post of assignment. It clearly makes no difference whether such clothing is purchased in the United States

or at the new post of assignment. For this reason it is our opinion that the location at which the expense is incurred was not restricted by Congress and, therefore, we agree with the Department of State that the first interpretation as stated above is the correct one. This, however, is not dispositive of the more important issue of whether hotel expenses incurred in the United States by an employee prior to departure to a post of assignment overseas are included in the types of expenses that section 5924(2) refers to as "extraordinary, necessary and reasonable."

The Department is of the opinion that hotel expenses were intended to be included under section 5924(2). That position is summarized as follows in the submission:

> An employee who returns home to the United States is elgible for a "home service transfer allowance" (lodging portion) if he is forced to incur hotel bills incident to his return. A new employee or an employee returning overseas after an assignment in the United States may incur similar expenses in the United States prior to his department for his post overseas. There is no reason to discriminate against the employee in the second situation.
>
> According to the Comptroller General's 1950 opinion, the Department could reimburse such an employee. The intervening statutory amendments have not been directed against the matter considered by the 1950 opinion and ordinarily, it is assumed that the legislators approve of decisions regarding a particular law when they reenact the law without indication of any disapproval. * * *

The Department's argument is based in part of its interpretation of our 1950 decision, 29 Comp. Gen. 461, which it considers implicitly upheld payment of a new employe's hotel expenses under language similar to that of the present section 5924(2). Our 1950 decision, as discussed above, did not so hold and, thus, does not support the Department' position.

We are aware of Congress' general intent as stated in section 101 of the Overseas Differentials and Allowances Act, Public Law 86-707, September 6, 1960, 74 Stat. 792, to improve administration of Government overseas activities by providing a means for more efficiently compensating Government employees for the extra costs and hardships incident to their assignments overseas. However, we find no specific intent on the part of the legislators that the transfer allowance authorized under section 5924(2) should reimburse the cost of hotel expenses incurred in the United States by a new employee or an employee returning overseas after an assignment in the United States.

The Department of State cites the apparent inequity of denying an employee reimbursement for hotel expenses incurred in the United States prior to his departure for an assignment abroad in view of the fact that hotel expenses incurred in the United States are reimbursable as part of the home service transfer allowance payable incident to an employee's establishing himself at a post of assignment in the United States between assignments to posts in foreign areas. Em-

ployees in the latter category are entitled to a home service transfer allowance by virtue of the language of 5 U.S.C. 5924(2)(B), quoted above. As defined at Chapter 250 of the Standardized Regulations (Government Civilians, Foreign Areas) the home service transfer allowance does provide for reimbursement of temporary lodging expenses incurred in the United States. Such expenses are reimbursable in that case, however, because of the very specific intent of Congress in enacting section 10(a) of the Foreign Service Act Amendments of 1955, Public Law 22–84, 69 Stat. 24, from which the present authority at 5 U.S.C. 5924(2)(B) is derived. The purpose of that enactment was to extend the transfer allowance to cover temporary lodging expenses.

At page 14 of House Report No. 229, 84th Cong., 1st Sess. (1955), the purpose of section 10(a) of the Foreign Service Act Amendments of 1955 is explained as follows:

(a) *Home service transfer allowance*

This subsection amends the Foreign Service Act of 1946 to give specific authorization for a home service transfer allowance to an employee assigned to a post in the United States between assignments to posts abroad. Such an allowance is already being provided to employees transferred to a new post in a foreign country.

In the Foreign Service, a transfer back to the United States is just another in a series of transfers. The unusual expenses incident thereto may be as great or greater than similar costs incurred in transferring between posts abroad. In the case of employees of long years of service, a transfer to the United States adds that much more to the total out-of-pocket expenditure incident to the mobile nature of their employment. *The home service transfer allowance contemplated would be a combination of two payments: (1) that comparable to the temporary lodging allowance at overseas posts, i.e., reimbursement for hotel room expenses for a short period while the employee is looking for permanent residence quarters, and (2) a lump-sum payment to help offset such inevitable expenses connected with transfers as those covered by the existing transfer allowance at present paid only on assignment to certain posts abroad,* namely, expenses for clothing to meet the different climatic conditions at the new post, for special types of furniture and household equipment, for insurance on or repair of effects damaged in shipment, etc.

It is intended that this allowance be paid to officers and employees of the Service who are assigned to duty in the continental United States and who may be normally expected to return to duty abroad. It is planned to pay this allowance at the time of assignment to the United States. It must obviously be paid without requiring proof of return abroad, since that would defeat the purpose of this allowance. It is not the intent of this section that such payments be repaid by the officer or employee or by his survivors in the event his return to service abroad is made impossible by death, disability, or other unforeseen circumstances preventing such return. However, if the officer or employee refuses to return abroad for personal reasons unacceptable to the Secretary, he will be required to make reimbursement. [Italic supplied.]

The above language makes it clear that the extension of the transfer allowance to cover temporary lodging expenses was strictly confined to the case of employees establishing themselves at posts of assignment in the United States between assignments to posts in foreign areas. We regard as particularly significant the statement therein as to the types of expenses covered by the then existing transfer allowance for it is that allowance with which we are here concerned.

For the reasons discussed above, hotel or other temporary lodging expenses incurred in the United States by an employee incident to a transfer abroad may not be reimbursed as part of the transfer allowance authorized under 5 U.S.C. 5924(2). Temporary lodging expenses payable to employees incident to assignments abroad are those prescribed under the authority of 5 U.S.C. 5923(1).

[B–176289]

Statutes of Limitation—Claims—Transportation—Set-Off Reclaims

The right to recover an erroneous payment made to a carrier for a transportation service claimed to have been performed for the United States, but which in fact had not been performed for the United States, is not subject to the time limitation in 49 U.S.C. 66; after review and reconsideration, prior decision affirmed.

In the matter of Trans Country Van Lines, Inc., May 15, 1974:

Trans Country Van Lines, Inc., by letter dated April 2, 1974, file 7301–R–21–474/873, asks for review and reconsideration of decision B–176289, dated October 23, 1973.

The decision allowed the carrier's claim for $674.55, the amount that had been previously deducted from carrier revenue to recover an alleged overcharge, but denied the carrier's claim for $1,743, an amount that had been deducted from carrier revenue to recover an erroneous payment made by the Army Finance Center in connection with Government bill of lading (GBL) D–0886089. Trans Country's contention was and is that the Government's right to make the second deduction was time barred because the deduction was made after the expiration of the 3–year period of limitation provided in 49 U.S. Code 66. The facts in the case are set forth below.

On July 7, 1967, the General Electric Company tendered a shipment of electronic equipment to Trans Country for transportation from Syracuse, New York, to Eglin Air Force Base, Florida, under a commercial bill of lading. The charges for the shipment, in the amount of $1,743, based on the applicable commercial rate, were paid to Trans Country by the General Electric Company by check dated July 27, 1967.

When the shipment reached Eglin Air Force Base, the base transportation office issued GBL D–0886089 under the mistaken impression that the commercial bill of lading was to be converted to a Government bill of lading at destination. Using this GBL as support, Trans Country submitted a bill for $1,743 to the Army Finance Center and the bill was paid April 4, 1968.

When the bill was audited here, a notice of overcharge in the amount of $674.55 was issued to Trans Country, based on the difference between

the commercial rate and a Section 22 quotation rate applicable to Government shipments. Upon the carrier's failure to refund, the amount of $674.55 was deducted from revenue due Trans Country for other services. Thereafter it was learned that the General Electric Company had paid the charges for the shipment for its own account, that the Government was not liable for the transportation charges, and that GBL D-0886089 should not have been issued to cover the shipment. A second deduction, in the amount of $1,743, was then made to recover the original payment made by the Army Finance Center.

Trans Country filed claims for recovery of both deductions and the decision of October 23, 1973, allowed recovery of the first deduction, in the amount of $674.55, but denied recovery of the second deduction, in the amount of $1,743.

As indicated, Trans Country asks for review and reconsideration on the sole ground that the second deduction was made more than three years after the original payment and was therefore barred by the 3-year period of limitation contained in 49 U.S.C. 66. The carrier's contention is without merit because the deduction in question was not made pursuant to the provisions of 49 U.S.C. 66. That statute provides that payment for transportation of property for or on behalf of the United States by any carrier or forwarder shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overcharge by any carrier or forwarder from any amount subsequently found to be due such carrier or forwarder provided the deduction is made within three years from the time of payment of bills.

In the subject case, no transportation for or on behalf of the United States was performed by Trans Country. The service was performed for the General Electric Company and that company paid the charges. The payment that was made to Trans Country by the Army Finance Center was made pursuant to a voucher submitted by the carrier bearing a certification that the account stated was correct and just, that services had been rendered as indicated, and that payment had not been received. In fact, the services had been rendered for the General Electric Company and payment had been received from that company long before the voucher was presented to the Army Finance Center for payment.

In these circumstances, the deduction made to recover the erroneous payment was not a deduction for recovery of an overcharge within the meaning of 49 U.S.C. 66, and consequently was not subject to the time limitation contained therein. The right to recover the erroneous payment arose because the carrier was paid for a service that it did not

perform and the deduction was made pursuant to the common-law right of setoff approved in *United States* v. *Munsey Trust Company*, 332 U.S. 234 (1947). We are not aware of any statutory time limitation that would bar recovery of the illegal payment made in this case pursuant to mistake of fact.

For the reasons stated, after review and reconsideration, the prior decision is affirmed.

[B-178563]

Transportation—Bills of Lading—Description—Presumption of Correctness

Presumption of correctness of bill of lading description of articles is rebutted by administrative report supported by carrier's descriptive inventory lists.

Transportation—Rates—Released Value Quotations—Acceptance

Lower rates in carrier's section 22 rate tender covering office equipment apply, and valuation charges provided in governing tender are not assessable where shipments moved on commercial bills of lading marked for conversion to Government bills of lading (GBL) since shipments are deemed released to value not exceeding 60 cents per pound per article under terms of governing tender and Condition 5 of GBL selects lower rates in absence of tender requirement for declaration of value.

Transportation—Rates—Exclusive Use of Vehicle—Constructive Weight Basis

Constructive weight of vehicles used is proper basis for charges under carrier's tender when vehicles are fully loaded, even though special service is not ordered. 53 Comp. Gen. 603 (1974), modified in part.

In the matter of Trans Country Van Lines, Inc., May 15, 1974:

By letter of March 12, 1974, Trans Country Van Lines, Inc., requests reconsideration of our decision of February 15, 1974, 53 Comp. Gen. 603, in which we held in part that under the second paragraph of item #1 of its special rate Tender I.C.C. No. 50, the carrier is not entitled to charges based on constructive weight of the cubic capacity of the vehicles used to transport several Government shipments from Cincinnati, Ohio, to Avon, Kentucky, even though the commercial bills of lading (CBL) indicated that special services were requested, because an administrative report advised that such services were in fact not ordered.

Correctness of the administrative report is questioned, but, according to the carrier, even if the report constitutes competent evidence to establish that special services were not ordered, other statements therein establish that the vehicles were loaded to full visible capacity, and as a matter of law, under the third paragraph of item #1 of Tender I.C.C. No. 50 charges based on constructive weight are proper in view of our decision of February 27, 1974, 53 Comp. Gen. 628.

Supplemental bills are presented on alternative theories (1) that the higher rates and valuation charges contained in Government Rate Tender, I.C.C. 1–V (GRT) apply; and (2) administrative reports, stating that the articles moved were office machines and equipment, rather than machines NOI, as annotated on the Government bills of lading (GBL), are not correct. This latter theory concludes that since Trans Country's Tender I.C.C. No. 50 does not cover machines, NOI, the higher rates of the GRT apply. In connection with the released rates theory Trans Country asserts that Tender I.C.C. No. 50 is limited in application to shipments released in value not exceeding 60 cents per pound per article, and that the shipments involved here are deemed released to a value of $1.25 per pound under paragraph (k) of the GRT because the spaces on the CBLs for insertion of a lower released valuation were not filled in. The carrier concludes that the rates and the valuation charges in the GRT apply.

The fact that the vehicles were fully loaded is undisputed. The representations on the CBLs are corroborated by the administrative reports. In view of the third paragraph of item #1 of Tender I.C.C. No. 50, which provisions were not proffered in our review of the settlements originally, the shipments are covered by our decision, 53 Comp. Gen. 628, as suggested by the carrier. Our decision 53 Comp. Gen. 603 is modified in part to hold that the carrier is entitled to charges based on constructive weight under the provisions of the third paragraph of item #1 where vehicles are fully loaded, even though special service is not ordered, as would be required otherwise under the second paragraph of that item.

With respect to the contention that rates in the GRT apply based on the commodity description, machines, NOI, appearing on the GBLs, it is noted that the presumption of correctness of a bill of lading description is not conclusive. The important fact is what actually moved—not what was billed. B–163956, August 15, 1968, and see *Buch Express, Inc.* v. *United States*, 132 Ct. Cl. 772 (1955).

Administrative reports received through the Commander, Eastern Area Military Traffic Management and Terminal Service (MTMTS), contained copies of Trans Country's or its subcontractor's descriptive inventory lists showing that the articles moved consisted of office furniture, supplies and office machines. These articles are covered by Tender I.C.C. No. 50. We feel that the Commander, MTMTS, has the necessary authority under Defense Supply Agency Regulations (DSAR) No. 4500.3, effective March 15, 1969, to make such a determination of fact for the Government. Paragraph 101004, page 101–1, states that the Commander, MTMTS is responsible for all functions incident to the procurement of freight transportation services from

commercial for-hire carriers by highway. These regulations have the force of law. 51 Comp. Gen. 208, 210 (1971). In the absence of evidence to the contrary, we cannot question the authority of the Commander, MTMTS, or his statements concerning the true description of the articles transported. *See* 41 Comp. Gen. 47, 54 (1961), and 37 *id.* 568, 570 (1958). We conclude that since the articles consisted of office related articles, the GRT does not apply. The soundness of this conclusion is fortified by the fact that, as stated above, part of the evidence tending to establish the identity of the articles was prepared by the carrier or its subcontractor.

The alternative theory for application of the GRT is based on the dual premises that Tender I.C.C. No. 50 does not apply unless a shipment is released to a valuation not exceeding 60 cents, and under paragraph (k) of Application of GRT I.C.C. 1–V the shipments were deemed released to a valuation exceeding 60 cents per pound per article, because the shipper failed to make insertions on the CBLs specifically limiting released valuation to 60 cents per pound per article. The relevant provisions of the tenders and the carrier's bill of lading underlying this theory are of importance. Tender I.C.C. No. 50 provides as follows:

Rates are in cents per 100 pounds in shipment (sic) when released to a value not exceeding 60 cents per pound per article * * *

Paragraph (k) of the GRT states in part:

DECLARED OR RELEASED VALUE ON SHIPMENTS MOVING ON COMMERCIAL BILLS OF LADING AS PROVIDED FOR IN PARAGRAPH (g) OF THIS TENDER

(A) On shipments moving on Commercial Bills of Lading containing certification as provided for in Paragraph (g) of this Tender, the released value must be entered on the Commercial Bill of Lading in the following form and may be completed only by the person signing the Commercial Bill of Lading.

The shipment will move subject to the rules and conditions of the carrier's tariff. Shipper hereby releases the entire shipment to a value not exceeding _____

(to be completed by the person signing below)

NOTICE: THE SHIPPER SIGNING THIS CONTRACT MUST INSERT IN THE SPACE ABOVE, IN HIS OWN HANDWRITING, EITHER HIS DECLARATION OF THE ACTUAL VALUE OF THE SHIPMENT, OR THE WORDS "60 cents per pound per article." OTHERWISE, THE SHIPMENT WILL BE DEEMED RELEASED TO A MAXIMUM VALUE EQUAL TO $1.25 TIMES THE WEIGHT OF THE SHIPMENT IN POUNDS.

_____ (Shipper)

_____ (Date)

(B) If the shipper fails to make the entry required in subsection (A) of this item, the shipment will be deemed released to an amount equal to $1.25 times the net weight of the shipment (in pounds).

The form and notice, as prescribed in paragraph (k), is printed on the carrier's bills of lading, and in most instances the 60 cents per pound valuation was not inserted in the appropriate spaces.

We do not believe that the language quoted from Tender I.C.C. No. 50 relates to applicability of the tender. We believe that since that tender is governed by the GRT for accessorial charges, it seems that when a shipment is released to a valuation exceeding 60 cents per pound, the rates in Tender I.C.C. No. 50 would apply, but in addition the valuation charge provided in item 220 of the GRT would be assessed. In any event, our conclusion that the GRT is not applicable is based on the premise that the shipments were released to a valuation not exceeding 60 cents per pound per article.

A critical flaw in the carrier's reasoning that paragraph (k) of the GRT applies was a result of the erroneous assumption that these shipments moved under the terms of its commercial bills of lading. The carrier agrees that the bills of lading were marked for conversion to GBLs, and since accomplished GBLs were presented in support of its bills for transportation charges, it cannnot deny that the conversion occurred. Since we are of the opinion that the shipments moved under GBLs, they are governed by the provisions of paragraph (j), rather than paragraph (k) of the GRT. Paragraph (j) provides that a shipment

> * * * will be deemed released to a value of 60 cents per pound per article, unless otherwise specifically annotated on the Government Bill of Lading.

In other words when a shipment moves on a GBL there is no requirement that a shipper declare the value of the shipment; it is deemed released at the 60-cent valuation. Paragraph (k) does not govern these shipments because it applies only when a shipment moves on a commercial bill of lading containing the certificate required by paragraph (g) and the involved commercial bills did not bear the required certification.

When a shipment moves on a GBL the terms of the commercial bill of lading do not form a part of the contract of carriage except to the extent that the terms are incorporated by reference. The terms of the commercial bill of lading are incorporated by reference in Condition 2 on the reverse of the Government bill of lading only to the extent not otherwise specifically provided or stated. Provision for released valuation is otherwise expressed in Condition 5, which states:

> 5. This shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face hereof.

The lowest rate appears to be available at the 60-cent per pound valuation. Unlike the situation where a notation of released value is required by a tender as a condition to acceptance, there is no such requirement

here. *Cf.* 53 Comp. Gen. 747 (1974) and 38 Comp. Gen. 768 (1959), overruling 38 Comp. Gen. 257 (1958).

We conclude then that there are two bases for applicability of the lower rates in Tender I.C.C. No. 50: (1) the terms of the GRT, deeming the value to be released not exceeding 60 cents per pound, when shipments move on GBLs, and (2) by operation of Condition 5 of the GBL where the tender does not require a declaration of released value as a condition of applicability.

It follows from the determination that these shipments were released to a value not exceeding 60 cents per pound that the additional valuation charges in item 220 of the GRT are not for application.

Accordingly, the carrier's bills will be reviewed consistent with this decision and settlements making appropriate allowances will be issued.

[B–130831]

Timber Sales—Contracts—Surveys—Cost Recovery

Proposal that Forest Service timber sale contracts require timber sale purchasers to make property line surveys to establish boundaries of sale, with cost thereof to be recovered through reduced sales prices, which costs heretofore have been paid from appropriated funds, would, in effect, improperly augment appropriated funds by use of timber sale receipts and would be contrary to intent of 16 U.S.C. 500 which provides for payment to States of 25 percent of national forest receipts derived from sales of timber within State boundaries.

In the matter of the establishment of sale boundaries by purchaser of National Forest timber, May 16, 1974:

This decision to the Secretary of Agriculture results from a request by the Assistant Secretary for Conservation, Research and Education, Department of Agriculture, for our decision as to "whether or not the Forest Service can require timber sale purchasers to make * * * property line surveys"—between corners established by the Department—in order to establish the boundaries of the particular sale. The proposed requirement which would be set forth as a provision in the timber sale contract with the cost to the timber purchaser being offset by an allowance in the timber appraisal is described in the following manner:

> Any survey requirement imposed upon timber purchasers would be limited to locating and marking property lines between established corners. As part of timber sale preparation, the Forest Service would make a search to determine the condition of corners in the sale area needed to establish sale boundaries. Existing corners would be remonumented as necessary. Missing corners would have to be re-established before any property lines controlled by those corners were eligible for timber purchaser participation.
>
> The corner search would provide the basis for making an accurate estimate of the cost of surveying and marking work necessary in connection with property boundary location on that particular timber sale. Through use of photogrammetry, location of the tentative boundary could be located on photographs, and on the ground accurately enough to proceed with cruising, other sale prepara-

tion work, and advertisement of the sale. After the sale was sold, the timber purchaser would be required to survey and mark the needed lines. The surveying would have to be done by licensed cadastral surveyors. Inspection and acceptance of the surveying and marking of the lines would be by the Forest Service. Upon completion of the survey the sale volume would be adjusted accordingly.

The Assistant Secretary explains the need for requiring timber purchasers to conduct these property line surveys as follows:

> Lack of properly marked landlines is impeding the orderly harvest and management of timber.
>
> * * * * * * *
>
> Appropriations for landline location have not been sufficient to keep corner search, line survey and marking on pace with resource activities.
>
> Diversion of other resource funds to do the landline location job offers only a partial answer. Timber funds used for this work reduce the amount available for preparation of additional timber sales. To do a quality job on all sales other means must be explored. We need to consider whether the timber sale purchaser can assist our limited manpower and funds to accomplish the objective of offering more timber.

In further support of his proposal the Assistant Secretary analogized the requirement that timber purchasers survey and mark the property lines needed to establish the boundaries of a particular sale to the requirement that timber purchasers construct those roads necessary to serve the particular timber sale. The Assistant Secretary noted that prior to the passage of Public Law 88–657 approved October 13, 1964, 78 Stat. 1089, 16 U.S. Code 532–536, specifically authorizing such a requirement as to construction of necessary roads, this was long recognized as being a proper requirement in a timber sales contract. In this connection two former decisions of our Office were cited, B–65972, May 19, 1947, and B–130831, February 7, 1958.

The basic statutory authority for the sale of national forest timber is contained in the act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. 476, which provides in pertinent part as follows:

> For the purpose of preserving the living and growing timber and promoting the younger growth on national forests, the Secretary of Agriculture, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such national forests as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe. * * * Payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, * * * and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Secretary of Agriculture, in a separate account, and shall be covered into the Treasury. * * *

While we did not question road construction necessary for timber purchasers to get timber out, each of the decisions referred to by the Assistant Secretary concerned the construction of access roads to standards higher than those necessary to serve the particular timber sale. We concluded that the additional cost of constructing roads to higher standards could not be financed through a reduction in timber sale receipts.

In any event while it is true that statutory authority was not provided for road construction by timber purchasers until enactment of Public Law 88–657, such funding practice had been recognized by the Congress and such matter apparently had been taken into consideration in determining the annual appropriations needed to administer the national forests. However, with regard to surveys needed to determine timber sale boundaries, it appears that such surveys heretofore have been financed solely from appropriations made therefor. Consequently, to now finance such costs through reductions in the price of the timber sale would improperly augment such appropriations and would, in effect, circumvent the requirement of 16 U.S.C. 476 that payments for the timber be deposited into the Treasury.

Furthermore, although Public Law 88–657 authorized construction of maximum economy roads that could be used for purposes other than the initial timber sale, such additional costs were to be borne from appropriated funds in that it specifically provides that—"* * * where roads of a higher standard than that needed in the harvesting and removal of the timber and other products covered by the particular sale are to be constructed, the purchaser of the national forest timber and other products shall not be required to bear that part of the costs necessary to meet such higher standard and the Secretary is authorized to make such arrangements to this end as may be appropriate." See 16 U.S.C. 535.

The purpose of the above language is explained on page 6 of House Report No. 1920, 88th Congress, as follows:

> There is a proviso in the section that if a road is to be built to a standard higher than that needed for removal of timber or other products from a particular sale, that neither the timber nor other products shall bear any of the costs attributable to the higher standard.
>
> * * * * * * *
>
> [It] also makes it clear that such requirements will not have the effect of reducing the 25 percent of national forest receipts paid annually to the States to be expended for roads and schools for the benefit of the counties in which the national forests are located.

The requirement that a portion of sales receipts be paid to the States, referred to above, is contained in the act of May 23, 1908, 35 Stat. 260, as amended, 16 U.S.C. 500, which provides in pertinent part that

> Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forests is situated * * *.

Consequently, and in addition to the objection previously stated, the language of 16 U.S.C. 500, as well as the clearly expressed intent to preserve maximum monetary return to the States in accordance with

the provisions of that section further indicate that the proposed contract requirement would be improper.

Accordingly, we must conclude that under existing law there exists no authority for financing the cost of property line surveys—between established corners—needed to establish the boundaries of timber sales through a reduction in the appraised value of the timber.

[B–171934]

Unemployment—Compensation—Disaster Victims—Disaster Unemployment Assistance *v.* Unemployment Compensation

Department of Labor's interpretation of section 240 of Disaster Relief Act of 1970 to effect that it authorizes benefits to eligible disaster victims covered under State regular unemployment compensation program for period in addition to State program cannot be supported, since the paramount purpose of the section was to provide the equivalent of State unemployment compensation benefits to victims who were not eligible for State unemployment compensation.

In the matter of Disaster Unemployment Assistance Program, May 16, 1974:

This decision to the Secretary of Labor results from our current survey of State disaster assistance activities under the Disaster Relief Act of 1970, 42 U.S. Code 4401. Incident to the survey a question arose as to whether the Philadelphia Regional Office Manpower Administration, Department of Labor, had correctly interpreted section 240 to authorize benefits to certain eligible disaster victims (namely, those covered under the State's regular unemployment insurance program) for a period in addition to the State's unemployment compensation program. This interpretation appeared to be contrary to the legislative intent of section 240 of the act which, in our opinion, is intended to provide coverage over a single benefit period that was equivalent to the benefit period authorized under the State's unemployment compensation program.

Section 240 of the Disaster Relief Act of 1970, 42 U.S.C. 4459, provides that:

> The President is authorized to provide to any individual unemployed as a result of a major disaster, such assistance as he deems appropriate while such individual is unemployed. Such assistance as the President shall provide shall not exceed to [sic] maximum amount and the maximum duration of payment under the unemployment compensation program of the State in which the disaster occurred, and the amount of assistance under this section to any such individual shall be reduced by any amount of unemployment compensation or of private income protection insurance compensation *available* to such individual for such period of unemployment. [Italic supplied.]

The questioned interpretation and application of section 240 of the act as it pertains to benefit eligibility periods is reflected in the following excerpts contained in a letter, dated April 20, 1973, from the Phila-

delphia Regional Office to the Executive Director, Bureau of Employment Security, State of Pennsylvania:

The maximum amount of DUA [Disaster Unemployment Assistance] payable to an individual in his disaster assistance period is his weekly assistance amount multiplied by the maximum number of weeks of regular unemployment compensation for total unemployment payable to any claimant under the applicable State law (see 20 CFR 625.9(b)(1)). Thus, in Pennsylvania where the maximum number of weeks of regular unemployment compensation is 30, a DUA applicant's maximum assistance amount will be 30 times his DUA weekly amount. If, for example, an applicant's weekly amount is $60, his maximum assistance amount will be $1,800 (30 × $60). This represents the maximum amount of DUA payable to the applicant during the disaster assistance period and will be reduced by the amount of each weekly payment of DUA. The number of weekly DUA payments (or UI [Unemployment Insurance] payments) has no effect on this amount.

Under 20 CFR 625.9(c)(1)(i), the amount of UI that a DUA applicant receives or will receive for a week of unemployment on his UI claim must be subtracted from his DUA weekly amount otherwise payable. Because of this provision, there may have been cases in your State where a DUA applicant totally unemployed since the 6-21-72 disaster has not received any DUA payments for up to 30 weeks following such disaster since his UI WBA [weekly benefit amount] equaled or exceeded his DUA weekly amount during such period of time. If otherwise eligible, he conceivably could be paid DUA for weeks following the exhaustion of his UI. His employment, however, for each week of unemployment following the disaster must be determined to be attributable to the disaster as provided for in 20 CFR 625.8.

The specific disaster referred to in the above correspondence was Hurricane Agnes in June 1972. The Pennsylvania Disaster Assistance period was June 18, 1972, to June 17, 1973—or 1 year. Thus, the effect of the interpretation in the above case is to provide eligible recipients with two coverage periods of benefits—one period of 30 weeks under the State unemployment compensation program and one period of up to 22 weeks under the Disaster Relief Act of 1970.

In a letter dated May 18, 1973, the Executive Director requested the Department's advice on the accuracy of their interpretation in three specific examples:

Example No. 1

Basic DUA Claim

Monetary Determination: DUA WBA $54
DUA MBA $1620 (30 × $54)

Claimant received $1500 reduced DUA benefits in 30 weeks, $120 balance remaining.

Pennsylvania processed DUA benefits to qualified claimants for *30 payment weeks* in the disaster assistance period.

Reference to 3 MGU UI PA 1.1 indicates the number of weekly DUA payments (or UI payments) has no effect on the DUA maximum benefit amount. Therefore, in the above example, if the claimant's unemployment continues to be disaster related—he is eligible for a DUA weekly benefit amount of $54 and a DUA balance of $120.

Example No. 2

UI Claim Filed Prior to Disaster

UI WBA Less Than Basic DUA

UI Re-open WBA at the Time of Disaster

Monetary Determination: UI WBA $50
UI MBA $1500 (30 × $50)
DUA Re-open WBA $60
DUA Re-open WBA $1600 (30 × $60)

Claimant received $1000 UI benefits prior to disaster (20 Wks. × $50)

Claimant re-opened his UI claim due to the disaster and received the balance of his UI entitlement—$500. (10 Wks. × $50) and also received 10 weeks of reduced weekly benefits in the amount of $100. ($60 DUA—$50 UI × Wks.)

Claimant would be eligible for the DUA balance remaining ($1700) provided his unemployment remains disaster related.

Example No. 3

UI Claim Filed *After* Disaster

UI Weekly Benefit Amount Greater Than Basic DUA WBA ($54)

Monetary Determination: UI WBA $80
UI MBA $2400

Claimant received 30 weeks of UI benefits $2400. (30×$80) UI Claim MBE [MBA].

If claimant's unemployment continues to be disaster related—he could receive a DUA weekly assistance amount of $80 for each remaining week in the Disaster Assistance period.

In response to this request for advice, the Assistant Regional Manpower Administrator for Unemployment Insurance, Department of Labor, in a letter dated May 25, 1973, to the Executive Director said: "We have examined the examples cited in your letter and are satisfied that your interpretation of the DUA Regulations, in this regard, is accurate."

It appeared to us that the proposed payment plans in Examples 1, 2, and 3 extend DUA payments beyond the maximum duration of the State unemployment compensation program. It also appeared to us that the proposed payment plans in Examples 2 and 3 provide an amount in excess of the maximum amount available under the State unemployment compensation program. Therefore, by letter dated November 21, 1973, we requested the views of the Secretary of Labor as to whether the position of the Philadelphia Regional Field Office was correct and if so the reasons therefor.

The Solicitor of the Department by letter dated December 21, 1973, replied that it is his opinion that the advice given the Pennsylvania agency was correct under the law and regulations.

The Solicitor states that under the regulations in question:

> There is no duplication of State unemployment insurance. The weekly amount of State unemployment compensation is deducted from the weekly amount of disaster unemployment assistance. Thus, unless the average weekly regular unemployment compensation in the State is higher than the amount the individual

would be entitled to under the State law the weekly amount of disaster unemployment assistance is zero for the week in which he receives State unemployment compensation.

It is the Solicitor's opinion that disaster unemployment assistance is to be paid not only to individuals who are not covered by the State unemployment compensation law but to those who are covered when their unemployment is due to the major disaster. He states if this were not so, there would have been no reason to provide for reduction of the amount of disaster unemployment assistance by the amount of State unemployment compensation, and that both individuals covered by State unemployment compensation laws and those not covered by such laws may be entitled to disaster unemployment assistance and the amount of such assistance may not be more than the maximum amount of compensation under the State law.

He expresses the view that an individual who is unemployed as the result of a major disaster is entitled to disaster unemployment assistance for a week if (1) he is not entitled to State unemployment compensation or other payments set forth in 20 CFR 625.9(c) in an amount equal to his weekly amount of disaster unemployment assistance, and (2) is able to work and available for work. According to the Solicitor the fact that the individual may have for some other week received State unemployment compensation is immaterial. He states that the Congress did not place a ceiling on the amount of money an individual "may receive during his benefit period in State unemployment compensation and disaster unemployment assistance combined."

For the reasons indicated below, we cannot agree with the Solicitor's position. It is our opinion that Congress by enacting section 240 primarily intended to provide the equivalent of State unemployment compensation benefits in the event of a major disaster to people who were not eligible for State unemployment compensation.

Section 240 authorizes the President to provide such assistance as he deems appropriate to individuals while they are unemployed as a result of a major disaster. By the express language of this section this assistance may not exceed the "maximum amount and the maximum duration of payment under the unemployment compensation program of the State in which the disaster occurred * * *." The express language of this section further specifies that the amount of this assistance "shall be reduced by any amount of unemployment compensation or of private income protection insurance compensation available * * * for such period of unemployment."

Further, the legislative history of the 1970 act and the predecessor 1969 act (Disaster Relief Act of 1969, Public Law 91-79) makes it clear that each claimant is entitled to only one period of disaster

relief coverage or its equivalent during a given disaster. Section 240 of the Disaster Relief Act of 1970 is identical to section 12 of Public Law 91–79 which is referred to as the Disaster Relief Act of 1969. Section 12 was incorporated into the 1969 act because disaster assistance in the past had not been available for persons, such as migrant workers, who were not entitled to regular unemployment compensation and would therefore not be entitled to compensation in a disaster situation as is shown in the following excerpts from Senate Report No. 91–280:

> Section 7 [Section 12 in act of 1969] recognizes that while public unemployment compensation programs and private income protection programs are available to a large number of workers and businessmen, there is a significant number of migratory workers who, when disaster strikes, lose everything, including the opportunity to work. Senator Alan Cranston of California, in an appearance before the Committee on Public Works, stressed the difficult situation of migratory farm labor in California following the winter rains and floods. This provision attempts to fill the gap in Federal authority by bringing aid to those who are unemployed as a result of a major disaster. Such assistance would be in the form of unemployment compensation in the nature both of a temporary income supplement and, especially, of employment services designed to provide gainful and productive employment as rapidly as possible. This provision is made necessary by the fact that public assistance funds in an area overwhelmed by a major disaster are almost immediately depleted, and neither the local nor the State government is capable of meeting the problem.

The Conference Report H.R. 91–495 on the proposed 1969 act shows that the conferees essentially agreed with the provisions of section 12 but subsequently amended this section to provide that any amount of DUA assistance available to an individual be reduced by any amount of unemployment compensation or private income protection insurance available to him for that period of unemployment. The Conference Report also indicates that the intent of this amendment was to provide a specific maximum amount of disaster assistance for a specific period. Excerpts from the Conference Report dealing with these matters follow:

> Section 7 of the Senate amendment would authorize the President to provide assistance to those individuals unemployed as a result of a major disaster who are not receiving unemployment compensation or private income protection insurance. *Any assistance provided under this section could not exceed the number or amount of payments such an individual would have received if he had been qualified for State unemployment compensation payments.*
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> * * * * * * *
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> Section 12 of the conference substitute is essentially the same as section 7 of the Senate amendment with clarification to insure that the assistance the President is authorized to provide to an individual unemployed as a result of a major disaster is not to exceed the maximum amount and the maximum duration of payments under the State unemployment compensation program and that any amount of assistance to an individual under this section will be reduced by any amount of unemployment compensation or of private income protection insurance available to him for that period of unemployment. [Italic supplied.]

It is clear, therefore, that the legislative purpose of section 12 was to provide assistance in the form of unemployment compensation to per-

sons who were not eligible for UI benefits, such as migrant workers, and to provide that persons already covered by unemployment compensation or private income protection insurance would receive an amount to equal the full share to which they would otherwise be entitled under the section.

Moreover, we find no indication that this purpose was intended to be changed by the 1970 act even though the discussion of the proposed section 240 during the legislative history of that act does not encompass as inclusive an application. *See* Senate Report No. 91-1157 dated August 31, 1970, at pages 21 and 31 as follows:

> Among the provisions of the 1969 Disaster Act which will be made permanent by this bill is Section 240, the special unemployment compensation program for persons who lose their jobs because of a major disaster but who are not eligible to receive unemployment compensation under the laws of their State. This program has proved most effective not only in providing needed financial support to disaster victims but in infusing substantial sums of money into the weakened economies of communities in disaster areas. As of the end of June this year, 36,800 individuals have been assisted by the provisions of the 1969 law. Almost $9,500,000 had been expended under the program from late December 1969, when the first payments were made to victims of Camille, until June 1, 1970. Weekly payments may not exceed in amount or duration those provided under State law for unemployment compensation. Payments vary between $45 and $57 a week. Because of the demonstrated success of this program, which is administered by the Department of Labor, the Committee proposes that it be continued indefinitely.
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> * * * * * * *
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> The President would be authorized to provide assistance to those individuals unemployed as a result of a major disaster who were not receiving unemployment compensation or private income protection insurance. Any assistance provided under this section could not exceed the number of payments such an individual would have received if he had been qualified for State unemployment compensation payments.

See also the Conference Report, House Report No. 91-1752, dated December 15, 1970, at page 31 which reads:

> UNEMPLOYMENT ASSISTANCE
>
> Senate bill
>
> The President would be authorized to provide assistance to those individuals unemployed as a result of a major disaster who were not receiving unemployment compensation or private income protection insurance. Any assistance provided under this section could not exceed the number of payments such an individual would have received if he had been qualified for State unemployment compensation payments.
>
> House amendment
>
> Makes permanent law the comparable provision of the Disaster Relief Act of 1969 on this subject.
>
> Conference substitute
>
> Same as the provisions of the Senate bill.

Thus, in our opinion the Solicitor's position is not supported by the statute involved when considered in conjunction with its legislative history.

As additional justification for the view that Congress placed no ceiling on the amount of combined aid, the Solicitor stated that:

> In our opinion there was good reason for not including such a limitation. An individual who has exhausted his State unemployment compensation and whose unemployment is still the result of a major disaster is in no different position than that of an individual who was not eligible for State unemployment compensation and is unemployed because of the major disaster. Both have the same need for Federal assistance. * * *

We cannot agree completely with the last quoted statement. First, it is obvious that a person who is not entitled to State unemployment compensation (or other unemployment compensation) is in a different position than a person so entitled. Second, the Solicitor's interpretation of section 204 results in, or could result in, discriminatory treatment of disaster victims by permitting some to receive up to double the amount of benefits that others may receive. For example, under the Solicitor's interpretation, a person not entitled to State (or other) unemployment compensation benefits may receive let us say 26 weeks of DUA benefits while a person entitled to 26 weeks of State unemployment compensation benefits may also receive 26 weeks of DUA benefits under the appropriate facts and circumstances. We can hardly believe that the Congress intended such a result. Further, although there may have been a good reason for not including such a limitation, the fact remains that Congress expressly did include a limit on the combined amount of UI and DUA benefits an individual could receive during his period of unemployment. Also, the Solicitor's argument overlooks the fact that the paramount purpose of the section as expressed in its legislative history was to provide the equivalent of State unemployment compensation to disaster victims who were not eligible for State unemployment compensation rather than to provide compensation for an additional period to those eligible for such benefits.

In further justification for the view that the Congress did not intend to cut off individuals from the receipt of disaster unemployment assistance because they had received State unemployment compensation when as of the time of the application they are still unemployed as the result of the major disaster the Solicitor states that—

> * * * This belief is strengthened by the fact that the regulations under the 1969 act were the same as the present regulations with respect to duration and Congress did not substantially change the language of section 12 of the 1969 act in enacting section 240 of the 1970 act.

It is our understanding, however, that until Hurricane Agnes in 1972, such a construction of the law was not required by the length of any disaster caused unemployment situation. Consequently the Congress would have been unaware of any such possible construction of the law

in considering the 1970 Act. Also, such a construction would not be in line with the legislative history referred to above.

In light of the foregoing it is our view that section 240 of the Disaster Relief Act of 1970 does not authorize the payment of disaster assistance to persons covered under a State's regular unemployment insurance program for a period in addition to the period covered by the State's program. However, considering all the facts and circumstances and since the recipients of the assistance were not at fault, no action need be taken by your Department to recover DUA payments that, if made subsequent to the date of this decision, would have been inconsistent therewith. As to any future DUA payments that are inconsistent with this decision, appropriate recovery action by your Department will be required by our Office. We suggest that you may wish—if you believe it desirable—to seek legislation which will specifically provide for DUA benefits after a person has exhausted his regular unemployment compensation benefits.

[B-180084]

Arbitration—Award—Compliance—Restoration of Leave and Payment of Per Diem

Two Navy employees remained at temporary duty station on Sunday, after completing assignment on Saturday, in order to perform return travel during regular workweek. Each was charged 8 hours leave and denied per diem in connection with the deferred travel. Navy may comply with arbitration award directing restoration of leave and payment of per diem since per diem costs for less than 2 days are considered reasonable for compliance with travel policy expressed at 5 U.S.C. 6101(b)(2) and Navy is, thus, not precluded under Executive Order 11491, § 12, by applicable law or regulations, from accepting such award.

In the matter of arbitration award relating to scheduling of travel on nonworkdays, May 17, 1974:

The Secretary of the Navy requested our opinion as to whether an advisory arbitration award directing recrediting of annual leave and the payment of per diem to two employees of the Long Beach Naval Shipyard may be accepted by the Department of the Navy.

The advisory award pertains to return travel by Messrs. Wilbur L. Kenney and Robert L. Riha from a temporary duty assignment at the Newport News Naval Shipyard under travel orders which scheduled temporary duty from Wednesday, October 14, 1970, to Wednesday, October 21, 1970. The work to be performed at the temporary duty location was in fact completed on the afternoon of Saturday, October 17, 1970, and both employees were instructed to return to Los

Angeles the following day. Mr. Kenney delayed his return until Monday, October 19, because he wished to attend church rather than travel on Sunday and because he believed that under ARTICLE XXIII—TRAVEL, Section 1, of the Negotiated Agreement between the Naval Shipyard, Long Beach, and Local 174, American Federation of Technical Employees, AFL–CIO, dated July 7, 1970, and extended to July 2, 1972 (hereinafter referred to as the Agreement), he was not required to travel outside of his regular duty hours. Mr. Riha delayed his return travel until Tuesday, October 20, in order to pick up his suit at the cleaners on Monday and because of his belief that he was not required to perform official travel during nonduty hours. He took annual leave on Monday. Both employees were paid per diem for Sunday, October 18, but were denied per diem and charged 8 hours of annual leave for the day on which return travel was performed.

The employees filed grievances seeking to regain the annual leave they had been charged. Prior to arbitration the Navy determined that the matter was not subject to arbitration and on behalf of Messrs. Riha and Kenney filed claims for per diem and recredit of annual leave with our Transportation and Claims Division. By Settlement Certificates dated September 28, 1971, the Transportation and Claims Division advised that, while the charging of leave in connection with temporary duty travel is a matter within administrative discretion, it is not within an agency's discretion to permit a traveler to delay his travel over a weekend so as to increase his entitlement to per diem in lieu of subsistence. Later the Assistant Secretary for Labor-Management Relations directed that the agency reinstate the arbitration hearing and the agency complied.

The arbitrator ruled that the travel vouchers of Messrs. Kenney and Riha should be revised to authorize travel on Monday, October 19, and Tuesday, October 20, respectively, and that the Shipyard should recredit each with 8 hours of annual leave and pay each an appropriate amount of per diem in connection with the travel performed. In concluding that the grievances should be allowed, the arbitrator relied on the policy regarding scheduling of Federal employees' travel as expressed at 5 U.S. Code 6101(b)(2) and ARTICLE XXIII—TRAVEL, Section 1, of the Agreement. Section 6101(b)(2) of Title 5, U.S. Code, provides:

> (2) To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee.

In connection with the scheduling of travel, ARTICLE XXIII—TRAVEL, Section 1, of the Agreement similarly provides:

Section 1. The Employer agrees, whenever it is feasible to do so, within applicable regulations, to schedule travel during regular duty hours.

The arbitrator, in his Written Opinion, states:

* * * In the opinion of the Sole and Impartial Arbitrator, Chapter 61, Section 6101(b)(2), certainly gave the Commandant of the Long Beach Naval Shipyard authority and discretion to schedule Mr. Robert L. Riha's travel time under his special circumstances as Tuesday, 20 October 1970, and to schedule Mr. Wilbur Kenney's travel date under his particular circumstances as Monday, 19 October 1970. * * * ARTICLE XXIII—TRAVEL, Section 1, of the Agreement of the Parties dated 7 July 1970 (extended to 2 July 1972) means what it says and places and placed *an obligation* on the Commandant of the Long Beach Naval Shipyard to give very special consideration to the facts of the cases of these two Grievants with respect to the scheduling of their travel time. This he did not do, and he did not do on the grounds of "applicable regulations," but in the opinion of the Sole and Impartial Arbitrator, the "applicable regulations" gave him authority to take action, which he refused to take (although required to do so by ARTICLE XXIII—TRAVEL of the Agreement of the Parties).

In the opinion of the Sole and Impartial Arbitrator, if regulations give authority to do something (*to schedule travel time during regular duty hours*) and (Commandant of the Long Beach Naval Shipyard) refuses to do so, although he has agreed to do so "whenever it is feasible to do so," then there is a violation of the Agreement of the Parties (as here), and the employees and the Union have a perfect right to grieve and object, and looking over all the language of the agreements in front of him, the Sole and Impartial Arbitrator simply has no other course but to advise the Commandant of the Long Beach Naval Shipyard that he must recommend that the parties' grievances be allowed.

V. *Conclusion*

Having found the Employer did violate the Agreement of the Parties by asking both of them to take eight hours' annual leave *and* by denying them per diem for the date actually traveled by them, the Sole and Impartial Arbitrator must recommend that their travel vouchers be revised, that their eight hours' annual leave be reinstated, and that they be paid their appropriate per diem for the one day actually traveled by them.

The question presented is whether the advisory award may be accepted by the Shipyard under part VIII.E.1 of Department of Defense Directive 1426.1. That provision is the Department's implementation of section 12 of Executive Order 11491 which provides:

SEC. 12. *Basic provisions of agreements.* Each agreement between an agency and a labor organization is subject to the following requirements—

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level;

(b) management officials of the agency retain the right, in accordance with applicable laws and regulations—

(1) to direct employees of the agency;

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;

(3) to relieve employees from duties because of lack of work or for other legitimate reasons;

(4) to maintain the efficiency of the Government operations entrusted to them;

(5) to determine the methods, means, and personnel by which such operations are to be conducted; and

(6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency; and

(c) nothing in the agreement shall require an employee to become or to remain a member of a labor organization, or to pay money to the organization except pursuant to a voluntary, written authorization by a member for the payment of dues through payroll deductions.

The requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supplemental, implementing, subsidiary, or informal agreements between the agency and the organization.

As required by section 12 of the Executive order, ARTICLE IV of the Agreement states that the terms of the Agreement are subject to the provisions of existing and future laws and regulations of appropriate authorities. By virtue of these authorities, the Department of the Navy doubts whether it may accept the arbitrator's award inasmuch as it does not comport with laws and regulations governing official travel as interpreted by our Transportation and Claims Division in the Settlement Certificates discussed above.

We have reviewed the Settlement Certificates issued to Messrs. Kenney and Riha and find that the interpretation therein of controlling law and regulations is partly incorrect as it applies to the particular circumstances of their travel. Relying upon regulatory provisions such as section 1.2 of the Standardized Government Travel Regulations, Office of Management and Budget Circular No. A-7, March 1, 1965, in effect on the dates of the employees' travel, we have held that in performing official travel an employee is required to proceed as expeditiously as he would if traveling on personal business. Prior to the enactment of 5 U.S.C. 6101(b)(2) it was considered that by virtue of his obligation of expeditious travel an employee should not delay travel simply to avoid traveling on nonworkdays. However, the policy set forth at 5 U.S.C. 6101(b)(2)—that to the maximum extent practicable an employee should not be required to perform travel outside of his regular duty hours—has modified the requirement for expeditious travel. We have now recognized that, insofar as permitted by work requirements, travel may be delayed to permit an employee to travel during his regular duty hours and that payment of up to 2 days additional per diem for that purpose is not unreasonable.

In B-168855, March 24, 1970, we considered an agency's contention that an employee who completed his temporary duty assignment at 4:45 p.m., remained overnight, and returned the following day, was limited to the amount of per diem that would have been payable had

he returned the prior evening. By reason of the travel policy expressed in 5 U.S.C. 6101(b)(2) we stated:

> In the absence of any indication that Mr. Thomas was required to be at his headquarters duty station on the morning of October 2, it does not appear unreasonable for him, in light of the cited regulations, to have left Fresno on the morning of October 2 rather than at the close of business October 1 to obviate at least 3 hours of travel during off-duty hours. * * *
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> The constructive cost of Mr. Thomas' travel may be recomputed on the basis of his leaving Fresno by common carrier on the morning of October 2 (with appropriate adjustment in his leave record), and we would not be required to object to payment on that basis.

Similarly, in B–160258, January 2, 1970, we held that payment of an additional 1 day's per diem was not unreasonable to permit an employee to travel during regular duty hours. However, additional per diem costs for 2 days for the purpose of facilitating an employee's travel during regular duty hours are not considered reasonable. 46 Comp. Gen. 425 (1966) and B–165339, November 18, 1968. In this connection it has been held that travel may be scheduled on nonworkdays and overtime paid to avoid the payment of 2 days per diem. 50 Comp. Gen. 674, 676 (1971); 51 *id.* 727, 732 (1972); B–169078, April 22, 1970.

In any case, since the delay in return travel by Messrs. Kenney and Riha until it could be performed during regular duty hours involved only 1 additional day of per diem, it was within the Shipyard's discretion to allow the employees to travel on Monday and Tuesday, respectively, and to pay them the attendant per diem costs. Similarly, as advised by our Transportation and Claims Division, it was within the Shipyard's discretion not to require the employees to take annual leave in connection with the travel.

We wish to stress, however, that 5 U.S.C. 6101(b)(2) is not an absolute mandate as to the scheduling of travel. Travel need be scheduled within an employee's regular duty hours only "to the maximum extent practicable." When an agency determines that it is necessary for an employee to perform travel during nonduty hours and the employee may not be paid overtime, the reasons therefor shall be recorded and, upon request, furnished to the employee. 5 CFR 610.123. *See also* B–179503, January 21, 1974. Regarding the effect of labor management agreements which may be in force, in view of the rights retained by management officials under section 12(b) of Executive Order 11491, quoted above, to direct employees, to maintain the efficiency of Government operations, and to determine the methods, means and personnel by which such operations are to be conducted, the determination of whether it is or is not practicable to permit an employee to defer or

accelerate travel until it can be performed during regular duty hours would appear to be reserved to the agency.

In the case of travel by Messrs. Kenney and Riha, the record contains no suggestion that there was any official necessity for their return to the Long Beach Naval Shipyard on Sunday, October 18. To the contrary, it appears that the employees were ordered to return on that day solely because of the belief on the part of Shipyard officials that there was no authority to delay travel. Thus, since there is no indication that work requirements of the agency would not permit Messrs. Kenney and Riha to perform return travel on Monday and Tuesday, respectively, we know of nothing that would preclude acceptance of the arbitrator's award by the Department of the Navy.

[B-179764]

Pay—Retired—Survivor Benefit Plan—Missing Persons—Status

In cases involving active duty service personnel who enter a missing in action status regardless of the date when such member entered that status and are subsequently determined to have died in that status, since time in an MIA status under 37 U.S.C. 551–558 is treated as active service for purposes of pay, allowances and other benefits, such time shall be considered as qualifying service for the purpose of establishing both the minimum eligibility retirement for years of service and retired pay computation within the meaning of the Survivor Benefit Plan, 10 U.S.C. 1447–1455, for the purpose of establishing an annuity under 10 U.S.C. 1448(d).

Pay—Retired—Survivor Benefit Plan—Missing Persons—Date of Death Determination

In cases where a Survivor Benefit Plan annuity under 10 U.S.C. 1448(d) is established for the survivor of a member who entered an MIA status before completing sufficient active service to qualify for retired or retainer pay but remained in such MIA status long enough to so qualify, the inception date for payment of an annuity under 10 U.S.C. 1450 is the day after the date the Secretary concerned makes a determination of death so long as such date of determination occurs after September 21, 1972, notwithstanding the fact that a date earlier than the date of determination may be used to establish a date of death required under 37 U.S.C. 555 or 556.

In the matter of application of the Survivor Benefit Plan to cases involving missing persons, May 28, 1974:

This action is in response to a letter dated September 24, 1973, from the Assistant Secretary of Defense (Comptroller), requesting a decision on several questions concerning the application of the Survivor Benefit Plan, 10 U.S. Code 1447–1455, to service members determined to be in a missing in action status in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 491, which was enclosed with the submission.

The questions presented in the Committee Action are as follows:

1. May the period during which a member is in a missing status, as defined in 37 USC 551, be considered qualifying service for retired or retainer pay "except that he has not applied for or been granted that pay" under 10 USC 1448(d) for the purpose of establishing a Survivor Benefit Plan annuity under that statute, in the following circumstances?

a. The member enters a missing status before he has completed sufficient service to qualify for retired or retainer pay, and

b. After a period sufficient to qualify him for retired or retainer pay, the Secretary concerned or his designee makes a finding of death under section 555 or 556 to title 37 and fixes a date of death earlier than that which would qualify him for such pay.

2. Would the answer to question 1 be the same regardless of whether the member entered a missing status before or after 21 September 1972?

3. If the answer to question 1 is in the affirmative, would the annuity be effective:

a. The date of death as established under section 555 or 556 of title 37, provided such date is on or after 21 September 1972, or

b. 21 September 1972, if the date of death was established prior to that date, or

c. The date the Secretary concerned or his designee makes his determination?

The brief discussion in the Committee Action states that the Secretary concerned may, on the basis of information which he considers sufficient to establish conclusively the death of a member, make a determination of death under the provisions of 37 U.S.C. 556 that is conclusive for specified purposes. He may also make a finding of death under the provisions of 37 U.S.C. 555, on the basis that the member cannot reasonably be presumed to be living, which determination is also conclusive for specified purposes. Further, that section 552 of the same title provides that the member is entitled to pay and allowances until the date the Secretary receives evidence that the member is dead or the date that his death is prescribed or determined under section 555. However, doubt is expressed as to whether such secretarial action under the Missing Persons Act or any other provision of law is applicable for the purpose of establishing an annuity under 10 U.S.C. 1448(d).

Subsection 1448(d) of Title 10, U.S. Code, provides as follows:

If a member of an armed force dies on active duty after he has become entitled to retired or retainer pay, or after he has qualified for that pay except that he has not applied for or been granted that pay, and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it had applied to the member when he died, the Secretary concerned shall pay to the spouse an annuity equal to the difference between that amount of compensation and 55 percent of the retired or retainer pay to which the otherwise eligible spouse described in section 1450(a)(1) of this title would have been entitled if the member had been entitled to that pay based upon his years of active service when he died.

In discussing subsection 1448(d) on the floor of the House of Representatives at the time H.R. 10670, which eventually became Public

Law 92–425 (10 U.S.C. 1431), was being considered, Representative Pike stated in part that:

A special section of the bill provides that in the case of personnel still on active duty who are eligible for retirement on length of service whose potential survivor annuity would be more than the dependency and indemnity compensation paid to survivors of active-duty personnel of like grade and years of service, a supplemental annuity payment sufficient to make up the difference would be paid * * *.

Cong. Rec., October 21, 1971, page H 9871.

In Senate Report No. 92–1089, Committee on Armed Services, United States Senate, dated September 6, 1972, on page 51, it is stated with respect to subsection 1448(d) that:

* * * the spouse of a service member, who is eligible to retire but dies on active duty, will be paid 55 percent of the member's earned retired pay. The payment will recognize that Dependency and Indemnity Compensation (DIC) may be payable by the Veterans Administration by offsetting any DIC payment from the 55 percent of retired pay.* * *

Based on the before-quoted material, it would appear that by including such special provisions (10 U.S.C. 1448(d)) in Public Law 92–425, it was expressly intended by Congress to insure that spouses of all active duty military personnel with 20 or more years of creditable service shall automatically be provided with coverage in the event of the member's death while serving on active duty.

Section 552 of Title 37, U.S. Code, as amended by Public Law 93–26, approved April 27, 1973, 87 Stat. 26, provides in pertinent part:

(a) A member of a uniformed service who is on active duty * * * and who is in a missing status, is—

(1) for the period he is in that status, entitled to receive or have credited to his account the same pay and allowances, as defined in this chapter, to which he was entitled at the beginning of that period or may thereafter become entitled;

* * * * * * *

Notwithstanding section 1523 of title 10 or any other provision of law, the promotion of a member while he is in a missing status is fully effective for all purposes, even though the Secretary concerned determines under section 556(b) of this title that the member died before the promotion was made.

Section 2 of Public Law 93–26 provides that, for all purposes other than for Chapter 13 of Title 38, U.S. Code, it becomes effective as of February 28, 1961.

Section 555 of Title 37, U.S. Code, entitled "Secretarial review," provides in part:

(a) When a member of a uniformed service entitled to pay and allowances under section 552 of this title has been in a missing status, and the official report of his death or of the circumstances of his absence has not been received by the Secretary concerned, he shall, before the end of a 12-month period in that status, have the case fully reviewed. After that review and the end of the 12-month period in a missing status, or after a later review which shall be made when

warranted by information received or other circumstances, the Secretary concerned, or his designee, may—

(1) if the member can reasonably be presumed to be living, direct a continuance of his missing status; or

(2) make a finding of death.

(b) When a finding of death is made under subsection (a) of this section, it shall include the date death is presumed to have occurred for the purpose of—

(1) ending the crediting of pay and allowances;

(2) settlement of accounts; and

(3) payment of death gratuities.

In conjunction with the above-quoted section, subsection, 556(b) of the same Title provides:

(b) When the Secretary concerned receives information that he considers establishes conclusively the death of a member of a uniformed service, he shall, notwithstanding any earlier action relating to death or other status of the member, act on it as an official report of death. After the end of the 12-month period in a missing status prescribed by section 555 of this title, the Secretary concerned, or his designee, shall, when he considers that the information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead, make a finding of death.

A member serving on active duty is entitled to basic pay under the provisions of 37 U.S.C. 204 at the rates prescribed in 37 U.S.C. 203, as amended, with years of service computed under 37 U.S.C. 205.

In 30 Comp. Gen. 285 (1951), involving the question of service credits for retirement purposes, we held that a leave of absence without pay granted an enlisted man is to be regarded as active service within the meaning of section 202(a) of the Career Compensation Act of 1949 (presently codified as 37 U.S.C. 205) for the purpose of computing the member's cumulative years of service to be used in determining his retired pay.

In arriving at that decision we said therein that:

While there would appear to be no question that the time lost due to absence by reason of sickness due to misconduct, absence without leave, etc., cannot be considered active service—22 Comp. Gen. 759—the conclusion that it cannot be considered active service is predicated not on the fact that the man was not in a pay status during the period in question but on the fact that he has deprived the Government of his services by deliberately absenting himself from duty without authority or by being unable to perform his duties by reason of his own misconduct thus making his absence, to an extent, unauthorized. * * * On the other hand, I do not think there is any question but that the periods a man may be absent with leave are to be considered as active service, not simply because he is in a pay status during such periods but because such absence was properly authorized; the man continued to be subject to control of his service; and he was ready and willing to, and did, return to his normal duties at the expiration of such leave of absence, or sooner, if so ordered. * * *

In 44 Comp. Gen. 667 (1965), while discussing the legality of crediting an excused period of absence without leave as active duty for retirement qualification we said on page 669 that time during which an absent member "is under some obligation to return to his station

for the performance of active duty but because of circumstances beyond his control or beyond the control of the Government such return is prevented" would qualify as active service.

The provisions of the Missing Persons Act established congressional recognition of the basic presumption of a continuation of life when a member who is serving on active duty becomes missing in action, and the presumption that his return to his duty station is prevented by circumstances beyond his control. Since such a member is entitled to be credited with full pay and allowances under 37 U.S.C. 552 (50 Comp. Gen. 148 (1970)); may accrue leave under 10 U.S.C. 701(g) (51 Comp. Gen. 391 (1972)); and may be promoted under 37 U.S.C. 552, as amended (51 Comp. Gen. 759 (1972)), the conclusion is inescapable that a member's status of being on active duty at the time of entering a missing status was to continue for the entire period of that status.

While the Survivor Benefit Plan does not specifically mention missing persons, its legislative history does speak clearly of the purpose of 10 U.S.C. 1448(d). In House Report No. 92–481, Committee on Armed Services, House of Representatives, to accompany H.R. 10670, at page 10, it is stated as follows:

> The Committee was particularly concerned, in a program primarily designed to provide an adequate level of income replacement for survivors of career personnel, that a situation not be created where survivors of retired personnel receive higher benefits than the survivors of active-duty personnel of the same grade and same years of service.

Similar statements are found in House Report No. 91–68, 91st Cong., 2nd sess. 9504 (1970) and Senate Report No. 92–1089, 92nd Cong., 2nd sess. 4 (1972). In light of the other benefits accruing to missing persons, it is our view that the Congress, in enacting Public Law 92–425, intended to include in 10 U.S.C. 1448(d) the otherwise eligible survivors of retirement eligible members who are determined to have died while in a missing in action status as defined in 37 U.S.C. 551.

One of the normal incidents of active service is that such time counts in establishing the member's entitlement to retired or retainer pay. Thus, where the member enters a missing status as defined in 37 U.S.C. 551 before he has completed sufficient service to qualify for retired or retainer pay, it is our view that, since the period during which he is missing is to be treated as active service for the purposes previously enumerated it may be considered qualifying service for the purpose of establishing both the minimum eligibility for retirement for years of service and entitlement to retired or retainer pay, "except that he has not applied for or been granted that pay for the purpose of establishing an annuity under 10 U.S.C. 1448(d). *Cf.* 53 Comp. Gen. 470 (1974).

Accordingly, question 1 is answered in the affirmative.

Regarding qeustion 2, September 21, 1972, is the effective date of Public Law 92–425 which established the Survivor Benefit Plan. Having determined that the period during which a member is missing in action may be treated as active service for purposes of 10 U.S.C. 1448(d), and acting on the assumption that such a member is properly in such status (*cf. Bell* v. *United States*, 366 U.S. 393 (1961)), we perceive no reason why the date on which the member entered a missing status should have any bearing upon the issues considered herein. Further, nothing in either subsection 1448(d) or its legislative history suggests that such a distinction should be made. Thus, question 2 is also answered in the affirmative.

The final question concerns the effective date of the annuity. Section 1450 of Title 10, U.S. Code, provides that the annuity shall be paid effective as of the day following the date of death. As previously stated, neither the Survivor Benefit Plan nor its legislative history specifically mentions members determined to be in a missing in action status, thus, no particular limitation can be ascribed to Congress in this context for the phrase "date of death" as mentioned in section 1450. This is especially pertinent in view of the fact that a determination of death under the Missing Persons Act normally is based upon evidence received by the Secretary concerned that the member cannot reasonably be presumed to be living, and may even be based upon a mere lapse of time without information.

We believe that, in the absence of statutory provision or clear indication of legislative intent to the contrary, the date on which to commence payment of a survivor annuity under 10 U.S.C. 1448(d) is the day following the date on which the compensation and other emoluments of active service terminate. Under 37 U.S.C. 552(b), "notwithstanding the death" of the member while in missing status, pay and allowances continue to the date of determination under section 555 or the date the Secreary concerned "receives evidence that the member is dead." Further, since the missing person is treated as if he were alive and on continuous active duty for all purposes up to the date that the Secretary concerned makes the determination of death or receives evidence that the member is dead, notwithstanding the fact that an earlier date may be fixed as the "date of death" for certain administrative purposes, it is our view that so long as the date of determination occurs on or after September 21, 1972, the inception date of the Survivor Benefit Plan, the day following the date the Secretary concerned makes the determination of death or receives evidence that the member is dead is controlling for the purpose of initiating payments under 10 U.S.C. 1448(d).

Question 3 is answered accordingly.

[B-180837]

Subsistence—Per Diem—Actual Expenses—Indian Arts and Crafts Board Members

Although Public Law 87-23 provides that members of the Indian Arts and Crafts Board are entitled to per diem in lieu of subsistence they may be paid travel expenses on an actual expense basis when circumstances warrant such payment since they are also authorized the same travel allowances as those for other employees serving the Federal Government without pay and those employees may be paid on an actual expense basis.

In the matter of payment of travel expenses of members of the Indian Arts and Crafts Board, May 28, 1974:

By letter of March 12, 1974, a request was made for an advance decision as to whether travel expenses may be paid on an actual expense basis to members of the Indian Arts and Crafts Board when traveling on official business, or whether they may be authorized only per diem in lieu of subsistence.

The Indian Arts and Crafts Board was created in the Department of the Interior by Public Law 74-355, approved August 27, 1935, 49 Stat. 891, 25 U.S.C. 305, as an advisory and informational clearinghouse on all matters relating to the development and promotion of Indian Arts and Crafts. The Board is composed of five Commissioners who are appointed by the Secretary of the Interior and serve without compensation. The act which created the Indian Arts and Crafts Board authorized reimbursement for all actual expenses incurred by the Commissioners in the performance of their duties as members of the Board; however, subsequently, a limitation of $10 per diem in lieu of subsistence paid to members of the Board was established and made permanent legislation in the Interior Department Appropriation Act of 1940, 53 Stat. 685.

Public Law 87-23, approved April 24, 1961, 75 Stat. 45, provides "That each Commissioner shall be paid per diem in lieu of subsistence and other expenses at a rate that does not exceed the rate authorized by the Act of August 2, 1946 (60 Stat. 808), as heretofore or hereafter amended (5 U.S.C. 73b-2), to be paid to persons serving without compensation." The cited provision of law, 5 U.S. Code, 73b-2, has been amended several times since 1961 and currently is codified as 5 U.S.C. 5703. Subsection (d) of 5 U.S.C. 5703 states in part that "* * * the head of the agency concerned may prescribe conditions under which an individual to whom this section applies may be reimbursed for the actual and necessary expenses of the trip, not to exceed an amount named in the travel authorization when the maximum per diem allowance would be much less than these expenses due to the unusual circumstances of the travel assignment."

The question submitted is whether official travel expenses of the Commissioners may be paid on an actual subsistence basis when circumstances so warrant, on the basis of subsection (d) of 5 U.S.C. 5703, or whether the wording in Public Law 87-23 "That each Commissioner shall be paid for per diem in lieu of subsistence" is to be strictly applied. The authority for the payment of per diem in lieu of subsistence and actual expenses of individuals serving without pay when traveling on official business is contained in 5 U.S.C. 5703 which provides in pertinent part as follows:

(c) An individual serving without pay or at $1 a year may be allowed transportation expenses under this subchapter and a per diem allowance under this section while en route and at his place of service or employment away from his home or regular place of business. Unless a higher rate is named in an appropriation or other statute, the per diem allowance may not exceed—

(1) the rate of $25 for travel inside the continental United States; and

(2) the rates established under section 5702(a) of this title for travel outside the continental United States.

(d) Under regulations prescribed under section 5707 of this title, the head of the agency concerned may prescribe conditions under which an individual to whom this section applies may be reimbursed for the actual and necessary expenses of the trip, not to exceed an amount named in the travel authorization, when the maximum per diem allowance would be much less than these expenses due to the unusual circumstances of the travel assignment. The amount named in the travel authorization may not exceed—

(1) $40 for each day in a travel status inside the continental United States; or

(2) the maximum per diem allowance plus $18 for each day in a travel status outside the continental United States.

We find nothing in the legislative history of Public Law 87-23 to indicate that the wording adopted with respect to the payment of per diem was intended to restrict members of the Indian Arts and Crafts Board to reimbursement for subsistence on a per diem basis as opposed to the reimbursement of actual subsistence expenses. Further, it is noted that 5 U.S.C. 5703(d) authorizes the payment of actual subsistance expenses in unusual circumstances when the authorized reimbursement on a per diem basis would not be sufficient to cover the costs incurred by the employee. It is significant that reimbursement on a per diem basis was provided as the means of paying employees' subsistence expenses and that payment of actual subsistence expenses was authorized as an exception thereto.

Since there is no evidence that Congress intended to preclude payment of actual subsistence expenses, and since authority to pay actual subsistence expenses is dependent upon an entitlement to per diem, we do not interpret the subject wording in Public Law 87-23 as precluding the reimbursement of members of the Indian Arts and Crafts Board on an actual subsistence basis while en route and at his place of service away from his home or regular place of business. *Cf.* 52 Comp. Gen. 684 (1973).

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