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[B-180147]

Compensation—Overtime—Aggregate Limitation—Reemployed Annuitant—Computation

In computing aggregate rate of pay for determining maximum limitation on premium pay under 5 U.S.C. 5547, amount of annuity for pay period received by reemployed annuitant is to be included.

In the matter of computation of aggregate rate of pay of reemployed annuitant, October 1, 1974:

By letter dated November 13, 1973, a disbursing officer for the Department of the Army has requested an opinion concerning the application of the limitation on payment of premium pay contained at 5 U.S. Code 5547 to the overtime claim of Mr. D. Sloan Murray, an annuitant reemployed by the Army Corps of Engineers.

Mr. Murray, who receives an annunity in the amount of $13,104, is reemployed at a grade GS–13, step 7, for which the annual compensation is $24,811. By virtue of the provisions governing pay upon reemployment of a retired annuitant contained at 5 U.S.C. 8344, Mr. Murray receives compensation payable by the Army Corps of Engineers in the amount of $11,707, which amount is equal to the difference between the $24,811 rate of pay for grade GS–13, step 7, and the $13,104 annuity he receives from the civil service retirement fund. Insofar as is pertinent here, section 8344 of Title 5, U.S. Code, provides as follows:

§ 8344. Annuities and pay on reemployment

(a) If an annuitant receiving annuity from the Fund

* * * * * * *

becomes employed after September 30, 1956, or on July 31, 1956 was serving, in an appointive or elective position, his service on and after the date he was or is so employed is covered by this subchapter. Deductions for the Fund may not be withheld from his pay. An amount equal to the annuity allocable to the period of actual employment shall be deducted from his pay, except for lump-sum leave payment purposes under section 5551 of this title. * * *

Specifically, the Disbursing Officer questions whether the biweekly annuity which Mr. Murray receives from the retirement fund is to be considered in computing his gross pay period earnings for purposes of determining whether they exceed the limitation established by 5 U.S.C. 5547. Section 5547 sets a limit on payment of premium pay as follows:

§ *5547. Limitation on premium pay.*

An employee may be paid premium pay under sections 5542, 5545 (a)–(c), and 5546 (a), (b) of this title only to the extent that the payment does not cause his aggregate rate of pay for any pay period to exceed the maximum rate for GS–15. * * *

To exemplify the difference which results from either including or excluding the employee's retired pay for the purposes of computing his aggregate rate of pay for any pay period, the Disbursing

Officer furnishes alternative computations of Mr. Murray's pay for the pay period ending November 3, 1973, during which he performed 62 hours of overtime work compensable at the rate of $9.65 per hour.

If Mr. Murray's biweekly annuity is excluded, his gross earnings are computed as follows:

Method A

80 hours Regular at $11,707 p/a	$450.40
62 hours Overtime at $9.65 p/h	598.30
8 hours Holiday at $11.93 p/h	95.44
Gross Earnings (excluding annuity)	$1,144.14

The $1,144.14 gross so computed is less than the $1,384.80 amount payable for one pay period at the maximum rate for grade GS-15 and by this method of computation the employee would be entitled to receive the full $598.30 amount payable for the 62 hours of overtime which he performed. If, on the other hand, the employee's annuity is included in computing his gross pay period earnings, his payment for overtime will be reduced by the $263.34 amount by which his gross pay exceeds the $1,384.80 statutory maximum. The computation of Mr. Murray's pay for the pay period ending November 3, 1973, based on the inclusion of his family, is as follows:

Method B

80 hours Regular at $11,707 p/a	$450.40
62 hours Overtime at $9.65 p/h	598.30
8 hours Holiday at $11.93 p/h	95.44
Biweekly annuity $13,104 p/a ÷ 2080 × 80 hrs	504.00
Gross Earnings (including annuity)	$1,648.14
Less—Statutory Limitation (5 U.S.C. 5547)	1,384.80
Gross Earnings for pay period in excess of Statutory Limitation	$263.34

The Disbursing Officer refers to our decisions 28 Comp. Gen. 693 (1949) and 32 *id.* 146 (1952) as authority for establishing the correct rate of overtime pay payable to a reemployed annuitant. As he has indicated, our decision 28 Comp. Gen. 693, at page 697, does address the question of the rate of overtime compensation payable to a reemployed annuitant as follows:

With respect to the doubt expressed in your letter as to the method of computing overtime compensation in the case of a reemployed annuitant, you are

advised that * * * overtime compensation otherwise proper may be paid to the annuitant involved upon the same basis and at the same rate authorized by law to be paid other employees who occupy similar positions.

However, in 32 Comp. Gen. 146 we did in fact address the precise question here presented. In that case we were specifically asked whether overtime compensation could be paid to an annuitant reemployed in a regular civilian position at the annual salary rate equal to $5,400. At the date of that decision, the predecessor section to 5 U.S.C. 5547, subsection 943a, of Title 5, U.S. Code, 1952 Revision, provided:

§ *943a. Limitations on increases in compensation.*

Notwithstanding any other provision of this Act, no officer or employee shall, by reason of the enactment of said sections, be paid with respect to any pay period, basic compensation, or basic compensation plus any additional compensation provided by this chapter, at a rate in excess of $10,330 per annum. (May 24, 1946, ch. 270, § 7(b), 60 Stat. 218; July 3, 1948, ch. 830, title III, § 303(b), 62 Stat. 1268.)

We there held that consistent with 28 Comp. Gen. 693, above, the annuity should be deducted only from the basic salary covering the 5 days per week and overtime would be payable upon the gross per annum rate. Specifically, this means that the regular salary rate of the position, without deduction of the annuity, is to be used in computing the aggregate rate of pay under 5 U.S.C. 5547. Or, to state it differently, the employee's annuity is to be included in computing his gross pay period earnings for that purpose.

Thus, the computation in Method B, set forth above, should be used in computing the overtime claim of Mr. Murray.

[B-182113]

Pay—Retired—Survivor Benefit Plan—Erroneous Payments—Waived

Overpayment resulting from erroneous annuity payments under Survivor Benefit Plan made to member's widow should be considered for waiver as authorized by 10 U.S.C. 1453 under rules similar to those contained in 35 Comp. Gen. 401 (1956), which applied to the Uniformed Services Contingency Option Act of 1953 (new Retired Serviceman's Family Protection Plan). Thus, waiver should be granted only where there is not only a showing of no fault by widow but also that recovery would result in a financial hardship to the widow or for some other reason would be contrary to purpose of Plan and therefore against equity and good conscience.

In the matter of waiver of erroneous annuity payments received under the Survivor Benefit Plan, October 1, 1974:

This action is in response to a letter dated July 12, 1974 (file reference FINCM-T Lemp, Harry J., SSN 074-03-9856 (Retired) (Deceased)), with enclosures, from the Commanding Officer, United States Army Finance Support Agency, recommending waiver of recovery of $1,174.04 representing annuity payments erroneously paid under the Survivor Benefit Plan (SBP) to Mrs. Helen C. Lemp,

widow of the late Lieutenant Colonel Harry J. Lemp, who died June 3, 1973.

According to the Finance Support Agency letter, it appears that the member elected to provide SBP coverage for his wife on January 5, 1973, on a reduced portion of retired pay of $300. The annuity payable to the widow was $165 a month, which was increased to $175.07, effective July 1, 1973, due to a cost-of-living increase. In addition to that payment, the widow was also awarded payments of $272 for Dependency and Indemnity Compensation (DIC) by the Veterans Administration, effective June 1, 1973.

Under the provisions of the SBP, when a surviving spouse is also entitled to DIC payments, the monthly SBP payment will be reduced by the amount of such DIC payment and the full SBP payment must be withheld if the DIC payment is greater. It appears that widow's DIC payments in this case exceeded her SBP annuity; thus, she was not entitled to any annuity payment under SBP. While the file indicates that she properly and timely reported the DIC payments on her application for an SBP annuity, she was paid annuity payments totaling $1,204.79 due to administrative error. According to the file, a refund of $30.75 for cost of annuity due the widow has already been applied to the indebtedness, thus reducing the amount of her indebtedness to $1,174.04.

According to the submission, Mrs. Lemp has advised the Finance Support Agency that her monthly income consists of $113.40 Social Security and $272 Veterans Administration pension for a total of $385.40 and that she listed her expenses as totaling $334.15 a month. In addition, the file indicates that due to the prolonged period of illness suffered by Colonel Lemp prior to his death, the family has apparently exhausted all of its financial resources.

On the basis of the above, the Commanding Officer of the Finance Support Agency recommends that recovery of the amount in question be waived under the provisions of 10 U.S. Code 1453.

Pursuant to provisions of 10 U.S.C. 1453, recovery of an erroneously paid annuity under the SBP is not required if in the judgment of the Secretary concerned and the Comptroller General "there has been no fault by the person to whom the amount was erroneously paid and recovery would be contrary to the purpose of this subchapter or against equity and good conscience."

Attention is directed to our ruling in 35 Comp. Gen. 401 (1956), in which we held that something more than freedom from fault must be shown before a basis exists for exercising the judgment as to whether the collection of a particular overpayment, or erroneous payment under the Uniformed Services Contingency Option Act of 1953 (now named the Retired Serviceman's Family Protection Plan),

should be waived. In that case it was held that unless it could be established that collection of the overpayment would work an undue hardship, or some other reason could be shown as to why collection should not be made, no proper basis exists for the exercise of the waiver authority.

Because of the similarity between the two Plans and the waiver authority contained therein, it is the view of this Office that the ruling in the before-cited decision is for application under 10 U.S.C. 1453.

Under the facts and circumstances of this case, Mrs. Lemp clearly appears to be without fault with regard to the erroneous payment of annuities which she received in good faith under the SBP. In view of her apparently limited financial means, it may be concluded that recovery would cause undue hardship on Mrs. Lemp contrary to the purpose of the Plan and against equity and good conscience. Accordingly, we agree that recovery of the erroneously made payments in the amount of $1,174.04 in this case should be waived.

[B–171947]

Courts—Reporters—Additional Compensation—Maximum Limitation

Court reporter who served in dual capacity as court reporter-secretary under authority of 28 U.S.C. 753(a) is not entitled to additional pay for performance of secretarial duties in excess of maximum established under 28 U.S.C. 753(e) as in effect prior to June 2, 1970. While language of 753(a) does not clearly so limit compensation for combined positions, the derivative language of Public Law 78–222, which was revised, codified and enacted without substantive change by Public Law 80–773, expressly provided that the salary for such a combined position was to be established subject to the statutorily prescribed maximum.

Foreign Differentials and Overseas Allowances—Territorial Cost of Living Allowance—Inclusion for Aggregate Limitation Purposes—Judicial Staff Members

Determination by Judicial Conference that limitation at 28 U.S.C. 753(e) on annual salary payable to court reporters precludes payment of cost-of-living allowance to reporters receiving maximum salary is reasonable exercise of pay-setting authority given the lack of any indication that Congress intended reporters to receive compensation, other than transcript fees, in excess of that maximum. Determination is in line with our holding in B–107827, November 9, 1973, that cost-of-living allowance payable to Judges' secretaries and clerks under 28 U.S.C. 604(a)(5) is subject to appropriations limitations on aggregate salary.

Leaves of Absence—Court Reporters—Leave Accrual

Court reporters paid annual salary to be on call as needed by the court and free otherwise to augment income with earnings from transcript fees do not have regular tours of duty consisting of a definite time, day and/or hour which they are required to work during workweek and are "part-time" employees excluded from annual leave entitlement by 5 U.S.C. 6301(2)(ii). While court reporter-secretary may be entitled to annual leave for secretarial portion of duties per-

formed during a regular tour of duty, record contains no certification of leave earnings and use upon which to base lump-sum leave payment.

In the matter of additional compensation, annual leave and cost-of-living allowance, October 2, 1974:

By his letter of October 23, 1963, Mr. John E. Barnes, a former court reporter employed by the District Court of Guam, has appealed the administrative denial of his claim for additional compensation for performance of secretarial duties, for a cost-of-living allowance and for annual leave. In view of the 10-year statute of limitations applicable to claims against the Government contained at 31 U.S. Code 71a, our determination as to Mr. Barnes' entitlement is based upon the circumstances of his employment after November 2, 1962, the point in time 10 years prior to the date on which his claim was received by our Transportation and Claims Division.

In regard to his claim for additional compensation, Mr. Barnes points out that for a substantial period of time he functioned in the dual capacity of court reporter-secretary. The Administrative Office of the United States Courts has confirmed that for the periods October 29, 1951, to January 2, 1954; February 19, 1959, to June 24, 1961; and September 30, 1963, to September 23, 1968, Mr. Barnes served in that dual capacity under the authority of the following provision of 28 U.S.C. 753(a) which provides in part that:

If any such court and the Judicial Conference are of the opinion that it is in the public interest that the duties of reporter should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination and fix the salary for the performance of the duties combined.

Mr. Barnes indicates that for the first few months of the term in which he served as court reporter-secretary he was paid additional compensation based on his performance of those secretarial duties, but that thereafter he received no additional compensation for those responsibilities. He thus claims entitlement to additional compensation for his performance of secretarial duties throughout the period that he served in that dual capacity.

Prior to October 11, 1962, subsection 753(e) of Title 28 of the U.S. Code had provided as follows:

(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States at not less than $3,000 nor more than $7,630 per annum. * * *

Public Law 87-793, October 11, 1962, 76 Stat. 866, 28 U.S.C. 753 note, amended that subsection of the U.S. Code as follows:

(c) Section 753(e) of title 28 of the United States Code (relating to the compensation of court reporters for district courts) is amended by striking out the existing salary limitation contained therein and inserting a new limitation to be effective for the period beginning as of the first day of the first pay period which begins on or after the date of enactment of this Act, and ending immediately prior to the first day of the first pay period which begins on or after January 1,

1964, and a second new limitation effective on the first day of the first pay period which begins on or after January 1, 1964, and thereafter, which reflect the respective applicable increases provided by title II of this part in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended.

We are advised by the Administrative Office of the United States Courts that on September 30, 1963, when Mr. Barnes' position was designated court reporter-secretary, his salary was increased from $7,535 to $8,310 per annum. Prior to 1964 we understand that all court reporters were not paid at the maximum rate provided under subsection 753(e) as amended, but that reporters in less busy districts, including Guam, were paid at a lesser rate established by the Judicial Conference. The increase received by Mr. Barnes in 1963 thus represents the difference in pay for the position of court reporter to the District Court of Guam and the maximum amount payable under subsection 753(e), as amended. We are advised that throughout the period prior to September 23, 1968, during which he served as court reporter-secretary, Mr. Barnes received compensation at the maximum rate payable under that subsection. Thus, Mr. Barnes apparently is of the opinion that he is entitled to additional compensation by reason of his performance of secretarial duties notwithstanding that he received the maximum compensation payable under 28 U.S.C. 753(e).

While the above-quoted language of subparagraph 753(a), authorizing the Judicial Conference to combine the duties of court reporter with those of any other employee of the court, does not clearly limit the compensation for combined positions to the amount allowable under subparagraph 753(e) as amended, our review of the derivation of the language of that subsection reveals that that limitation on compensation is in fact applicable to combined positions. The language of the applicable portion of subsection 753(a) is derived from the following language of Public Law 78–222, January 20, 1944, 58 Stat. 5:

* * * If the court and the Judicial Conference are of the opinion that in any district it is in the public interest that the duties of reporters should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination of positions and fix the salary therefor, as provided by subsection (c) hereof, any provision of law to the contrary notwithstanding.

Subsection (c), referenced in the quotation immediately above, contains a $6,000 maximum upon the amount of compensation payable to court reporters and is the source of the language of subsection 753(e), quoted above, which, as amended, remained in effect until superseded by Public Law 91–272, June 2, 1970, 84 Stat. 298, 28 U.S.C. 133 note. That language appeared in substantially identical form at subsections 9a(a) and 9a(c) of Title 28 of the U.S. Code until that title was revised, codified and enacted into law by Public Law 80–773, June 25, 1948, 62 Stat. 869. By that enactment, subsection 9a(a) was redesignated subsection 753(a) and the words "for the performance of the

duties combined" were substituted for "thereof, as provided by subsection (c) hereof, any provision of law to the contrary notwithstanding." Since it is well established that the effect of a codification statute is to leave the effected statute substantively unchanged, the language of subparagraph 753(e) as in effect prior to June 2, 1970, is to be construed in light of the particular language of the statute from which it is derived. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 227 (1957).

In light of the legislative history of section 753 it appears that prior to June 2, 1970, a court reporter whose position was combined with that of another employee of the court could have been paid no more than the maximum compensation payable under subsection 753(e). Since Mr. Barnes received compensation at the maximum allowable rate after 1964, we find no basis for payment to him of any additional amount as consideration for his performance of secretarial functions.

As a basis for his claim for a cost-of-living allowance in connection with his position with the District Court of Guam, Mr. Barnes states that it is his understanding that, with the exception of court reporters, all court employees in Hawaii, Alaska, the Virgin Islands and American Samoa receive a cost-of-living allowance. He urges that the nonpayment of such an allowance to reporters in Guam who serve in a dual capacity is discriminatory.

The Administrative Office of the United States Courts has reported that the Judicial Conference viewed the maximum limitation on salary contained at 28 U.S.C. 753(e) prior to June 2, 1970, discussed above, as precluding payment of a cost-of-living allowance which would result in a court reporter's receiving compensation in excess of that limitation. We are advised that since that date, with the enactment of Public Law 91–272, which removed the maximum salary limitation, the Judicial Conference has recommended that court reporters overseas be allowed the usual cost-of-living allowance. The Administrative Office of the United States Courts, in conformance with this recommendation, requested the necessary funds from Congress but they have not yet been appropriated. We also note that S. 2791, 93d Congress, if enacted, would expressly provide for payment of a cost-of-living allowance to officers and employees of the Judicial Branch of the Government, including court reporters stationed outside the continental United States or in Alaska.

The payment of a cost-of-living allowance to secretaries and law clerks of district and circuit court judges is the subject of our recent decision, B–107827, November 9, 1973, affirming our prior holding in 31 Comp. Gen. 466 (1952) that the cost-of-living allowance payable

to those employees under 28 U.S.C. 604(a)(5) is to be regarded as "additional compensation." That determination turned on the fact that the cost-of-living allowance paid to court employees under 28 U.S.C. 604(a)(5) is paid in accordance with the authority provided by section 207 of the act of April 20, 1948, as amended by section 104 of the act of June 30, 1948, 62 Stat. 1205, now codified in 5 U.S.C. 5941 for payment to civilian employees of the executive departments of additional compensation based on living costs substantially higher than in the District of Columbia. We there held that by virtue of the language of Judicial Appropriation Acts through and including that of October 25, 1972, Public Law 92-544, 86 Stat. 1109, which had consistently prescribed limitations on the "aggregate salaries" payable to secretaries and law clerks, the cost-of-living allowance is to be considered in computing that aggregate amount. Thus, prior to June 2, 1970, a secretary or law clerk whose base pay equaled that aggregate limitation could not receive a cost-of-living allowance since his receipt of any additional compensation would result in payment of an aggregate salary in excess of the limitation amount set by statute.

In the case of court reporters, a cost-of-living allowance is payable under the pay-setting authority of 28 U.S.C. 753(e), quoted above. As previously discussed, that subsection, prior to October 11, 1962, provided for an annual salary of not more than $7,630 per annum. Until June 2, 1970, amendments to that subsection provided for a maximum annual salary to be established by administrative action. The Judicial Conference has construed that limitation on payment of annual salary for court reporters as the equivalent of the aggregate salary limitation applicable to secretaries and law clerks.

While the limiting statutory language applicable to court reporters is less definitive than the language regarding aggregate salary payable to secretaries and law clerks, our review of the legislative history of 28 U.S.C. 753(e) shows the Judicial Conference's parallel construction of that language to be reasonable. With the single exception of transcript fees which are specifically provided for by statute, we find no indication that it was contemplated that court reporters would receive any compensation in excess of the statutorily prescribed maximum. Thus, the construction placed on that limiting language by the Judicial Conference appears to be reasonable and consistent with the administration of pay provisions applicable to other court employees. In view of the well-established rule that great deference is to be paid the contemporaneous construction of a statute by the agency vested with the principal authority for its administration, we find no basis for payment of a cost-of-living allowance to court reporters who received compensation at the maximum rate prescribed in accordance with 28 U.S.C. 753(e) prior to June 2, 1970.

In regard to the final portion of his claim—that for annual leave—Mr. Barnes states that court reporters have not been afforded the benefits of annual leave because of a decision of this Office holding that they are part-time or intermittent employees. Mr. Barnes takes exception to any finding that court reporters are other than full-time employees. He points out that they are paid an annual salary to be available to report all court proceedings and that they are entitled to be away from duty only when the Judge for whom they are working is on leave or attending a Judicial Conference. While Mr. Barnes does not state that he was not allowed any leave, he does indicate that he was unable to take leave on at least those occasions when the Judge for whom he worked was attending conferences since during such periods he was assigned to work for a visiting Judge.

Mr. Barnes' reference to a decision by this Office in regard to leave entitlements of court reporters is apparently to our decision 25 Comp. Gen. 185 (1945) concerning, in part, the application of the Annual Leave Act of March 14, 1936, 49 Stat. 1161. Regulations in effect at the time of that decision, issued pursuant to the authority contained at section 7 of that act, excluded "part-time or intermittent employees." In considering the applicability of that exclusion to court reporters, we examined the statutory provisions for employment of court reporters as added by Public Law 78–222, referenced above, and concluded as follows:

> While those statutory provisions provide for permanent appointment of court reporters with an annual salary and with the privilege of collecting fees from private parties and from the Government—constituting court reporters "permanent employees" as that term ordinarily is used—nevertheless, their duties as prescribed by the statute do not require them to be "continuously employed during regular tour of duty" within the meaning of these words as used in section 6.1(e) of the leave regulation which has been issued pursuant to law and therefore has the force and effect of law. That is, the *1944* statute does not authorize or require that a regular tour of duty for all court reporters be established, but makes each individual court reporter subject to the call of the court when his services are needed. It is believed the statute has recognized that the nature of the duties of court reporters is such as to be inconsistent with the granting of leave of absence with pay. It is concluded, therefore, that court reporters employed under the *1944* statute are not full-time employees, but rather, part-time or intermittent employees, within the meaning of the leave regulation and, as such, are excluded from the benefit of receiving leave of absence with pay under the annual leave statute and regulations thereunder.

Our decision in that case relied upon the language of the regulations implementing the 1936 Leave Act. That act was superseded by the Annual and Sick Leave Act of 1951, title II of Public Law 82–233, October 30, 1951, 65 Stat. 679, which expressly excludes from coverage "part-time officers and employees * * * for whom there has not been established a regular tour of duty during each administrative workweek." Substantially the identical exclusionary language has appeared in Title 5 of the U.S. Code since 1951 and now appears at 5 U.S.C. 6301

(2) (ii) among the definitions applicable to the annual and sick leave provisions of subchapter I of Chapter 63.

In interpreting the particular language here in question as added by the 1951 act, we held at 31 Comp. Gen. 581, 584 (1952) that for the purpose of determining the right of a part-time employee to earn leave the requirement that he have a "regular tour of duty during each administrative workweek" contemplates a definite and certain time, day and/or hour of any day during the workweek when the employee will regularly be required to perform duty. *Cf.* 32 Comp. Gen. 206 (1952). An employee who is employed on a part-time basis but who has a regular tour of duty, as explained above, is entitled to annual leave benefits on a pro rata basis in accordance with the provision therefor at 5 U.S.C. 6302(c), 32 Comp. Gen. 490 (1952). Consistent with this section 630.303 of title 5 of the Code of Federal Regulations provides:

> A part-time employee for whom there has been established in advance a regular tour of duty on 1 or more days during each administrative workweek, and an hourly employee in the field service of the U.S. Postal Service earn annual leave as follows:
> (a) An employee with less than 3 years of service earns 1 hour of annual leave for each 20 hours in a pay status.
> (b) An employee with 3 but less than 15 years of service earns 1 hour of annual leave for each 13 hours in a pay status.
> (c) An employee with 15 years or more of service earns 1 hour of annual leave for each 10 hours in a pay status.

Our interpretation of the applicability of the leave provisions of the 1951 act, as amended, to part-time employees has been affirmed by the Court of Claims in *John T. Lemily* v. *United States*, 190 Ct. Cl. 57 (1969). There, in great detail, the court examined the evolution of the language of the 1951 act pertaining to part-time employees and their pro rata entitlement to annual leave benefits. Finding that the language of the particular provisions of the 1951 act had succeeded Public Law 81–316, October 5, 1949, 63 Stat. 703, extending pro rata annual and sick leave benefits under the 1936 act to part-time officers or employees with established regular tours of duty covering not less than 5 days in any administrative workweek, the court stated as follows:

> Thus, it is seen that on its face the part-time employee leave-exclusion provision of the Annual and Sick Leave Act of 1951 represents a reenactment of prior law except for the elimination, for reasons undisclosed, of the 5-day ingredient in the definition of a tour of duty. There is no evidence of a legislative intent to otherwise alter or relax the basic concept of a tour of duty as representing a specific period of time, regularly established in advance, during which an employee is unequivocally required to work. In short, except for the direct effect of eliminating the 5-day feature, there is no legitimate basis to impute to Congress a more liberal leave policy towards part-time employees under the 1951 Act than it specifically announced in 1949 when it first accorded leave to that group by amending the Leave Act of March 14, 1936, *supra*. This is especially so when it is recognized that, as previously noted, the 1951 Act was regarded as an economy measure whose stated purpose was to narrow, not liberalize, leave privileges generally.

The part-time employee leave regulations of the Civil Service Commission, in prescribing that a tour of duty may consist of as little as a specified work period during only one day of a workweek, have interpreted Section 202(b)(1)(B) of the 1951 Act in the most liberal light permissible. 5 C.F.R. § 30.501 (Rev. as of Jan. 1961), 5 C.F.R. § 630.303 (Rev. as of Jan. 1964).

We are advised by the Administrative Office of the United States Courts that court reporters' duties continue to be performed in accordance with the authority of Public Law 78–222 considered in our decision at 25 Comp. Gen. 185 (1945), discussed above, and in the same manner discussed in that decision, and that the day-to-day variance in courts' schedules preclude establishing a definite day or hour of any day of prescribed work for reporters. While Mr. Barnes has indicated that he was required to be available to report all court proceedings, he affirms that the situation with respect to his tour of duty as a court reporter was virtually identical to that considered in our prior decision. Specifically, Mr. Barnes was free when the court did not require his services to practice his profession privately and augment his annual salary income by earnings from the sale of transcripts to private parties. Neither the particular hours that he was free to pursue his private profession nor the hours he was required to provide services for the court could be determined or designated in advance. We therefore find no basis for concluding the holding at 25 Comp. Gen. 185 (1945) is no longer applicable to court reporters.

In regard to Mr. Barnes' claim for annual leave benefits, we point out, however, that our holding at 25 Comp. Gen. 185 (1945) is not strictly controlling in the case of a court reporter whose duties, like Mr. Barnes' for the period from September 30, 1963, to September 23, 1968, are combined with secretarial duties. In *Cain* v. *United States*, 77 F. Supp. 505 (1948), the court held that secretaries and law clerks to Judges who are obliged to observe fixed schedules of attendance are entitled to annual leave where the employing Judge certifies that such leave has in fact accrued. On the basis of that decision we recognized in B–86699, June 14, 1949, and July 20, 1949, that a court reporter-secretary might be entitled to leave benefits if in fact that employee worked a regular tour of duty each week. That decision was rendered prior to the revision of the leave laws by the 1951 act authorizing pro rata leave entitlements to part-time employees with regular tours of duty. Under that law as presently in effect a court reporter who serves in addition as a secretary on a regular tour of duty as defined at 5 CFR 630.303 would be technically entitled to pro rata leave benefits on the basis of those secretarial duties. However, because the leave he earned in connection with those secretarial duties could be used only for the purpose of absenting him from those regularly scheduled secretarial duties and not for the purpose of excusing him from

the requirement that he be available when the court requires his services as a reporter, the technical leave entitlements of reporters holding such dual positions are more a matter of form than substance as well as being extremely difficult to administer. In general, it appears that a court reporter-secretary would benefit more by having his combined position administered for leave purposes in the same manner as individuals serving solely as reporters.

In Mr. Barnes' particular case, the Judge for whom he worked was advised that his dual position could be administered under the leave laws. By letter of February 12, 1959, the Chief, Division of Personnel, Administrative Office of the United States Courts, advised the Clerk for the District Court of Guam as follows:

> It has not been the practice to allow credit under the leave laws to a court reporter who also serves as secretary to a judge for that portion of his time that is devoted to secretarial duties. In our opinion such a procedure would be impractical because in order to become entitled to the benefits of the leave laws, it is necessary that leave records be kept so that leave in excess of the amount permitted will not be taken and so that there may be an accurate basis for the computation of the sums due for unused leave when the employee leaves the Government service. We feel that it would be extremely difficult for judges to keep such a record for a single employee on the basis of an allocation of only part of his duties to the leave law requirements. It would be impossible to maintain such a record without constant regard for such considerations as the determination of the proper allocation of time in connection with the following: (a) Time when transcripts were being prepared; (b) Time while serving as secretary to the Judge; and (c) Time spent answering his telephone.
>
> However, if Judge Gilmartin wishes Mr. Barnes to abide by the leave regulations and to keep leave records in accordance with the enclosed Memorandum Regarding Leave for Secretaries and Law Clerks to Judges, dated September 29, 1958, Mr. Barnes should not engage in private work during regular office hours. Further, Mr. Barnes should be on official duty, either for the performance of work as official court reporter or as the judge's secretary at all times during regular office hours on a forty-hour a week basis, just as a secretary who has no other duties would be.
>
> Since the circumstances of Mr. Barnes' particular situation will determine whether or not he falls in the category of a reporter alone or in that of a secretary so far as leave regulations are concerned, it would be appreciated if you would advise us of Judge Gilmartin's views of the proposed status of Mr. Barnes.

Mr. Barnes' position as court reporter-secretary was not in fact administered under the Leave Act and he apparently was afforded leave when the Judge for whom he worked was on vacation and as the court's schedule otherwise permitted when he did not choose to privately pursue his profession. Since Mr. Barnes has not presented evidence that he worked a regular tour of duty either as secretary or in his dual capacity as court reporter-secretary and has not provided a certification from either the Judge for whom he worked or the Clerk of the Court as to the amount of accrued annual leave to his credit at the time of his separation from his position as court reporter with the District Court of Guam on June 29, 1973, there is no basis for payment to him of a lump-sum payment for accumulated and accrued annual leave under 5 U.S.C. 5551.

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[B–180847]

Subsistence—Per Diem—Rates—American Samoa—Establishment

Per diem entitlements of the employees in American Samoa classified as General Schedule employees are same as those of any Federal employee under Title 5 of the U.S. Code, regardless of whether expenses are paid out of appropriated funds or commingled grant and local moneys. However, restrictions in Title 5 would not apply to employees of the Samoan Government. Under Article II of the Samoan Constitution, the Samoan Legislature could establish per diem rates or vest the Governor with authority to do so.

In the matter of the authority of Governor of Samoa to establish per diem rates, October 2, 1974:

By letter of March 13, 1974, the Secretary of the Interior requested our opinion concerning the scope of authority of the Governor of the Government of American Samoa to establish per diem rates for himself, members of his staff, and local employees. Presently, the rates prescribed in the Federal Travel Regulations for travel in the continental United States, those prescribed by the Per Diem, Travel and Transportation Allowance Committee of the Department of Defense for travel in nonforeign areas outside the continental United States, and those prescribed in the Department of State's Standardized Regulations (Government Civilians, Foreign Areas) are used to establish per diem rates for all personnel in American Samoa.

The Secretary explains that the Governor and 15 other individuals holding positions in Samoa are classified as General Schedule employees, while the remaining positions are filled by employees of the local Government, hired either by contract or locally at rates of compensation prescribed by the Legislature of American Samoa.

Funding for American Samoa, and for payment of the salaries and travel expenses of local and Federal employees, is derived from local revenues and Federal funds. Approximately 98 percent of the funds are from local revenues supplemented by grants pursuant to the annual Department of the Interior and Related Agencies Appropriations Acts and approximately 2 percent from direct annual congressional appropriations. Regarding the funding we note that in addition to grant funds to supplement local revenues for support of local Samoan governmental functions, Public Law 93–120 (87 Stat. 429), making appropriations for the Department of the Interior and related agencies for the fiscal year ending June 30, 1974, provides for expenses of the Office of the Governor and operation of the Governor's house, as well as for compensation and mileage of members of the local legislature, and compensation and expenses of the judiciary.

It has long been recognized that grant funds which are transferred to a State or to one of the United States Territories, including American Samoa, become the property of the transferee and, when

mingled with local revenues, lose their character as public funds. Such commingled grant funds are not subject to statutory restrictions which may exist with respect to the expenditure of appropriated moneys unless such restrictions are made a condition of the grant. 16 Comp. Gen. 948 (1937); 36 *id.* 221 (1956); 43 *id.* 697 (1964); 46 *id.* 586 (1966); B–131569, June 11, 1957; B–169707, August 31, 1970; and B–173589, September 30, 1971. The Secretary's question as to the authority of the Governor to establish rates of per diem for the various categories of employees in American Samoa arises because much official travel performed by General Schedule, contract and local employees for the benefit and business of American Samoa is chargeable to and paid out of such commingled funds. Specifically, the Secretary asks whether under the terms of the Constitution of American Samoa and/or the Department of the Interior Secretarial Order No. 2657, as amended, the Governor of American Samoa, through the Legislature, has authority to establish per diem rates for:

1. Himself and/or other General Schedule employees for temporary duty travel and permanent change of station travel which pertains to official Federal business being financed out of annual U.S. Congressional appropriated funds.
2. Himself and/or other General Schedule employees for temporary duty travel and permanent change of station travel which pertains to business of American Samoa being financed out of commingled funds.
3. Contract and/or local employees for temporary duty and permanent change of station travel which pertains to official Federal business being financed out of annual U.S. Congressional appropriated funds.
4. Contract and/or local employees for temporary duty travel and permanent change of station travel which pertains to American Samoa business being financed out of commingled funds.

Executive, legislative, and judicial responsibilities for American Samoa have been largely delegated by the Secretary of the Interior under Secretarial Order No. 2657 and the Constitution of American Samoa. Nevertheless, the interest and responsibility of the Secretary of the Interior in the affairs of Samoa remain. For example, the Governor, Lieutenant Governor, the Chief and Associate Justices of American Samoa and various other officials are appointed by the Secretary, revisions to the Constitution remain subject to Secretarial approval, and legislative requests for funds are required to be submitted to the Secretary. However, while particular individuals are regarded as performing Federal functions in Samoa and are classified under the General Schedule, they are necessarily involved in performing duties that pertain to the business of the Samoan Government. Thus, such employees perform both Federal functions and functions relating to purely local affairs.

In reviewing the hearings before the House Subcommittee on Appropriations, 93d Congress, on the Department of the Interior and Related Agency Appropriations for the fiscal year ending June 30, 1974, we note that grant funds were requested in part for payment of the

salary of the new General Schedule position of Procurement Officer, one of six General Schedule positions in the offices of Administrative Services, Manpower and Resources, and Legal Affairs for which salaries and related expenses are budgeted under grant funds for the operations of those offices. See pages 238 through 246 of Part 4 of the above-referenced hearings. While approximately $4,800,000 is provided by grant funds for procurement of facilities, supplies and services for various of the Samoan Departments, only about $60,000 is appropriated for procurement of facilities, supplies and services for the Office of the Governor and the Judiciary. Thus, it clearly appears that the Procurement Officer will be almost exclusively engaged in procurement activities for the various Departments of American Samoa. Thus, it appears that, while the duties are performed primarily for the Government of American Samoa, it has been determined that the duties of that position involve the performance of a Federal function so as to qualify for inclusion under the General Schedule. The same determination would appear to be true of the duties performed by the other General Schedule employees whose salaries are provided for either by grant funds or direct appropriation for American Samoa.

The above indicates that the Governor and the General Schedule employees perform duties which range from those which are primarily Federal to those which are primarily local in nature. While a breakdown of duties could be made, we do not believe such a breakdown would be desirable since it would be arbitrary at best. Moreover, while there is a mingling of Federal and local funds, the compensation of these employees is now budgeted to be paid from what is clearly a Federal source of funds. See page 204 of the above-referenced hearings. Therefore, insofar as it has been determined that the offices of 15 individuals in Samoa are Federal positions classified under the General Schedule, the entitlements of those individuals to travel expenses, including per diem, are no different than the entitlements of other Federal employees regardless of the funds from which those expenses are paid. Accordingly, in regard to the first and second questions posed by the Secretary of the Interior, it is our opinion that the Governor of Samoa neither has nor may he be given authority to establish per diem rates for himself or other General Schedule employees for temporary duty or permanent change of station travel without regard to the provisions of Title 5 of the U.S. Code and implementing regulations.

In our opinion, however, the provisions of Title 5 and implementing regulations concerning payment to Federal employees of travel and per diem expenses would not necessarily be applicable to individuals who are employees of the Government of American Samoa who are not General Schedule employees. Under Article II, Section 1 of the

American Samoa Constitution the local Legislature has responsibility to enact laws with respect to "subjects of local application." Inasmuch as the entitlement to per diem expenses of individuals who have been determined to be employees of the Government of American Samoa would seem to be a "subject of local application," it would appear that it would be within the authority of the Legislature to enact legislation establishing per diem rates for such employees or vesting the Governor with authority to do so. The Secretary's third and fourth questions are answered accordingly.

[B-180311]

Compensation—Promotions—Temporary—Retroactive

Civilian employee, assigned temporarily to perform the duties of a higher level position, may be retroactively temporarily promoted for that period since provision in collective bargaining agreement in effect at the time provided that employees so assigned for more than one pay period would be temporarily promoted. If such provision is valid under Executive Order 11491, then agency acceptance of agreement made provision a nondiscretionary agency policy and General Accounting Office has permitted retroactive changes in salary when errors occurred as the result of a failure to carry out a nondiscretionary agency policy.

Officers and Employees—Promotions—Administrative Determination—Federal Labor Relations Council Review

Question of whether provision in collective bargaining agreement providing for temporary promotion for employees assigned to higher level positions for one pay period or more is valid in light of section 12(b)(2) of Executive Order 11491 which provides that management officials of an agency retain the right to promote employees within the agency is for determination by head of agency involved, subject to review by Federal Labor Relations Council. It is noted, however, that provision appears valid since agency has retained right to make determinations as to whether and whom to assign to higher level position, and 5 CFR 335.102(f) leaves to agency discretion the definition of a "reasonable time" in which to effect such promotions, thus making the time period amenable to negotiation.

In the matter of a retroactive temporary promotion, October 4, 1974:

This matter involves a request for a decision from the Commander of the Puget Sound Naval Shipyard as to whether he may retroactively give an employee of the Shipyard a temporary promotion and pay the employee the compensation commensurate with that promotion for the period in question. The Commander states that his designated representative in a negotiated grievance procedure held that a temporary promotion should have been processed for a period of time in June and July of 1972 under the provisions of a collective bargaining agreement between the Shipyard and the Bremerton Metal Trades Council. The decision in the grievance was that retroactive documentation

of and payment for such a promotion required a determination as to legality. Therefore the matter has been submitted to our Office.

The facts in the case are stated in the submission as follows:

> The grievant, a GS–9 quality assurance specialist, was assigned the duties of a nonsupervisory GS–10 level position from 2 June through 21 July 1972, while the individual who filled that position was on leave. The applicable Agreement provision states that when an employee is assigned to a higher level nonsupervisory position for a pay period or more, a temporary promotion will be made. It was determined, primarily on the basis of a written decision by the first line supervisor, that the scope of the grievant's assignment encompassed substantially all of the duties of the GS–10 position and that the grievant was qualified to assume those duties. The supervisor did not, however, notify or discuss with any higher level supervision this particular work assignment.

It is a well-settled principle of law that Federal Government employees are entitled only to the salaries of the positions to which they are appointed, regardless of the duties they actually perform. *Price* v. *United States*, 80 F. Supp. 542, 543 (112 Ct. Cl. 198 (1948)) and cases cited therein. Also, the granting of promotions from grade to grade is a discretionary matter primarily within the province of the administrative agency involved. See *Tierney* v. *United States*, 168 Ct. Cl. 77 (1964); *Wienberg* v. *United States*, 192 Ct. Cl. 24 (1970). Moreover, salary increases may ordinarily not be made retroactively. However, we have held that when an employee has become eligible for a compensation increase under agency regulations or policies, administrative action retroactively correcting an error or oversight in processing the necessary documents to grant the increase will not be regarded by us as a prohibited retroactive adjustment. We discussed the general rule regarding retroactive salary changes in our decision of January 22, 1970, B–168715:

> As a general rule an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. 26 Comp. Gen. 706 (1947), 39 *id.* 583 (1960), 40 *id.* 207 (1960). However, we have permitted adjustments (retroactively effective) of salary rates in certain cases when errors occurred in failures to carry out *nondiscretionary* administrative regulations or policies. See 34 Comp. Gen. 380 (1955) and 39 *id.* 550 (1960). Also, we have permitted retroactive adjustments in cases where the administrative error has deprived the employee of a right granted by statute or regulation. See 21 Comp. Gen. 369, 376 (1941), 37 *id.* 300 (1957), 37 *id.* 774 (1958).

In the cited decision, B–168715, it was held that the employees involved had no vested right to be promoted at any specific time, but rather that the agency's regional commissioner was given the authority to promote. We recognized in that case that the intent of the administrative instructions involved was that the promotion be made within a reasonable time, but that a delay in effecting the promotions did not, in effect, constitute administrative error.

In the present case, however, the agency has through collective bargaining negotiated an agreement with the union, one of the provisions of which is that when an employee is assigned to a higher level non-

supervisory position for a pay period or more, he will be temporarily promoted to that position. Matters regarding temporary promotions are properly within the discretion of the agency under section 335.102 (f) of title 5 of the Code of Federal Regulations which provides that, generally, an agency *may* temporarily promote an employee to meet a temporary need for a definite period of 1 year or less and extend such a promotion for a definite period not to exceed 1 additional year. The time periods provided in the regulations are maximums rather than minimums and it is left to the individual agency's discretion to decide after what minimum period to temporarily promote an employee. We believe that the temporary promotion provision involved in this case, if properly includible in the collective bargaining agreement in accordance with sections 11 and 12 of Executive Order 11491 as amended by Executive Order 11616 of August 26, 1971, 3 CFR 254, became a nondiscretionary agency policy at the time that the collective bargaining agreement was approved by the head of the agency under section 15 of Executive Order 11491. Therefore, while the Shipyard retained the discretion to choose which employee, if any, to assign temporarily to a higher level position, once the decision was made to assign a particular employee to a higher level position for a pay period or more, it then became incumbent upon the agency to temporarily promote that employee in accordance with the collective bargaining agreement.

In the instant case it has been determined that the employee involved was assigned the duties of the higher level position, that he was qualified to assume those duties, and that he did in fact perform them for longer than a pay period. The fact that the employee's first line supervisor did not discuss the particular work assignment with any higher level of supervision would not make a difference if the first line supervisor had the authority, as he apparently did, to order the employee to perform the duties of the higher level position.

Accordingly, we view the agency's failure to give the employee a temporary promotion at the time in question as an administrative error and would have no objection to correction of the error at this time by processing a retroactive temporary promotion and paying the appropriate back pay so long as the provision in the agreement calling for temporary promotions after assignment for 1 or more pay periods is valid under Executive Order 11491. In that regard we note that section 12(b)(2) of Executive Order 11491 provides, concerning provisions in Federal employees' collective bargaining agreements, that management officials of an agency retain the right, in accordance with applicable laws and regulations, to promote employees within the agency. The question of whether or not the provision in the agree-

ment for temporary promotions is contrary to the agency's retained right to promote under section 12(b) (2) is a matter for determination by the head of the agency, subject to review by the Federal Labor Relations Council. We have been informally advised by the Federal Labor Relations Council that such an agreement would not appear to be contrary to the provisions of section 12(b) (2) and we note that there is no minimum time period provided by law or regulations before which temporary promotions cannot be effected and the agency in this case has retained the right to make the determination as to whether or not to assign an employee to the higher level position, and whom to assign to that position, agreeing only that once those determinations have been administratively made, it will process a temporary promotion if the assignment extends for more than 1 pay period.

Therefore it would appear that the temporary promotion provision in the agreement was proper and corrective action in this case may be taken as indicated.

[B-179316]

Pay—Retired—Survivor Benefit Plan—Retired Prior to Effective Date of SBP—Marriage Prior to First Anniversary Date of SBP

A service member who was retired prior to the effective date of the Survivor Benefit Plan and who marries prior to the first anniversary of the effective date of the Plan may provide immediate coverage for his spouse regardless of the 2-year limitation under 10 U.S.C. 1447(3) (A), provided such an election is made within the time limitation stated in subsection 3(b) of the act, as amended by section 804 of Public Law 93-135.

In the matter of a wife's annuity eligibility under the Survivor Benefit Plan, October 7, 1974:

This action is in response to a letter from the Principal Deputy Assistant Secretary of Defense (Comptroller) requesting an advance decision concerning the eligibility of a spouse to receive an annuity under the provisions of the Survivor Benefit Plan (SBP), 10 U.S. Code 1447–1455, as added by Public Law 92–425, effective September 21, 1972, 86 Stat. 706, in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 489, enclosed with the submission.

The questions presented in the Committee Action are as follows:

1. Does the two year proviso involving the wife's eligibility for an SBP annuity apply when the member marries after retirement but before the effective date of the SBP legislation?
2. Would the answer to question one equally apply if the marriage occurred after 20 September 1972 and before 21 September 1973?

With regard to the first question, in our decision, 53 Comp. Gen. 818 (1974), we considered the issue involving the immediate eligibility of a spouse under the Survivor Benefit Plan in the case of a member

who retired from the United States Air Force on September 30, 1967, married his present wife on August 19, 1971, and where there was no issue born of the marriage. We stated therein that military personnel who were receiving retired pay prior to the effective date of the act could elect to participate in the Plan by virtue of subsection 3(b) of Public Law 92–425, as amended by section 804 of Public Law 93–155, effective November 16, 1973, 87 Stat. 605, 615, if such election was made within 18 months of the effective date, or by March 21, 1974, and that by virtue of subsection 3(e) of Public Law 92–425 such an election made under subsection 3(b) became effective on the date received by the Secretary concerned. 10 U.S.C. 1448 note.

Based on the language of those subsections and their legislative history, we concluded therein that the limitation contained in 10 U.S.C. 1447(3), restricting the eligibility of a surviving spouse to receive 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 and that such spouse became an immediate eligible beneficiary under the Plan on the date the member's election was received by the Air Force.

The first question, therefore, is answered accordingly.

With regard to the second question, the Committee Action states that from the legislative history of Public Law 92–425, it appears that it was the intention of Congress to build provisos into the law that would best serve all members having or who had attained retirement rights. Further, there were also introduced protective provisos, for example, the Congress did not intend that "death bed" marriages and elections should serve as a windfall for potential annuitants. However, it does not appear that marriages entered into prior to enactment of this legislation could have been entered into on account of the potential "windfall" benefits.

Subsection 3(b) of Public Law 92–425, provides that any person who is entitled to retired or retainer pay on the effective date of the act may elect to participate in the Plan if such election is made within 1 year of the date of enactment. As previously noted, that 1-year period was subsequently extended to 18 months by Public Law 93–155, which expired on March 21, 1974. In addition, the fourth sentence of that subsection provides that:

> A person who is not married or does not have a dependent child on the first anniversary of the effective date of this Act, but who later marries or acquires a dependent child may elect to participate in the Plan under the fourth sentence of section 1448(a) of that title [Title 10, United States Code].

In our decision 53 Comp. Gen. 818 (1974), we expressed the view that coverage under the Plan for military personnel who were retired prior

to the effective date of the Plan is only by virtue of subsection 3(b) of Public Law 92–425, indicating that in the absence of any other provision in that act which would restrict or prohibit such participation, the limitations contained in 10 U.S.C. 1447(3) would not apply to subsection 3(b) participants.

It clearly indicated that the before-quoted sentence from subsection 3(b) provides a time limitation within which military personnel who were retired prior to the effective date of Public Law 92–425 may elect to participate in the Survivor Benefit Plan. Since a retired member's entrance into the Plan is authorized only under the provisions of section 1448 of Title 10, U.S. Code, or section 3 of the act and since pre-effective date retirees, who are not married or have not acquired a dependent child by "the first anniversary of the effective date of this Act," are limited in their participation election thereafter to the provisions of the fourth sentence of subsection 1448(a), should they later marry or acquire a dependent child, it stands to reason that their participation prior to that anniversary date remains by virtue of subsection 3(b).

Therefore, it is our view that a member who is retired prior to the effective date of the act, and who marries prior to the first anniversary of that date (September 21, 1973), may elect to participate in the Plan under subsection 3(b) of the act. Further, the limitation contained in 10 U.S.C. 1447(3)(A) restricting the eligibility of a surviving spouse to receive an annuity would not be applicable.

The second question is answered in the affirmative.

[B–181352]

Travel Expenses—Personal Convenience—Private and Public Business Intermingled—Special Fare *v.* Regular Rate—Reimbursement for "Accommodations" in Travel Package

When an employee combines personal travel with official travel, thereby qualifying for a special fare, he is entitled to reimbursement of the lesser of the actual cost of the special fare, or the regular fare by direct route, notwithstanding the fact that the special fare may necessitate the purchase of accommodations or other items normally classified as subsistence or included in per diem which are not reimbursable while the employee is on leave, if such items are included as part of a travel package.

In the matter of expenses necessary to obtain special travel fare, October 8, 1974:

This action is made pursuant to a request for a decision by an authorized certifying officer as to whether amounts paid for accommodations by two employees to obtain special "tour-basing" fares incident to temporary duty assignments may be certified for payment.

Douglas L. Hunter and Marilyn C. DeHaan, two employees of the Internal Revenue Service Data Center, Detroit, Michigan, were required to travel from their residences in the Detroit area to Fresno and San Francisco, California, and return on official business. The employees left Detroit earlier than necessary to perform official business in order to stop in Colorado on annual leave for personal reasons. Mr. Hunter departed from Detroit on January 17 and Ms. DeHaan did so on January 13. From Colorado, they traveled to Fresno, California, on January 21, 1974, remained in Fresno for 2 days, traveled to San Francisco the evening of January 23, and returned to Detroit on January 25.

The regular air fare for a direct trip from Detroit to Fresno to San Francisco to Detroit, which the Government would have paid had they traveled directly, was $320.92 for each traveler. However, the employees were able, as a result of the combination of their personal travel with their official travel, to secure a special "tour-basing" fare of $228.15. This special fare was available only with the purchase of a minimum of $65 in accommodations. The question presented for decision is whether this amount of $65 is reimbursable by the Government.

The administrative office of the Internal Revenue Service questions the propriety of paying the $65 to each employee, on the ground that with certain exceptions not here applicable, per diem in lieu of subsistence may not be paid while the traveler is on leave, under the provisions of Federal Travel Regulations, FPMR 101–7, section 1–7.5 (a)(1). (Although the section in question deals only with per diem payments and not with items of subsistence expense such as accommodation charges specifically, since per diem is payable in lieu of subsistence expenses, we consider the section to be applicable to the present situation as well.)

The employees maintain that although the $65 was listed separately on their vouchers as an accommodation charge, it was in fact included by the airline as an inseparable part of the overall cost of the special "package" tour and that such special arrangements are permissible under the provisions of the Federal Travel Regulations, FPMR 101–7, section 1–3.4b(1), which reads in pertinent part as follows:

(1) *Use of special lower fares.* Through fares, special fares, commutation fares, excursion, and reduced-rate roundtrip fares shall be used for official travel when it can be determined prior to the start of a trip that any such type of service is practical and economical to the Government. * * *

We would agree that the above-quoted regulation not only permits the use of special package tours but actually requires the traveler to use them for official travel when it can be determined in advance that it would be advantageous to the Government for him to do so. In this

connection, see FPMR 101–7, section 1–1.3, which states that an employee's obligation is to exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business.

We have held on numerous occasions that when personal and official travel is performed, we will not require that the expenses of such transportation be prorated unless the overall cost exceeds that which would otherwise have been incurred had only official travel been performed. In our decision, B–178535, June 21, 1973, an employee was sent to the Soviet Union. The regular fare would have been $837.40. The employee chose to take leave in Europe following the completion of his duties in the Soviet Union and as a result was able to qualify for a special excursion fare of $639.20. It was held that he was entitled to the full $639.20 even though part of the travel covered by that fare was personal.

In B–176512, October 25, 1972, an employee was sent from Virginia to Florida. He chose to take the autotrain with his wife and automobile rather than to fly. The fare was $380 for the round-trip transportation of both him and his wife as well as for the automobile, while the air fare for him alone would have been $180. Had he traveled alone by autotrain the fare would not have been reduced. Even though the travel of his wife and the transportation of his automobile were personal, and not permissible for reimbursement under the applicable statute and regulations, we held that the fare need not be prorated or separated from the nonreimbursable items in the total autotrain package. The employee was still entitled to the lesser of the actual cost or the air fare, which in this case was the air fare. *See also* B–167183, December 19, 1969.

In B–175643, April 27, 1972, an employee drove a rented automobile 600 miles on official business and 683 miles for personal convenience. The authorized monthly rental included 3,000 miles without additional charge. We held that the rental costs were not to be apportioned to official and personal uses, and that the employee did not have to pay any portion of the rental costs because his personal use of the automobile did not result in any additional expense to the Government.

In the instant case, it may fairly be argued that the use of the $65 accommodations also resulted in no additional expense to the Government. On the contrary, had the accommodations not been purchased, the cost to the Government would have been increased by $27.77 for each traveler, representing the difference between the regular air fare for a direct trip and the special package fare. Under these circumstances we would regard the $65 charge as an allowable additional air fare expense, rather than a subsistence expense, and we suggest that the supplemental voucher be amended accordingly.

[B-181692]

Bonds—Bid—Discrepancy Between Bid and Bid Bond—Bid Nonresponsive

Bid of corporation, which submitted defective bid bond in name of joint venture consisting of corporation and two individuals, must be rejected as nonresponsive and defect cannot be waived by contracting officer, since invitation for bids requirement for acceptable bid bond is material and General Accounting Office is unable to conclude on basis of information bidder submitted with bid that surety would be bound in event bidder failed to execute contract upon acceptance of its bid.

Agents—Government—Authority—Contract Matters

Contracting personnel's erroneous advice that bidder would receive award cannot estop Government's rejection of nonresponsive bid.

In the matter of A. D. Roe Company, Inc., October 8, 1974:

On May 8, 1974, the United States Army Corps of Engineers, Baltimore District, Baltimore, Maryland, issued invitation for bids (IFB) No. DACA31-74-B-0087 for the modernization of barracks at Fort Knox, Kentucky. The IFB included Standard Forms (SF) 20 and 22. Paragraph 4 of SF-22 states in pertinent part:

> Where a bid guarantee is required by the invitation for bids, failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

Paragraph A of SF-20 states in pertinent part:

> Each bidder shall submit with his bid a Bid Bond (Standard Form 24) with good and sufficient surety or sureties acceptable to the Government * * *.

The apparent low bid was submitted by the A.D. Roe Company, Inc. (Roe). However, Roe identified itself differently on its bid bond (SF-24). On the bid form the bidder is identified as the "A. D. Roe Company, Inc." and the bid is signed by "J. E. McCubbin, Jr.," Vice President. In addition, Roe identifies itself on SF-19-B, "Representation and Certifications," as the "A. D. Roe Company, Inc.," a corporation incorporated in the State of Kentucky.

The bid bond identifies its principal as the "A. D. Roe Company, Inc. and A. D. Roe and James E. McCubbin, Jr. (a Joint Venture)." In the signature blocks for the principal of the bid bond appear the signatures of "A. D. Roe" as President of the A. D. Roe Company, Inc., "A. D. Roe," Individual and "James E. McCubbin, Jr.," Individual. Also, the words "joint venture" are checked in a space entitled "Type of Organization" appearing in the upper right hand corner of the face of the bid bond.

Consequently, the procuring activity determined that "Roe's bid was nonresponsive, since there was a discrepancy between the legal entity show on the bid and the legal entity shown on the bid bond. Award was made on June 27, 1974, to the only other bidder under the

IFB, Cal Constructors, a joint venture consisting of Santa Fe Engineers, Inc., Excavation Construction Company, and Lan Cal Equipment Co., Inc., in the amount $6,532,529. Roe's bid for this same work was $6,162,300.

By letter dated July 2, 1974, Roe protested to our Office against the rejection of its bid. Roe contends that the clerical error on the bid bond should not render its bid nonresponsive and it should have been given the opportunity to correct this simple mistake. Roe states that the bid bond clearly covered Roe as a bidder under the IFB, as has been unequivocably recognized by the surety in a letter to the procuring activity dated July 1, 1974. Roe concludes that the rejection of its bid for such "grossly inequitable and ludicrous" reasons constituted an arbitrary and capricious act on the part of the Army, which will cost the Government almost $400,000 more than if award had been made to Roe.

It is clear that in order for a bid to be considered responsive to an IFB, it must comply with all of the IFB's material requirements. 52 Comp. Gen. 265 (1972). It also is a fundamental principle of procurement law that whether a bid is responsive to the IFB is for determination upon the basis of the bid as submitted and that it is not proper to consider the reasons for the nonresponsiveness, whether due to mistake or otherwise. 38 Comp. Gen. 819 (1959); 51 *id.* 836 (1972). Moreover, it is equally well-settled that defects which make a bid nonresponsive may not be waived by the contracting officer. 30 Comp. Gen. 179 (1950); 50 *id.* 733 (1971).

Beginning with our decision in 38 Comp. Gen. 532 (1959), we have consistently held that the bid bond requirements must be considered a material part of the IFB and the contracting officer cannot waive the failure to comply with these requirements. *See* e.g., 39 Comp. Gen. 60 (1959); 44 *id.* 495 (1965); 50 *id.* 530 (1971); 52 *id.* 223 (1972). We summarized the basis for this rule at page 536 of 38 Comp. Gen., *supra*, as follows:

> * * * waiver of a bid bond requirement stated in an invitation for bids would have a tendency to compromise the integrity of the competitive bid system by (1) making it possible for a bidder to decide after opening whether or not to try to have his bid rejected, (2) causing undue delay in effecting procurements, and (3) creating, by the necessary subjective determinations by different contracting officers, inconsistencies in the treatment of bidders. The net effect of the foregoing would be detrimental to fully responsive and responsible bidders, and could tend to drive them out of competition in those areas where the practices described occur. This result could hardly be said to serve the best interests of the United States. * * *

Our Office was not alone in the view that waiver of the material bid bond requirements tended to compromise the integrity of the competitive bidding system. Prior to our decision, a congressional committee expressed grave concern over the frequent waiver of the require-

ments for acceptable bid bonds. *See* Procurement Subcommittee of the House Committee on Armed Services, 82d Congress, *Investigation of Bid Bonds*, (Comm. Print. 1951), wherein it was stated that the then-existing regulations allowing waiver of the bid bond requirements had no justification in law and should be changed.

Furthermore, Armed Services Procurement Regulation (ASPR) 10–102.5 recognize the materiality of the bid bond requirements. This regulation states in pertinent part:

> When a solicitation requires that bids be supported by a bid guarantee, noncompliance with such requirement *will* require rejection of the bid * * *. [Italic supplied.]

ASPR 10–102.5 does state certain specified exceptions to this general rule. However, none of these stated exceptions are applicable to the present case nor do any of these exceptions permit the possibility of attempts by bidders to leave themselves the option of refusing the contract with no effective security for the Government or of correcting the defective securities in order to receive the award. *See* 39 Comp. Gen. 796 (1960).

We have consistently held that a bid bond which names a principal different from the nominal bidder is deficient and the defect may not be waived as a minor informality. 44 Comp. Gen., *supra;* 51 Comp. Gen. *supra;* 52 Comp. Gen 223 *supra;* B–177890, April 4, 1973; B–178796, August 8, 1973. This rule is prompted by the rule of suretyship that no one incurs a liability to pay the debts or perform the duty of another unless he expressly agrees to be bound. *See* 72 C.J.S. *Principal and Surety*, § 91 (1951). *Cf.* Section 4.14, *Stearns Law of Suretyship* (5th ed., 1951). In this regard, Annot., 144 A.L.R. 1263, 1267 (1943) states:

> Even aside from the general doctrine that a surety's liability is strictissimi juris and cannot be extended by construction, there seems to be no escape from the proposition that a surety who undertakes to respond in respect of the acts of one principal cannot be held liable in respect of the acts of another, or of the principal and another acting with him as principal; for so to extend his liability would be to hold him to an essentially different contract. Clearly, the identity of the principal is linked to the identity of the contract. * * *

Furthermore, it has been held that a surety under a bond in the name of several principals is not liable for the default of one of them. See 72 C.J.S. *supra*; *Dolese Brothers Company* v. *Chaney & Richard*, 145 P. 1119 (1915); *Oklahoma Portland Cement Company* v. *Chaney*, 150 P. 884 (1915); *Shuttee* v. *Coalgate Grain Company*, 172 P. 780 (1918); *Wilson Machinery & Supply Company* v. *Fidelity & Casualty Company of New York*, 110 S.W. 2d 1075 (1937).

The determination of the sufficiency of a bid bond relates to whether the Government will receive the full and complete protection it contemplated in the event the bidder fails to execute the required contract

documents and deliver the required performance and payment bonds. *See* 39 Comp. Gen. 60; 52 *id.* 223, *supra.* In the present case, the surety's liability under the bond is contingent upon the bid being in the name of the entity listed on the bid bond, i.e., "A. D. Roe Company, Inc. and A. D. Roe and James E. McCubbin, Jr., a Joint Venture." Therefore, we are unable to conclude on the basis of the information Roe submitted with its bid that the surety would be bound in the event of the failure of Roe to execute the contract upon acceptance of its bid. *See* B–170361, July 27, 1970; 50 Comp. Gen. 530, 534; 51 Comp. Gen., *supra*; B–177890, *supra*; B–178796, *supra.* Roe cannot be excepted from the bid bond requirements by virtue of the fact that it is a proven responsible contractor, since all bidders must meet the material requirements of the IFB in order for it to be said that they are competing on an equal basis. *See* 52 Comp. Gen. 265.

Roe also argues that under suretyship law the terms of the contract of which the surety promises performance must be read into the surety's contract with the principal, i.e., the bond, and that the two contracts must be construed together as one instrument. Roe states that, therefore, the bid form (SF–21) and the bid bond (SF–24) must be construed together as the suretyship contract, which under the circumstances of the present case must be considered ambiguous. Roe goes on to argue that inasmuch as under suretyship law recourse may be had to extraneous evidence in order to resolve any uncertainty as to the intent of the parties under the suretyship contract, it is clear from the prompt affirmations of Roe and its surety that the parties intended to recognize the "A. D. Roe Company, Inc." as the bidder/principal, and that the inclusion of the other parties on the bid bond was a mere clerical error.

Assuming arguendo that Roe's statement and application of the law of suretyship is correct, it still must be concluded that Roe's bid as submitted is, at best, ambiguous. By reading the bid and bid bond together, we have found bids to be responsive, even though they named different principals on the bonds than those named on the bid forms, in cases where we were able to conclude from the bid itself that the intended bidder was the same legal entity as the principal named on the bid bond. *See* B–169369, April 7, 1970; B–176321, August 25, 1972. However, it is well-settled that an ambiguous bid may not be explained after bid opening with extraneous evidence in order to make it responsive to the IFB's requirements, since the bidder would then, in effect, have an election as to whether or not he wished to have his bid considered. 40 Comp. Gen. 393 (1961); 50 *id.* 302 (1970); *id.* 379 (1970). Therefore, the surety's letter to the procuring activity regarding its obligation on the bid bond and any other evidence sub-

mitted after bid opening cannot be considered in determinig whether Roe's bid is responsive. *See* 44 Comp. Gen. *supra;* 51 Comp. Gen. *supra.*

Roe also contends that since the statement used in the IFB's bid guarantee requirement (SF–22, paragraph 4) was only that failure to comply "*may* be cause for rejection of the bid," Roe's bid should not have been rejected in view of the cost savings to the Government and the other circumstances surrounding this procurement set out above. However, we have held that this statement is just as compelling and material as if more positive language were employed. *See* 46 Comp. Gen. 11 (1966); B–160507, December 27, 1966; B–179107, October 26, 1973; *Matter of Thorpe's Moving*, B–181154, July 17, 1974. Moreover, paragraph A of SF–20, which was incorporated in the IFB, stated: "Each bidder *shall* submit with his bid a Bid Bond * * *" [Italic supplied.]

Roe further contends that the Army had essentially waived its right to determine that Roe's bid was nonresponsive by virtue of the repeated assurances made to Roe, on which Roe and its subcontractors relied to their detriment, by various contracting personnel, after bid opening up until Roe's bid was rejected, that Roe would receive the contract. However, the bid guarantee requirements have the force and effect of law, since they were promulgated by the Department of Defense in implementation of the Armed Services Procurement Act of 1947, and are published in the Federal Register. See *Paul* v. *United States*, 371 U.S. 245 (1963). Therefore, the Army was legally bound to reject Roe's bid as nonresponsive. It is well-established that the United States is not liable for the erroneous acts or advice of its officers, agents or employees, even if committed in the performance of their official duties. See *Hart* v. *United States*, 95 U.S. 316, 318 (1877); *Federal Crop Insurance Corporation* v. *Merrill*, 332 U.S. 380 (1947); 19 Comp. Gen. 503 (1939); 46 *id.* 348 (1966). Therefore, it is clear that the erroneous advice given by Army contracting personnel cannot act to estop the Army from rejecting Roe's bid as nonresponsive as it was required to do by law. See *Prestex Inc.* v. *United States*, 320 F. 2d 367 (1963).

Finally, although acceptance of Roe's bid may result in a monetary savings to the Government on this procurement, we have often observed that the maintenance of the integrity of the competitive bidding system is more in the Government's best interest than the pecuniary advantage to be gained in a particular case. *See* 43 Comp. Gen. 268 (1963); B–175420, May 22, 1972.

We have reviewed all of the contentions, cases and authorities cited by Roe and its attorneys, but do not find them persuasive or applicable under the circumstances of the present case. Accordingly, Roe's protest against the rejection of its bid is denied.

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[B-179922]

Bankruptcy—Contractors—Prospective

The filing of a petition under Chapter XI of the Bankruptcy Act does not in itself require a finding that petitioner is not a responsible prospective contractor.

Bidders—Qualifications—Bankruptcy Effect

Contracting officer did not arbitrarily determine firm to be responsible, although it was undergoing Chapter XI arrangement, in view of favorable preaward surveys concluding that firm had financial and other resources adequate for performance of the contract.

Contracts—Negotiation—Duration, etc.

Offeror's purported post-closing date consent to certain contract clauses which were incorporated into request for proposals by reference, and to which offeror had not objected in its initial proposal, did not constitute the conduct of discussions.

Contracts—Protests—Timeliness—Negotiated Contract

Allegation that agency improperly failed to conduct discussions was dismissed as untimely since it was filed almost 2 months after award was made.

In the matter of Hunter Outdoor Products, Inc., October 16, 1974:

The protester's principal contention is that the contracting officer arbitrarily and capriciously determined the low offeror to be a responsible prospective contractor. Our Office has discontinued the practice of reviewing bid protests of contracting officer's affirmative responsibility determinations, except for actions by procuring officials which are tantamount to fraud. *Matter of United Hatters, Cap and Millinery Workers International Union*, 53 Comp. Gen. 931 (1974). However, we shall consider the instant protest on the merits because it was filed prior to our change in policy.

The Defense Supply Agency (DSA), Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania, issued request for proposals (RFP) DSA100-74-R-0001 for the furnishing of 90,000 sleeping bags. La Crosse Garment Manufacturing Company (La Crosse) submitted the low offer for a substantial portion of the procurement and therefore was the subject of a preaward survey, described more fully below. In the meantime, a requirement for 113,732 additional sleeping bags was received. The new requirement was added to the current solicitation by amendment, and a subsequent amendment clarifying the specifications set the due date for receipt of proposals as November 2, 1973.

Of the five offers received, La Crosse submitted the lowest for the entire quantity solicited. Since the quantity of sleeping bags to be supplied had increased substantially, a supplemental preaward survey was conducted at La Crosse. Additionally, DPSC and La Crosse

representatives met to discuss the availability of fuel, equipment, labor resources, finances, and the proposed production rate. On the basis of the information derived from this discussion and the two preaward surveys, the contracting officer determined La Crosse to be a responsible prospective contractor.

La Crosse's price was determined to be fair and reasonable, in view of the competition obtained and an independent price analysis, and therefore it was considered unnecessary to conduct written or oral negotiations.

On November 29, 1973, Hunter Outdoor Products, Incorporated (Hunter) protested to our Office against any award being made under the solicitation on the basis that the RFP "is defective in a number of respects including the fact that the Government furnished materials called for are not available." Hunter never developed this basis for protest and we assume it has been abandoned. The procuring agency proceeded with an award to La Crosse under the authority of Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(3) (1973 ed.) since supplies of the sleeping bags were exhausted and 85,000 units were on backorder.

Hunter first alleges that the contracting officer abused his discretion by "precipitously" making award to La Crosse after the protest was filed. In view of our conclusions on the merits of this protest, we do not believe that the protester has been prejudiced by the decision to proceed with the award, and therefore we see no necessity to discuss its propriety.

As we indicated above, the protester's principal contention is that that contracting officer arbitrarily and capriciously determined La Crosse to be a responsible prospective contractor. This contention is based upon the observation that La Crosse is "in bankruptcy," a reference to the fact that La Crosse is undergoing an arrangement in accordance with Chapter XI of the Bankruptcy Act. In this regard our Office has stated that:

> * * * the mere fact that a contractor files a petition in bankruptcy under Chapter XI does not in itself require a finding of nonresponsibility regardless of other facts.

See B-172149, June 25, 1971, and the cases cited therein; B-160374, January 4, 1967; B-156288, July 29, 1965.

The initial preaward survey of La Crosse included that firm's technical and production capability; plant facilities and equipment; financial capability; purchasing and subcontracting; quality assurance capability; labor resources; performance record; and ability to meet the required schedule. All of these factors were rated "satisfactory" except "plant facilities and equipment." The unsatisfactory rating in that category resulted from uncertainty as to whether a certain build-

ing would be available for the manufacturing operations. As related in the administrative report, this uncertainty was resolved in La Crosse's favor, and the evaluators subsequently changed their rating of "plant facilities and equipment" to "satisfactory." In addition to the two preaward surveys, the procuring agency independently investigated La Crosse's fuel supply; its equipment set-up plans; its labor resources and finances and the realism of its proposed production rate.

We have reviewed the information obtained from these surveys and conclude that it provides a rational basis for the determination that La Crosse was a responsible firm.

Basically, the survey team concluded that La Crosse was capable of establishing a production line from machinery in storage in its building. The team was advised that the machinery was not included among surplus equipment to be placed at auction. It was also concluded that the proposed building to be used in the production of the item was adequate. It appears from information submitted by La Crosse, the local union representative, and the Wisconsin State Employment Service that production personnel were available in the La Crosse area. La Crosse's performance record was rated as satisfactory in view of its on-schedule production of 72,000 sleeping bags under its most recent contract for that item. La Crosse also demonstrated to the preaward survey team that it had obtained firm written quotes from subcontractors and adequate financing to perform the contract.

Apart from La Crosse's financial status, Hunter alleges that the preaward surveys were defective in that DPSC did not advise the survey team that special and modified equipment (which La Crosse lacked) was required for the performance of this contract. Hunter also contends that La Crosse had an unsatisfactory record of performance which should have precluded an affirmative determination of responsibility.

There is no discussion in the record of any need for "special and modified equipment." However, we note that the preaward survey team was in possession of the solicitation and accompanying specifications when it visited La Crosse's plant. Moreover, during their visit to La Crosse's facility after the preaward surveys, DPSC representatives specifically inquired as to the availability and condition of production equipment and the plans for setting it up in a production line. The conclusion of both the preaward survey and DPSC teams was that La Crosse was equipped to perform the contract. We do not believe that the protester's general allegation has shown this determination to have been arbitrary.

With respect to La Crosse's prior performance record, the procuring agency has provided a statement of La Crosse's performance under

DPSC contracts for the past five years. All 17 of these contracts were timely completed by La Crosse. However, under three of these contracts, La Crosse delivered items which in the agency's judgment contained minor deviations from specification requirements. Under four other contracts, we are advised, La Crosse deviated "substantially" from specification requirements.

Individuals' judgments may differ as to whether this performance record is one of a responsible firm. However, in view of the fact that the majority of La Crosse's performance has been satisfactory, we are not prepared to characterize as arbitrary or unreasonable the procuring agency's determination that La Crosse was a responsible prospective contractor.

The record in the instant case was held open for a long period largely in deference to the protester's requests to submit additional information regarding La Crosse's responsibility. This information, however, concerned La Crosse's performance under the instant contract, which we do not consider relevant to the issue before us. We are of the opinion that the propriety of the contracting officer's affirmative determination of responsibility must be made on the basis of information available to him at the time the determination was made.

In any event, it is reported by DSA that La Crosse's first articles were conditionally approved subject to the correction of numerous but minor deviations; that La Crosse has since been meeting the delivery schedule; and that "* * * Quality Audits conducted on four separate shipments from La Crosse totaling 18,400 items indicate that La Crosse is performing in accordance with the specifications." La Crosse has been permitted to deviate from the specifications only for the thread treatment for 9,000 items, for the backstitching for 1,000 items and for the inclusion of different colored linings within the same item.

As a secondary argument, Hunter alleges that the procuring agency conducted negotiations solely with La Crosse, in violation of 10 U.S.C. § 2304(g) (1970) and ASPR § 3-805.1(b) (1973 ed.). This argument is based upon the fact that 10 days after offers were received for the increased quantity of sleeping bags, La Crosse advised DPSC by telegram that La Crosse "agreed to inclusion" in its offer of several clauses which the solicitation had incorporated by reference. Hunter contends that La Crosse thereby remedied the omission of several provisions from its offer, in the absence of which La Crosse would not have been eligible for award.

If La Crosse did not assent to certain terms of the RFP, that was not apparent from its offer. We have carefully examined La Crosse's offer and the correspondence which accompanied it and find therein no

indication that La Cross took exception to any of the solicitation terms. It appears to us that had an award been made to La Cross before it dispatched its telegram it would have been bound to the same terms which it later purported to accept. Under these circumstances, we do not believe that La Crosse's telegram affords a basis for disturbing the award.

Finally, Hunter alleges that the initial prices received were not fair and reasonable, and therefore the agency should have conducted negotiations with all offerors pursuant to 10 U.S. Code § 2304(g) (1970). Since this allegation was first made approximately 2 months after the contract was awarded to La Crosse, we regard it as untimely filed and decline to consider it upon the merits. 4 C.F.R. § 20.2(a) (1974).

[B-181709]

Mileage—Military Personnel—As Being in Lieu of All Other Expenses—Rates—Increase—Effective Date

Where Navy member's dependents complete travel to new home port prior to July 1, 1974, and effective date of change of home port order is after July 1, 1974, increased monetary allowance in lieu of transportation rates effective July 1, 1974, may be authorized as effective date of order is controlling without regard to date of dependents' travel (case a).

Mileage—Military Personnel—As Being in Lieu of All Other Expenses—Rates—Increase—Effective Date

Where members' dependents complete travel under normal permanent change of station order prior to July 1, 1974, date of increased monetary allowance in lieu of transportation rates, and effective date of order is after July 1, 1974, increased rates may be authorized as effective date of order is controlling without regard to date of dependents' travel (case b).

Mileage—Military Personnel—Rates—Increase—Effective Date

Where member detaches from former permanent station prior to July 1, 1974, date of increased mileage rates, and after utilization of authorized leave, travel and proceed time, reports to new permanent station on or after July 1, 1974, increased rates may be authorized where effective date of orders is on or after July 1, 1974, without regard to actual date of performance of travel (case c).

Mileage—Military Personnel—Rates—Increase—Effective Date

Where member is directed to perform periods of temporary duty en route to new permanent station prior to July 1, 1974, date of increased mileage rates, and effective date of permanent change of station is on or after July 1, 1974, since all the travel is performed in accordance with the permanent change of station order, the effective date of such order determines the mileage allowance rate applicable to all travel performed in accordance with the order without regard to the date member is required to travel in connection with temporary duty en route (case d).

In the matter of a claim for mileage allowance, October 16, 1974:

This action is in response to a letter dated June 5, 1974, with enclosures, from the disbursing officer, U.S.S. *Holland* (AS 32) request-

ing an advance decision as to the rate payable for monetary allowance in lieu of transportation (MALT) to Chief Warrant Officer Ronald W. Miller, 028–30–0216, USN, where the effective date of the change of home port order is after the date increased MALT rates went into effect, July 1, 1974, but travel of dependents was completed prior to July 1, 1974. The request was forwarded to this Office by endorsement of the Per Diem, Travel and Transportation Allowance Committee dated June 28, 1974, and has been assigned PDTATAC Control No. 74–28.

The request for decision also was endorsed by the Chief of Naval Personnel on June 27, 1974 (file reference Pers–2243–jh 4650) which endorsement included the following comments:

4. Regarding the instant case which centers on the approved increases in mileage rates and monetary allowance in lieu of transportation (MALT). The changes in these rates were approved for implementation as of July 1, 1974. It is the opinion of the Chief of Naval Personnel that as in the case of any other permanent change of station entitlement, that the effective date of orders continues to be the legal precedent for use in determining payment of the revised mileage and MALT rates. Application of these revised rates is considered appropriate in the following types of case.

a. Change of home port/home yard of a ship whose effective date is on or after July 1, 1974 even though dependents complete travel prior to July 1, 1974.

b. Normal permanent change of station orders with an effective date on or after July 1, 1974 where dependents complete travel prior to July 1, 1974.

c. Member's travel in a situation where the member detaches from their former permanent duty station prior to July 1, 1974 and after utilization of authorized leave, travel and proceed time reports to the new permanent duty station on or after July 1, 1974. In this case effective date of orders as determined in accordance with reference (c) is on or after July 1, 1974.

d. Same situation as paragraph 4c above, except the member is also directed to perform certain periods of temporary duty enroute to the new permanent duty station. If the effective date of permanent change of station orders occurs on or after July 1, 1974, then the revised mileage and MALT rates are applicable for the entire travel performed under these orders. This would be the case regardless if some or all of the temporary duty is performed prior to July 1, 1974.

5. In summary, it would be entirely inappropriate to abandon the long standing legal precedent of effective date of orders. Such action would result in a host of doubtful entitlement determinations and create an administrative nightmare throughout the uniformed services. Your concurrence with the above determinations is solicited.

With regard to the case of Mr. Miller it appears that the home port of the U.S.S. *Holland* was changed, in accordance with Chief of Naval Operations Message 121634Z March 1974, from Charleston, South Carolina, to Bremerton, Washington, effective September 1, 1974, and that Mr. Miller was assigned to the U.S.S. *Holland* at the time the above message was received.

The member has submitted a request for MALT for the travel of his wife and four children. He indicates that his dependents departed from Charleston, South Carolina, on May 9, 1974, and arrived at Bremerton, Washington, on May 16, 1974.

Section 406 of Title 37, U.S. Code, provides in pertinent part that a member of a uniformed service who is ordered to make a change of

permanent station may be authorized a monetary allowance in place of transportation in kind for his dependents, in accordance with regulations prescribed by the Secretaries concerned.

The above statute is implemented by the Joint Travel Regulations (JTR), subparagraph M7003–2 of which was amended, effective July 1, 1974 (change 255, May 1, 1974), to increase the MALT for dependents to 7 cents per mile for each dependent 12 years of age or over and to 3½ cents per mile for each dependent 2 years of age or over but under 12 years of age.

Prior to July 1, 1974, the authorized MALT for dependents was 6 cents per mile for each dependent 12 years of age or over (not to exceed two such dependents); and 3 cents per mile for each dependent 5 years of age or over, but under 12 years of age, provided that in no instance would the amount payable for all dependents exceed 18 cents per mile.

Paragraph M3003–1a of the JTR defines the term "permanent change of station" to include a duly authorized change in home yard or home port of a vessel. Subparagraph 1b(1) defines the term "effective date of orders" to mean the date of the member's relief (detachment) from the old station except:

1. when leave or delay prior to reporting to the new station is authorized or the member is granted additional travel time to permit travel by a specific mode of transportation, the amount of such leave, delay, or additional travel time will be added to the date of relief (detachment) to determine the effecive date; or
2. when the orders involve temporary duty at one or more places en route to a permanent duty station, the effective date is the date of relief (detachment) from the last temporary duty station plus leave, delay, or additional travel time allowed for travel by a specific mode of transportation, authorized to be taken after such detachment.

If all authorized leave, delay, or additional travel time is not utilized, only that amount actually utilized will be considered in determining the effective date of orders.

The U.S. Navy Travel Instructions (1971 edition), paragraph 3050–1 (change 1, May 17, 1972), states, in part, that the effective date of permanent change of station orders is the date the member would be required to commence travel to comply with his orders.

Subparagraph 5 of the instructions states:

ORDERS INVOLVING CHANGE OF HOME YARD/HOME PORT. The effective date of orders for a change in home yard/home port of a vessel, ship-based staff, or other afloat-based mobile unit is the date specified in the orders issued by the Chief of Naval Operations upon which such change is to become effective.

It appears to be well settled that increased allowances effective as of a definite date are payable for permanent change of station travel performed by a member or his dependents when the effective date of his permanent change of station orders is on or subsequent to the effective date of the change even though the travel may have been performed prior to either the effective date of the change in allowances or of the permanent change of station.

In decision B–150451, February 11, 1963, this Office held that where a member's effective date of permanent change of station orders was established as July 7, 1962, the official table of distances in effect on July 1, 1962, was controlling regarding travel performed prior to July 1, 1962. It was stated therein as follows:

> * * * if the travel regulations are revoked or changed prior to the effective date of the orders to provide a different basis for payment for the performance of official travel, there appears to be no authority to apply the superseded regulations for any portion of the travel which may have been performed prior to the effective date of the orders. Compare 41 Comp. Gen. 392.

In 44 Comp. Gen. 158 (1964) this Office had for consideration the propriety of payment of dislocation allowances at the rate of basic allowance for quarters effective January 1, 1963, incident to permanent change of station orders effective January 1, 1963, or thereafter, in cases where dependents completed travel before the effective date of orders. It was stated as follows:

> * * * The fact that the member's dependents may have performed travel pursuant to his orders prior to the effective date thereof would not affect his fixed entitlement to the dislocation allowance at the increased rate * * *.

Accordingly, the voucher presented by Mr. Miller may be paid in accordance with the MALT in effect on or after July 1, 1974, if otherwise correct.

In accord with the foregoing, rates in effect on July 1, 1974, would be for application to case "a" cited by the Chief of Naval Personnel, where the effective date of change of home port/yard of a ship is on or after July 1, 1974, even though dependents complete travel prior to July 1, 1974, and to case "b" where there are normal permanent change of station orders with an effective date on or after July 1, 1974, and dependents complete travel prior to July 1, 1974.

Case "c" involves a member who detaches from his former permanent duty station prior to July 1, 1974, and, after utilization of authorized leave, travel and proceed time, reports to the new permanent duty station on or after July 1, 1974, the effective date of orders being on or after July 1, 1974, as determined in accord with paragraph M3003–1b(1), JTR. Since the mileage allowance which may be paid members upon permanent change of station is a commuted allowance to cover the cost of transportation, subsistence, lodging and other incidental expenses, the rate at which it is payable is determined as of the effective date of orders, without regard to the dates on which the travel actually was performed. Accordingly, the higher mileage rate would be payable to members whose change of station orders were effective after July 1, 1974, without regard to the date on which travel was performed.

Case "d" is similar to case "c" except that the member also is di-

rected to perform certain periods of temporary duty en route to the new permanent duty station.

Paragraph M4151, JTR, provides that in connection with a permanent change of station, mileage is payable for the official distance between permanent duty stations, including travel directed via temporary duty points en route, when the member is authorized to and does perform such travel at his personal expense.

The mileage allowance payable to a member on a permanent change of station with temporary duty en route is at the same rate as that which would be paid for a permanent change of station without temporary duty en route. Consistent with such payment, we view this commuted allowance to be based on the entire travel to be performed under the permanent change of station order and that the effective date of such order is applicable to all travel performed in accordance with the order without regard to the date that the member is required to travel in connection with temporary duty en route.

The questions submitted are answered accordingly.

[B-181827]

Subsistence—Per Diem—Fractional Days—Excess of Ten Hours—Beginning or Ending Hours Not for Consideration

Although they did not begin travel before 6 a.m. or end travel after 8 p.m., employees who were in travel status for periods of 12 hours and 15 minutes to 13 hours and 15 minutes may be paid per diem allowances under Federal Travel Regulations 101–7, paragraph 1–7.6d(1), since that regulation requires the employees to begin or end the travel at the stated times only when travel of 6 to 10 hours is involved.

In the matter of per diem allowances, October 16, 1974:

This action is in response to a letter dated July 12, 1974, from an authorized certifying officer requesting an advance decision as to whether he may certify for payment four vouchers for per diem allowance covering periods of less than 24 hours.

The vouchers presented for certification should have been submitted with the request for an advance decision. *See* 7 GAO 23.5 (October 1, 1967), 26 Comp. Gen. 797, 799 (1947) and 21 *id.* 1128 (1942) cited therein. However, since the authorized certifying officer has the vouchers before him for certification, we shall render a decision in this instance in order to save time.

All of the vouchers involve the payment of per diem allowances under Federal Travel Regulations, FPMR 101–7, paragraph 1–7.6d (1) (May 1973) which provides:

(1) *Travel of 24 hours or less.* For continuous travel of 24 hours or less, the travel period shall be regarded as commencing with the beginning of the travel

and ending with its completion, and for each 6-hour portion of the period, or fraction of such portion, one-fourth of the per diem rate for a calendar day will be allowed. However, per diem shall not be allowed when the travel period is 10 hours or less during the same calendar day, except when the travel period is 6 hours or more and begins before 6 a.m. or terminates after 8 p.m. (The proviso does not apply in the case of travel incident to a change of official station.)

Each of the four vouchers represents a claim of per diem allowance for ¾ day for travel during the following time periods:

(1) Leave at 6:45 a.m. Return at 7:00 p.m.

(2) Leave at 6:00 a.m. Return at 6:30 p.m.

(3) Leave at 6:45 a.m. Return at 7:00 p.m.

(4) Leave at 6:30 a.m. Return at 7:45 p.m.

The specific question submitted is: "Since the travel period in each case is in excess of 10 hours, but did not begin before 6 a.m. or terminate after 8 p.m., is payment of per diem proper or should it be denied?"

When per diem is authorized incident to temporary duty under the quoted regulation, travel before 6 a.m. and after 8 p.m. is only relevant when the total travel period is between 6 and 10 hours. Travel periods of less than 6 hours on the same calendar day do not qualify for per diem allowances. Travel periods of more than 10 hours always qualify for per diem allowances. Therefore, it is only when travel periods of 6 to 10 hours are involved that the travel must start before 6 a.m. or end after 8 p.m. In the instant case, all of the travel periods are greater than 10 hours and therefore all of the travelers qualify for per diem allowances.

Accordingly the vouchers may be certified for payment if otherwise proper.

[B-178270]

Pay—Retired—Survivor Benefit Plan—Incompetents—Election by Guardian or Committee

Where a court of competent jurisdiction determined that a member was mentally or physically incapable of managing his own affairs under State law which vests in a guardian or committee the power to act for and on behalf of the adjudged individual and such a guardian or committee was appointed to manage all his affairs, without limitation, an election made by the guardian or committee under the Survivor Benefit Plan on behalf of the member before his death was valid and became effective when received by the Secretary of the Department concerned.

In the matter of a committee's election under the Survivor Benefit Plan, October 17, 1974:

This action is in response to a letter dated December 7, 1973 (file reference NCF–411 7720/6–5), with enclosures, which in effect requests an advance decision on the question as to whether the action taken in the case of the late Commander Cadwallader F. Blanchard, USN (Re-

tired), constituted a valid election under the Survivor Benefit Plan (SBP), 10 U.S. Code 1447–1455, as added by Public Law 92–425, effective September 21, 1972, 86 Stat. 706.

The file shows that the member, who was retired from the United States Navy in November 1958, was paralyzed by a stroke, could neither walk nor communicate, thereby becoming a complete and total invalid. On May 28, 1971, Philip N. Brophy, Esq., was appointed the guardian or committee of the estate of the member by the Circuit Court of Fairfax County, Virginia, under the provisions of section 37.1–132, Virginia Code, which provides in pertinent part as follows:

> On petition of any person in interest to the circuit court of the county * * * in which any person who by reason of advanced age or impaired health, or physical disability, has become mentally or physically incapable of taking proper care of his person or properly handling and managing his estate, resides, the court * * * may appoint some suitable person to be the guardian or committee of his person or property, and the guardian or committee shall have the same rights and duties which pertain to committees and trustees appointed under § 37.1–127 or 37.1–134 * * *.

By letter dated October 10, 1972, Mr. Brophy wrote to the U.S. Navy Finance Center, making inquiry concerning the member's participation in the Retired Serviceman's Family Protection Plan (RSFPP) and available coverage for the member under the then recently enacted Survivor Benefit Plan. By letter dated February 9, 1973, Mr. Brophy was provided the details of the member's participation in the RSFPP and the costs of coverage under the SBP in order to provide maximum annuity on the member's then gross retired pay. In addition, that letter made reference to and enclosed instructions relating to SBP coverage procedures for "incompetent members."

By letter dated February 15, 1973, Mr. Brophy set forth the basic details of the SBP coverage desired in the member's case, and in accordance with the before-mentioned instructions, requested the Secretary of the Navy to elect, on behalf of Commander Blanchard, coverage under the SBP for Mrs. Blanchard and in addition, to retain Commander Blanchard's participation in the RSFPP. With his request, Mr. Brophy submitted a certificate issued by the Circuit Court of Fairfax County, Virginia, reflecting his appointment as committee of Commander Blanchard's estate. In reply to his request, the Chief of Naval Personnel informed Mr. Brophy by letter dated March 13, 1973, that the court certificate of his appointment was not adequate proof that Commander Blanchard was mentally incompetent and did not, therefore, provide a sufficient basis upon which the Secretary of the Navy was authorized to elect SBP coverage within the meaning of 10 U.S.C. 1449. Mr. Brophy was further informed that, for this purpose, a letter from the court certifying that his appointment as committee was due to Commander Blanchard's mental incompetency

would suffice. On March 12, 1973, the day before the letter from the Chief of Naval Personnel was released to Mr. Brophy, Commander Blanchard died.

By letter dated July 24, 1973, the Director, Retired Pay Department, U.S. Navy Finance Center, informed Mr. Brophy that in view of the ambiguous and inconclusive evidence as to the late member's mental condition, and the absence of a declaration of such incompetency, there was no alternative in this case other than to consider the late member to be mentally capable of making a decision with respect to the SBP. Further, that since the Director knew of no provision of law which would allow anyone to elect for a mentally competent person, the election on behalf of Commander Blanchard could not be honored.

By letter dated August 29, 1973, addressed to the Director, Retired Pay Department, Mr. Brophy contended that the court order which established him as committee neither stated specifically that Commander Blanchard was mentally incompetent, nor that he was physically incapable; the order merely declared the member incapable of managing his own affairs for either of the reasons. Mr. Brophy further contended that once the court order was entered, section 37.1–140 forbids any action or suit on any claim or demand by or for the incompetent, and that section 37.1–142 gives the power to the fiduciary to take care of and preserve the ward's estate and manage it to the ward's best advantage. Therefore, it was Mr. Brophy's position that, from the date of the court order, Commander Blanchard had no authority under Virginia law to handle his own personal business and that the election made by Mr. Brophy as the committee of the late member was a valid election.

Commander Blanchard's eligibility to participate in the SBP was by virtue of subsection 3(b) of the act of September 21, 1972, Public Law 92–425, which provides that any person who is entitled to retired or retainer pay on the effective date of the act may elect to participate in the SBP. Subsection 3(e) of the act provides that an election made under subsection 3(b) is effective on the date it is received by the Secretary concerned. (10 U.S.C. 1448 note.)

Doubt has arisen concerning the validity of the committee's election because of certain language in our decision B–171793, April 5, 1971, involving an election under the RSFPP made by a spouse pursuant to a power of attorney because the member was too ill to sign his name. We stated therein that we were not aware of any law authorizing military personnel to delegate to another the power to elect any retirement or annuity benefit on their behalf other than the secretarial election provisions for mentally incompetents under 10 U.S.C. 1433.

We are of the view that the case where an election is made pursuant to a power of attorney is completely different from the case where a member has been determined by a court of competent jurisdiction to be incapable of managing his own affairs and the power to manage them without limitation has been vested in a committee. In the latter situation the committee receives his power as a result of a proper judicial process which does not require any concurrence by the individual adjudged incompetent, as compared to the former situation where the person acting on behalf of an individual receives his authority directly from the individual, by his own voluntary act.

In the present case, the circuit court determined that because of advanced age and impaired health, the member was incapable of managing his own affairs. In view of the substantial evidence concerning the total deterioration of the member's physical condition and his inability to even communicate and the fact that the management of the member's affairs was completely removed from his control and placed in his committee, it is our view that the court in effect determined that the member was totally incapable of managing his own affairs.

Under Virginia law, Mr. Brophy, as committee, was vested with complete authority to do the member's every legal act, which included the making of an election into the SBP. His letter dated February 15, 1973, in our view, is to be considered as a valid election into the Plan under subsection 3(b)(1) of Public Law 92-425, and effective from the date received in the appropriate administrative office. *Cf.* 53 Comp. Gen. 519 (1974).

[B-162578]

Compensation—Removals, Suspensions, etc.—Deductions From Back Pay—Outside Earnings—Evidence Requirement

Where volume of nonofficial part-time teaching, lecturing and writing of Federal employee prior to separation may be equal to such activity during interim between separation and restoration which would eliminate need that interim earnings be deducted from backpay under 5 U.S.C. 5596, affidavit by employee based on limited records and recollection as to his belief of such activity is not sufficient to establish volume when agency requested detailed listing showing date, place, and duration of each lecture and date and citation of each article. Agency is entitled to specificity requested.

In the matter of back pay entitlement upon reinstatement after unjustified separation action, October 18, 1974:

The Department of the Air Force requests advice on the application of 53 Comp. Gen. 824 (1974) concerning the computation of interim earnings for deduction from backpay. That decision involved the entitlement of Mr. A. Ernest Fitzgerald to backpay under 5 U.S. Code

5596 incident to his reinstatement in his former position on the basis of a timely appeal resulting in a finding by appropriate authority that he had undergone an unjustified or an unwarranted personnel action resulting in the withdrawal of his pay. Questions concerning Mr. Fitzgerald's backpay have been settled with the exception of the amount of deduction, if any, from lecturing, writing and teaching activities during the period of separation.

The agency questions the sufficiency of the affidavit set forth in pertinent part below in complying with the requirements of 53 Comp. Gen., *supra*, as to the subject interim earnings. The pertinent part of the decision stated as follows:

> 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.

In order to comply with the terms of the decision quoted above, the agency requested Mr. Fitzgerald to furnish information as follows:

> a. *Lectures and Articles.* No deduction will be required to the extent that you are able to establish a substantially commensurate volume of such activities during a representative period prior to your separation. This may be done on an earnings basis, on an hourly basis, or on the basis of the number of lectures and articles. If you do not choose to report on an earnings basis, you should submit a detailed listing showing the date, place, and duration of each lecture, and the date and citation of each article. The submission should cover the entire period of your separation as well as comparable activities which you previously engaged in while an employee, other than in an official capacity. In view of the close correspondence between the length of your previous employment and the length of your separation, four years may be used as the representative prior period. Two years would appear to constitute the minimum acceptable prior period. * * *

Mr. Fitzgerald's affidavit in response to the agency's request reads in pertinent part as follows:

> 2. I believe, on the basis of my limited records and my own recollection, that I made about 70 appearances, including lectures and participation in educational seminars, during the four-year period from 1970 through 1973. Thus, I averaged about 17.5 such appearances per year during the period of my separation from the Department of the Air Force.
>
> 3. In 1969, the year before my separation from the Department of the Air Force, I recall making approximately 29 appearances similar in nature to those of 1970 through 1973, although I believe the actual number was higher. I was also active in both lecturing and educational activities during 1968. The fre-

quency of such nonofficial appearances and activities by me during the two-year period immediately preceding my separation (1968–1969) was comparable to, if not greater than, the average yearly frequency of similar appearances during the four years following my separation (1970–1973).

4. During the period 1970 through 1973, I had six major articles published. In 1969, I had one major article published and to date in 1974 I have had one magazine article published and have another major article in the process of being published. Based on my own experience in free-time writing for publication, I believe that one or two articles per year is about what I can expect to sell. I conclude, therefore, that my sales volume of written work during the period 1970 through 1973 was average for me.

5. In summary, the volume of my lecturing and writing activities prior to my separation from the Department of the Air Force on January 5, 1970, calculated on the basis of the number of lectures given and articles written during a representative period prior to January 5, 1970, did not either increase or decrease substantially during the four-year period of my separation from the Department of the Air Force (January 5, 1970 to December 10, 1973).

As noted by the agency, Mr. Fitzgerald's affidavit is based on a comparison involving the number of lectures given and articles written and reaches the conclusion that the volume of such activities did not either increase or decrease substantially during the separation period. The agency points out that the affidavit does not provide the detailed listing which had been requested for the purpose of assuring the comparability of off-duty activities engaged in as full-time employee, prior to separation, and those engaged in during the period of separation. Rather, Mr. Fitzgerald believes, from limited records and recollection, that the frequency of his appearances, including lectures and participation in educational seminars, in the 2 years preceding separation, was comparable to, if not greater than, the average yearly frequency of similar appearances during the period of separation. Mr. Fitzgerald indicates that he published one major article in 1969 and six major articles from 1970 through 1973, and from experience, he concludes that the volume of written work from 1970 through 1973 was average for him.

The agency seeks our advice as to whether or not the affidavit is sufficient to support further payment in accordance with our decision and, if not, what degree of detail is required to support such payment.

We believe that the agency is entitled to the degree of specificity requested, i.e., since Mr. Fitzgerald chose not to report on an earnings basis, he should submit as requested "a detailed listing showing the date, place, and duration of each lecture, and the date and citation of each article" covering the entire period of separation as well as comparable activities he previously engaged in for at least the 2-year period prior to his separation, other than in an official capacity. We see no reason to consider any lesser degree of detail sufficient to support the payment in question. Accordingly, further backpay payment should not be made pending receipt and analysis of the detailed data requested.

[B-163443]

Enlistments—Pay Rights, etc.—Contractual

An enlistment is more than a contract; it effects a change of status and once that status is achieved the member is entitled to his military pay and allowances and such pay and allowances are not dependent upon the duties he performs but, rather, upon the status he occupies.

Enlistments—Minority—Pay Rights, etc.

The enlistment of an individual below the minimum statutory age for enlistment is void; however, if such individual continues in a military status after reaching the minimum age he enters a voidable military status which enlistment may be avoided at the option of the Government.

Enlistments—Void—Medically Unfit and Minority

The enlistments of individuals enlisted below the minimum statutory age who are still below that age when that fact is discovered and the enlistments of individuals who are insane are void and upon a definite determination of such facts the individual's pay and allowances are to be stopped and he should be released from military control.

Enlistments—Fraudulent—Pay Rights, etc.

Members who fraudulently enlist (voidable enlistments) are entitled to receive pay and allowances until the fact of the fraud is definitely determined at which time either the fraud should be waived and the member continued in the service with pay and allowances, or the enlistment should be avoided by the Government and the member released from military control with no entitlement to pay and allowances beyond the date of determination of the fraud.

Enlistments—Fraudulent—Determination—Waiver of Fraud *v.* Avoidance of Enlistment

The date of determination of the fraud and the date of the decision to either waive the fraud or avoid the enlistment and release the individual from military control should be contemporaneous or as close to contemporaneous as possible so as to avoid retaining control over an individual whose status as a military member is void. Regulations may be changed in line with 47 Comp. Gen. 671 to place the authority to waive fraud in enlistment on the same level as the authority to determine the fact of a fraudulent enlistment.

Enlistments—Minority—Discharge—Within 90 Days of Enlistment

Under 10 U.S.C. 1170 a member enlisted between the ages of 17 and 18 years and who is discharged upon application of parent or guardian made within 90 days of enlistment is entitled to pay and allowances through the date of discharge.

Enlistments—Pay Rights, etc.—Discharge Before Expiration of Enlistment—Medically Unfit

Members who subsequent to enlistment are determined to have been medically unfit at the time of enlistment may be paid pay and allowances through the date of discharge since the determination of medical fitness is primarily a function of the service and no statute affirmatively prohibits their enlistment, such as in the case of insane persons (10 U.S.C. 504).

In the matter of fraudulent enlistments, October 18, 1974:

This action is in response to letter from the Assistant Secretary of Defense (Comptroller) requesting a decision on a question presented

in Military Pay and Allowance Committee Action No. 495, enclosed with the letter.

The question presented in the Committee Action is:

> May service regulations be changed to authorize payment of pay and allowances to a member through date of separation when he is being separated from the service for fraudulently concealing or misrepresenting a material fact which disqualified him for enlistment?

The Committee Action discussion states that presently service regulations, as supported by various decisions by this Office, operate to deny payment of military pay and allowances for specified periods to an individual who has enlisted in one of the armed services of the United States, under various conditions which require a determination that his enlistment is void, or if not void, is voidable at the option of the Government. The discussion also indicates that under certain similar, but different, circumstances pay and allowances may accrue and be paid through the date of the member's release from military control.

With regard to the above, the discussion includes several examples of circumstances which, under current regulations—Department of Defense Military Pay and Allowances Entitlements Manual (DODPM)—lead to varying results. Those examples are as follows:

a. When an individual enlists without parents' consent after attaining the minimum statutory enlistment age of 17 and, upon discovery of that fact the Government voids the enlistment, pay and allowances may not be paid after the date the disbursing officer is notified of the fraud. Rule 3, Table 1–4–1, DODPM. Conversely, if the same individual had been discharged, not as a result of the Government having detected the fraud but, instead, upon application of the parent or guardian, pay and allowances would have accrued through the date of discharge or release. Rule 6, Table 1–4–1, DODPM; 39 Comp. Gen. 860. Thus, it may be rationalized that entitlement to pay and allowances in the latter instance did not hinge on the validity of the individual's enlistment but, rather on the intervention of a parent or guardian.

b. An individual could enlist before attaining 17 years of age; his true age is discovered after he becomes 17. In this situation, pay and allowances are suspended until a determination is made by the commander having general courts-martial jurisdiction to void the enlistment, or to recommend to higher headquarters that it be allowed to stand. If the enlistment is voided, pay and allowances which accrued from the time the fraud was determined until separation are not paid. If the enlistment is allowed to stand the member is paid for the entire period. Rules 2, 3, 4, Table 1–4–1, DODPM; 31 Comp. Gen. 562, 11 Comp. Dec. 710, 9 Comp. Gen. 26, 39 Comp. Gen. 860, 10 U.S.C. 505.

c. In another instance, the discovery of fraud is made before the individual attains age 17. In this case, the enlistment is void and pay and allowances are stopped upon discovery of the fraud. Again, several days or weeks may elapse before the individual is separated, during which time he normally performs military duties, but receives no pay or allowances. Rule 5, Table 1–4–1, DODPM; 39 Comp. Gen. 860.

d. When an individual is determined to be serving under a fraudulent enlistment and the Government waives the fraud and retains him in the service, he suffers no loss of pay and allowances. Rule 4, Table 1–4–1, DODPM. Conversely, if the Government voids an enlistment obtained under like circumstances, pay and allowances may not be paid to the member from the date the disbursing officer was notified of the fraud through the date of separation, notwithstanding the fact that the member's enlistment was no more, or no less, invalid than that of a member whose fraud was waived.

e. When an individual is discovered by service medical authorities to have been medically unfit for enlistment at the time of entry and is released from military control, pay and allowances accrue from the date of entry on active duty through the date of release from military control. Rule 10, Table 1–4–1, DODPM; 48 Comp. Gen. 377. Conversely, if an enlistee who, at the time of enlistment, misrepresented a material fact which would have been a bar to his enlistment; e.g., his age, pay and allowances may not be paid after the date the disbursing officer was notified of the fraud. If the enlistment is voided, no further payments are authorized. In some cases it can be conjectured that the medically unfit had an awareness of his disqualifying condition just as the minor had an awareness of his disqualifying age.

f. In the case of a member who withholds information which would have been a bar to enlistment, e.g., to disclose a felony, pay and allowances are terminated at the time the determination of fraud is made. In such cases, the Government may either waive the fraud or void the enlistment. A decision to waive the fraud must be made at service headquarters level, and not by an installation or major commander. During the administrative processing time, the member performs full military duties without pay or allowances. Rule 1, Table 1–4–1, DODPM; 31 Comp. Gen. 562.

The discussion further indicates that the administrative processing time required to effect a separation is influenced by circumstances peculiar to each individual case, such as the location of the member, e.g., in the United States or overseas, with one service reporting that in some cases 30 to 45 days might elapse before separation is finally effected during which time the individual involved performs full military duty but is not entitled to pay. It is stated that a member of Congress in a letter to the Secretary of Defense expressed the view that such a policy is incomprehensible and requested that the regulations be amended "in such a way that no man or woman is restricted to a base nor required to render service to any of the Armed Forces without benefit of compensation for the reason of determination of fraudulent enlistment before necessary processing is completed to either release the individual from active duty or to re-enlist him through legal channels."

In the analysis of the problems associated with void and voidable enlistments contained in the discussion it is correctly pointed out that it has long been the rule in the case of an enlisted person who on entry into the service fraudulently concealed or misrepresented a material fact disqualifying him from enlistment, and who is discharged upon discovery by the Government of the fraud, that his discharge constitutes an avoidance of the contract of enlistment. Upon such avoidance the person is not entitled to pay or allowances for any period served under the fraudulent enlistment except as may be specifically authorized by statute. *See* 8 Comp. Dec. 655 (1902), 1 Comp. Gen. 511 (1922), 9 *id.* 436 (1930), 31 *id.* 562 (1952), 36 *id.* 439 (1956), and 47 *id.* 671 (1968). However, by analogy to the rule applicable in the case of a *de facto* officer, he is permitted to retain the pay paid to him currently while serving, if the payments were otherwise proper. *See* 31 Comp. Gen. 562, *supra*, and decisions cited.

The discussion also correctly notes that this Office has long recognized as *de jure* service constructive enlistments where persons otherwise qualified to enlist, enter upon, and render full military duty and the Government accepts such services without condition. *See* 24 Comp. Gen. 175 (1944), 33 *id.* 34 (1953), and 45 *id.* 218 (1965). Further, while a definite distinction can be drawn between the constructive enlistment of a person "otherwise qualified" to enlist and an enlistment which is obtained through fraud, a similar distinction is not so apparent with regard to performance of military duties prior to discharge from either status. The discussion suggests that such a basis may serve as reasonable grounds to permit a change in the regulations to provide that entitlement to pay and allowances is contingent upon the performance of assigned military duties rather than the mere voidability of a contract of enlistment.

At the outset, it must be stated that it is well settled that an enlistment is more than a contract, it effects a change of status. *United States* v. *Williams*, 302 U.S. 46, 49 (1937). Common-law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon a statutory right and generally he is entitled to the statutory pay and allowances of his grade and status, however ignoble a soldier he may be. *Bell.* v. *United States*, 366 U.S. 393, 401–402 (1961). Such pay is not generally dependent upon the duties he performs but upon the status he occupies. See *Ward* v. *United States*, 158 F. 2d 499 (1947), cited in *Bell*, *supra*, page 404, note 14.

Therefore, in determining whether an individual is entitled to the pay and allowances of a member of the Armed Forces, it is first necessary to determine whether he has achieved a military status.

Section 505(a) of Title 10, U.S. Code, as amended by the act of May 24, 1974, Public Law 93–290, 88 Stat. 173, provides generally that the Secretary concerned may accept original enlistments in the Regular components of the Armed Forces "of qualified, effective, and able-bodied persons who are not less than seventeen years of age, nor more than thirty-five years of age." Section 505(a) also provides that "no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control."

In the decision at 39 Comp. Gen. 860 (1960), it was stated that where the minimum statutory age for enlistment is 17 years and parental consent is required for enlistment of a person 17 years of age, enlistment prior to attaining that age creates no military status. However, if an individual who fraudulently enlisted before attaining the age of 17 continues to perform military duties after reaching that age, he is

regarded as entering a voidable military status on his seventeenth birthday, no parental consent being shown. In so holding, particular consideration was given to the cases of *United States* v. *Blanton*, 23 C.M.R. 128 (1957), and *Hoskins* v. *Pell*, 239 F. 279 (1917).

In the *Blanton* case it was held that a minor below the statutory age when he enlisted could not achieve military status as a member of the Army and not having that status could not, while still below that age, be court-martialed for desertion. In so holding, the court said that an enlistment is predominantly a matter of status and not of contract and that Congress having set a minimum age limit for enlistment, no one could achieve the status of Army membership who was below that age and that such enlistment would be void and of no effect. See also *In re Grimley*, 137 U.S. 147 (1890), *In re Morrissey*, 137 U.S. 157 (1890), *United States* v. *Williams*, *supra*, *United States* v. *Graves*, 39 C.M.R. 438 (1968), and *United States* v. *Williams*, 39 C.M.R. 471 (1968).

In *Hoskins* v. *Pell*, *supra*, the court concluded that a minor who purportedly enlisted and deserted prior to attaining the minimum statutory enlistment age was not subject to the jurisdiction of a court-martial since he was not competent to enlist. The court stated, however, that it is not denied that such an enlistment may be validated by the minor's continuance in the service until he reaches the age which qualified him for enlistment. See also in this regard *In re Grimley*, *supra*, *Ex parte Rush*, 246 F. 172 (1917), *Barrett* v. *Looney*, 158 F. Supp. 224 (1957), 23 Comp. Gen. 755, 761 (1944), and 37 *id.* 406 (1957).

A distinction is, therefore, clearly drawn between an absolutely void enlistment and one which is merely voidable at the option of the Government. The purported enlistment of one who is below the minimum statutory age of 17 years (10 U.S.C. 505(a)) or who has been judicially declared insane (10 U.S.C. 504) would appear to be absolutely void since such an individual would not have the legal capacity to acquire a military status. See *In re Grimley*, *supra*, pages 152–153. Normally, such an individual would not be entitled to pay and allowances under such a void enlistment, except that by analogy to a *de facto* officer he may retain payments received prior to the determination that his enlistment is void and the disbursing officer so notified (*see* 39 Comp. Gen. 742 (1960) (answers to questions 1, 2, and 3) and 39 *id.* 860 (1960) (answer to question 3)), and upon a definite determination by an appropriate official that the enlistment is void, payments of pay and allowances to the individual terminated. In this regard, the retention of such an individual in a military duty status for a significant period of time (30 to 45 days) would appear inappropriate, particularly in the case of a minor below the age of 17 years in view of the court's decision in the *Blanton* case holding that a minor below the statutory age of enlistment is not subject to military law.

In the cases of the enlistment of minors under the minimum statutory age of 17 years who serve beyond the minimum statutory age and thus enter a voidable military status (39 Comp. Gen. 860, 863, *supra*), or enlistments involving other types of fraud which result in voidable enlistments at the option of the Government, it has been held that when avoided by the Government such an enlistment is void from the beginning. Nevertheless, until the contract is avoided upon discovery of the fraud, the individual remains an enlisted member of the service involved and *prima facie* entitled to the benefits and subject to the disabilities of that status. *See* 11 Comp. Dec. 710 (1905), 9 Comp. Gen. 26 (1929), and 31 *id.* 562 (1952).

In 47 Comp. Gen. 671 (1968), favorable consideration was given to a proposed amendment to Army regulations which amendment had the effect of authorizing continuation of pay and allowances to members who fraudulently enter the service until the commander exercising general court-martial authority makes a determination as to whether the fact of fraudulent entry has been completely verified or proven. It was stated in that decision that in the Army, the member's unit commander, after verifying the fact of fraudulent entry, submits a recommendation either for discharge by reason of fraudulent entry or for retention through intermediate commanders to the commander exercising general court-martial authority. It was indicated that since the final determination of retention or discharge must be made by the general court-martial authority, there are often delays of 30 days or more while cases are administratively processed through channels, during which time the individual is performing duty for the Army. The authorization of payments under that proposed change in regulations was based on the recognition that during the period between the submission of the unit commander's recommendation and the final action taken by the commander exercising general court-martial authority, the member is, in fact, performing duty, and there is no authority to avoid the contract of enlistment until such commander has determined that the member's entry into the service actually was fraudulent. That decision did not authorize payments of pay and allowances beyond the date of the commander's determination of fraudulent entry. It would appear, however, that once such a determination is made, the fraud should be waived or the individual should be promptly released from military control unless, of course, he is to be held for court-martial proceedings. See in this connection, Article 83 of the Uniform Code of Military Justice, 10 U.S.C. 883.

Applying the rules discussed above to the examples given in the Committee Action discussion the following results appear.

In example "a," the individual who enlisted between the ages of

17 and 18 years without parental consent as required by 10 U.S.C. 505 and presumably without giving his true age at the time of the enlistment, is considered as having fraudulently enlisted by concealing a material fact, which enlistment is voidable. If the fraud is discovered by the Government and it is determined by proper authority to avoid the contract, the individual is entitled to pay and allowances only through the date of such determination. However, his release should be contemporaneous with that determination or if contemporaneous release is not possible, it should occur as soon as possible after the determination is made. *See* 47 Comp. Gen. 671, *supra.*

By statute (10 U.S.C. 1170) if such an individual is discharged upon application of his parents or guardian made within 90 days of his enlistment, he is entitled to be paid through the date of discharge. *See* 39 Comp. Gen. 860, 867 (answer to question 4).

In example "b," the individual enlisted before he attained the statutory minimum age (an absolutely void enlistment) but served beyond the minimum age before the fact of his underage enlistment was discovered, thus, making the enlistment voidable. As was previously stated in 47 Comp. Gen. 671, Army regulations were authorized to be amended so that pay and allowances of an individual serving in a voidable enlistment status may be paid until the commander having general court-martial jurisdiction makes his determination as to the existence of fraud in connection with the enlistment. If at that time or at a later date it is also decided that the fraud should be waived, pay and allowances, of course continue. However, if it is decided that the contract of enlistment should be avoided, pay and allowances must cease upon determination that fraud existed and the individual should be promptly released from military control.

In example "c," the individual enlisted before reaching the minimum statutory age and that fact is discovered before he reaches the minimum age. Such enlistment is absolutely void as the individual never was capable of entering a military status. Accordingly, his pay and allowances must be stopped upon a definite determination of that fact and it would appear that he should be released from military control as quickly as practicable.

Example "d" refers to an individual who is determined to be serving in a fraudulent enlistment which, as is stated above, is voidable at the option of the Government. Upon determination of the fraud if the Government elects to waive the fraud, the individual continues to serve and is entitled to full pay and allowances. If, however, the Government elects to avoid the contract of enlistment and discharge the individual, the enlistment is void from the beginning and the individual is entitled to no further pay and allowances, except as may be spe-

cifically authorized by law. 47 Comp. Gen. 671, *supra*, and 31 *id.* 562, *supra*. In such case, however, as is noted above, it is contemplated that the determination of fraud and the decision to avoid the contract and discharge the individual will be, if not one and the same, at least as contemporaneous as possible, thus preventing an individual from remaining under military control without entitlement to pay and allowances for any significant period of time. 47 Comp. Gen. 671, *supra*.

Example "e" notes that an individual who, subsequent to enlistment, is discovered by service medical authorities to have been medically unfit for enlistment at the time of entry and who is released from military control is entitled to pay and allowances through the date of release, while an individual who fraudulently enlists by misrepresenting a material fact may not be paid after the disbursing officer is notified of the fraud.

In 48 Comp. Gen. 377 (1968), the entitlement to pay and allowances of medically unfit members inducted into the armed services was considered in depth. There it was pointed out that no statute was found which affirmatively prohibits the induction into the Armed Forces of persons not physically and mentally qualified in all respects and the determination of such physical fitness is primarily a function of the Government and not the individual. Thus, it was held that the administrative failure to discover that the mental or physical condition of a person inducted into the service was such as would warrant rejection for military service does not deprive him of the right to military pay and allowances.

That reasoning would also appear to apply in cases of enlistments, except in the case of one who had been legally declared mentally incompetent and, therefore, as noted previously, by statute (10 U.S.C. 504), could not achieve military status, 39 Comp. Gen. 742, *supra*.

Clearly, the individual who fraudulently enlists by misrepresenting himself or concealing a material fact which it is his duty to reveal must accept the consequences of the fraud he has committed, not the Government.

In example "f," it is indicated that in the case of a fraudulent enlistment, which is voidable, pay and allowances are terminated at the time the fraud is determined until a decision is made at service headquarters to waive the fraud or discharge the individual concerned, during which time the individual performs military duties without pay or allowances. As was indicated previously, this appears to be primarily an administrative problem which it would appear could be dealt with by placing the authority to definitely determine the fact of the fraud and the authority to make the decision to waive the fraud or release the individual at the same decision-making level. *See* 47 Comp. Gen.

671, *supra.* As was also stated above, it is not contemplated that individuals fraudulently enlisted would be retained under military control for long periods of time without pay and allowances.

Accordingly, upon review of previous decisions, the rules discussed above remain for application. However, it would appear that revision of regulations in line with 47 Comp. Gen. 671 would alleviate the primary problem discussed in the Committee Action. Any further changes in such rules to authorize military pay and allowance payments to individuals who it has been definitely determined have no military status, appear to be matters for presentation to the Congress for consideration. The question is answered accordingly.

[B-180910]

Subsistence—Per Diem—Rates—Lodging Costs—Application of "Lodging Plus" System

Civilian employee of Department of Army is entitled to a per diem allowance while on temporary duty under paragraph C8101-2.a of Joint Travel Regulations, Volume 2, on the basis of the average amount the traveler pays for lodging plus an amount set forth in paragraph C8101-2.a for meals and incidental expenses not to exceed the maximum per diem of $25.

Travel Expenses—Temporary Duty—Return to Official Station on Nonworkdays

Under paragraph C10105 of Joint Travel Regulations, Volume 2, an employee of the Department of the Army who is on temporary duty and voluntarily returns to his headquarters on nonworkdays is entitled to round-trip transportation by any mode and per diem en route not to exceed the per diem which would have been allowable had the employee remained at his temporary duty station.

In the matter of a request for additional per diem allowance, October 18, 1974:

This action is in response to a request for reconsideration of Settlement Certificate Z-2509080, December 18, 1973, issued by the Transportation and Claims Division of the United States General Accounting Office which allowed retroactive increases in per diem rates for the periods of February 1 through February 11, 1973, and March 30, 1973, but disallowed reimbursement for additional per diem rates from February 12, 1973, through March 29, 1973.

The record shows that by Travel Order No. SO 39, dated January 2, 1973, Mr. James K. Gibbs, an employee of the Department of the Army at Huntsville, Alabama, was authorized to perform temporary duty (TDY) at Fort Benning, Georgia, during the period from January 18, 1973, through March 31, 1973. Per diem in lieu of subsistence was authorized in accordance with the Joint Travel Regulations (JTR). While performing TDY at Fort Benning, Mr. Gibbs returned home to

his residence at Arab, Alabama, every weekend. Mr. Gibbs occupied a hotel room at the Holiday Inn at Fort Benning at the cost of $13.39 per night, until he rented an apartment at a cost of $60 per week (a cost of $8.57 per day) beginning February 12, 1973. Upon submission of his voucher, he was paid a per diem rate of $25 for 9¾ days in January and a per diem rate of $23 for 28 days in February and for 30 days in March. Mr. Gibbs contends that he should have received a per diem rate of $25 for the entire period of time he was on TDY at Fort Benning.

Per diem payments for employees traveling on official business are governed by 5 U.S. Code 5702 which provides in part as follows:

§ *5702. Per diem; employees traveling on official business.*

(a) An employee, while traveling on official business away from his designated post of duty, is entitled to a per diem allowance prescribed by the agency concerned. For travel inside the continental United States, the per diem allowance may not exceed the rate of $25 * * *.

In order to arrive at the proper per diem allowance, consideration will be given to paragraph C8101–2.a of the JTR, Volume 2, implementing 5 U.S.C. 5702 concerning travel within the continental United States by regular salaried employees which provides in part as follows:

a. *Per Diem Rates Within the Continental United States.* Except as otherwise provided herein or when a reduced rate is prescribed under the provisions in par. C8051, the per diem rate is fixed partly on the basis of the average amount the traveler pays for lodging. To such amount is added the following for meals and incidental expenses, with the total rounded off to the next higher dollar:

1. $11.80 when meals are taken in other than open messes,

This allowance is not to exceed the $25 ceiling set by statute.

It is further provided by paragraph C10105 of the JTR, Volume 2, that:

* * * Lodging costs will be totaled for the period while at the TDY station. Lodging costs incurred while en route to, between, or from TDY locations are excluded from consideration in arriving at the average cost for lodging. The total amount paid for lodging for the period at the TDY station will be divided by the number of nights on which lodging was required. The resulting amount will be the average cost paid for lodging. * * *

In accordance with the statute and regulation cited above, the maximum allowance of $25 per diem should be paid for the period of January 22, 1973, through February 11, 1973, while occupying a hotel room at the cost of $13.39 per night. Upon renting an apartment at the cost of $60 per week (a cost of $8.57 per day) beginning February 12, 1973, through March 29, 1973, the average nightly amount of expenses paid for lodging was reduced, thereby decreasing the average rate of per diem allowance. As a result of this, Mr. Gibbs is entitled to the average per diem rate of $8.57 plus $11.80 for meals, rounded off to the next highest dollar which would be $21 per diem.

With regard to the employee returning to his residence at Arab, Alabama, during nonworkdays, paragraph C10158 of JTR, Volume 2, provides in pertinent part as follows:

C10158 VOLUNTARY RETURN TO PERMANENT DUTY STATION

When a traveler performing temporary duty travel by privately owned conveyance or common carrier voluntarily and for personal reasons returns on nonwork days or on workdays after the close of business to his permanent duty station, or his place of abode from which he commutes daily to his permanent duty station, the maximum reimbursement allowable for the round trip transportation by any mode and per diem en route will be the per diem which would have been allowable had the traveler remained at his temporary duty station (see par. C3008–2).

Under the above-cited regulation, the employee was entitled to round-trip transportation and per diem allowance not to exceed the per diem allowance that is payable had the employee remained at the temporary duty station. *See* B–176706, October 13, 1972. The record shows that the employee has been reimbursed travel expenses in accordance with the above-cited regulation for the nonworkdays he returned to his permanent duty station.

Accordingly, we must sustain the action taken in our Office settlement of December 18, 1973.

Mr. Gibbs states that the $60 per week that he paid for rent at Fort Benning while on temporary duty beginning February 12, 1973, when his per diem allowance was limited to $23 did not include utilities and incidentals. If Mr. Gibbs can furnish receipts for utilities or other expenses which are for accommodations or other services ordinarily included in the price of a hotel or motel room, we will give that part of his claim further consideration. *See* 52 Comp. Gen. 730 (1973).

[B–181450]

Transportation—Household Effects—Commutation—Shipment of Automobiles Precluded

Employee who ships automobile from old official duty station to new official duty station as part of his household goods even though still within the weight limition is entitled only to reimbursement for shipment of his household goods on a commuted rate basis but not for shipment of his automobile since chapter 2, subsection 2–1.4h, Federal Property Management Regulations, specifically precludes the shipment of an automobile as household goods.

Travel Expenses—Transfers—Employee Return to Old Station—To Complete Moving Arrangements

An employee who has reported to new official duty station in Washington, D.C., and thereafter returns to his old duty station in Los Angeles, California, to settle his rental agreement and to complete his moving arrangements is not entitled to additional travel expenses for this purpose even though erroneously advised otherwise.

In the matter of payment of additional travel expenses, October 18, 1974:

This is in response for a request for an advance decision from the Associate Assistant Secretary for Financial Management, United

States Department of Labor, whether a travel voucher in the amount of $1,027.49, submitted by Mr. Leonel V. Miranda, an employee of the Department of Labor, covering transportation of automobile and additional travel expenses while on temporary duty, may be certified for payment.

The record shows that incident to a permanent change of duty station, Mr. Miranda traveled from Los Angeles, California, to Washington, D.C., effective June 4, 1973. On his original travel voucher dated July 2, 1973, Mr. Miranda claimed reimbursement for a shipment of 5,800 pounds of personal goods; he was allowed the commuted rate for shipment of household goods which amounted to 2,750 pounds. A payment of $923.59, for the remainder of the 3,050 pounds shipment, applicable to transporting his automobile, was disallowed. Also, in conjunction with a temporary assignment to Albuquerque, New Mexico, Mr. Miranda returned to Los Angeles on June 12, 1973, to settle his rental agreement and to ship household goods. His claim for $78 airfare from Los Angeles to Albuquerque, in addition to related expenditures for taxi, limousine, and extra baggage charges of $25.90, was disallowed. This return trip was made to the old official station after having reported for duty at his new official station.

Federal Property Management Regulations (FPMR), 101-7, May 1, 1973, chapter 2, subsection 2-1.4h (Federal Travel Regulations) in force at the time in question, provides as follows:

> h. *Household goods.* Personal property which may be transported legally in interstate commerce and which belongs to an employee and his immediate family at the time shipment or storage begins. The term includes household furnishings, equipment and appliances, furniture, clothing, books, and similar property. It does not include property which is for resale or disposal rather than for use by the employee or members of his immediate family; nor does it include such items as *automobiles*, station wagons, motorcycles, and similar motor vehicles, airplanes, mobile homes, camper trailers, boats, birds, pets, livestock, cordwood, building materials, property belonging to any persons other than the employee or his immediate family, or any property intended for use in conducting a business or other commercial enterprise. [Italic supplied.]

This regulation would preclude shipment of an automobile as household goods by the commuted rate system. In addition we have held as a recognized policy of our Office that no authority exists to transport the privately owned vehicle of an employee at Government expense between duty stations within the United States. *See* B-176224, July 27, 1972. This policy has been followed regardless of the fact that the employee may have been advised by an agency official that such a payment was proper or that his travel order included specific authority for shipment of the atuomobile at Government expense. *See* B-163936, May 3, 1968.

The claim for $78 airfare from Los Angeles to Albuquerque and re-

lated expenditures for taxi, limousines and extra baggage charges of $25.90 were incurred by Mr. Miranda when he returned to his old duty station in Los Angeles to make arrangements for the shipment of his household goods and to settle his leave arrangement.

Mr. Miranda made his initial trip to Washington, D.C. on or about June 4, 1973, reported to and entered on duty at his new duty station. Such being the case the conclusion is warranted that the change of station authorized in the travel order was accomplished and his travel expense reimbursement thereby became fixed. The fact that the employee was unable to make arrangements for the shipment of his household goods and to settle his lease agreement prior to his transfer is not considered as justifying payment by the Government of a second trip for the employee to the old duty station. *See* B–167022, June 18, 1969.

Mr. Miranda states that he was advised by an official of the Department of Labor that he would be entitled to reimbursement of certain expenses incident to his transfer which included the cost of transporting his automobile and that he would be allowed to come to Washington, D.C. to find a home and return to California and close his home there. When a Government employee acts outside the scope of the authority actually held by him, the United States is not estopped to deny his unauthorized or misleading representations, commitments, or acts, because those who deal with a Government agent, officer, or employee are deemed to have notice of the limitations on his authority, and also because even though a private individual might be estopped, the public should not suffer for the act or representation of a single Government agent. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917); *Bianco* v. *United States*, 171 Ct. Cl. 719 (1965); *Bornstein* v. *United States*, 170 Ct. Cl. 576, 345 F. 2d 558 (1965); *Potter* v. *United States*, 167 Ct. Cl. 28 (1964), cert. denied, 382 U.S. 817 (1965); *Vogt Bros. Mfg. Co.* v. *United States*, 160 Ct. Cl. 687 (1963); *Byrne Organization, Inc.* v. *United States*, 152 Ct. Cl. 578, 287 F. 2d 582 (1961); *National Electronics Lab., Inc.* v. *United States*, 148 Ct. Cl. 308 (1960). The Government is not estopped from repudiating advice given by one of its officials if that advice is erroneous. *von Kalinowski* v. *United States*, 151 Ct. Cl. 172 (1960), cert. denied, 368 U.S. 829 (1961). Where a Government official approves and promises reimbursement beyond that allowed by applicable law, any payments made under such unauthorized actions are recoverable by the Government. *W. Penn Horological Inst.* v. *United States*, 146 Ct. Cl. 540 (1959).

In view of the foregoing, the voucher may not be certified for payment.

[B-181286]

Bids—Late—Transmission by Other Than Mail

Late bid, even though late due to mishandling by personnel of Government installation, may not be considered for award since late bid was sent via commercial carrier rather than via the mails.

In the matter of Federal Contracting Corporation; Taylor Air Systems, Inc., October 25, 1974:

Invitation for bids No. F04699-74-B-0079 established a bid opening date of April 11, 1974. It further advised bidders that they should either mail their bids addressed to SMAMA/PPKS. Base Procurement, McClellan Air Force Base, California, or hand carry them to room 245 of Base building 200.

Award under the invitation had not yet been made when Base Procurement received what now is the apparent low bid of Taylor Air Systems, Inc. (Taylor), on April 12. That bid had been delivered to the Central Receiving Office of the Base on April 4, 1974, by REA Air Express on behalf of Taylor. In view of the fact that the Taylor bid had been in the hands of Base personnel for 1 week prior to bid opening, the contracting officer determined the late receipt of the bid to have been caused by Government mishandling after its receipt at the Base. Consequently, the bid was accepted for consideration for award under paragraph 2-201(b)(xlviii) of the Armed Services Procurement Regulation. The contracting officer's determination was based on the fact that had the bid been sent through the mails, and since it was addressed with the mailing address set forth in the invitation it would have arrived similarly at the Base Administrative Division, where it would then have been placed in the Base distribution system for delivery to Base Procurement. Had the Taylor bid been properly placed in the normal distribution system after its arrival in the Central Receiving Office it would have been timely delivered to Base Procurement.

The Federal Contracting Corp. submits that where a bid is not correctly delivered by a bidder or its agent, even though the incorrect delivery was made to Base personnel, and, consequently, is not received in a timely manner by the proper procurement personnel, it may not be considered for award.

The general rule followed by our Office is that the bidder has the responsibility for the delivery of its bid to the proper place at the proper time. Exceptions to the rule requiring rejection of late bids may be permitted only in the exact circumstances provided for in the invitation. While application of the rule here may be harsh, paragraph 12 of the invitation (Instructions to Bidders) allows con-

sideration of a late bid only when the bid was sent by mail. That paragraph reads in part:

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:
(i) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids (e.g., a bid submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier); or,
(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

Inasmuch as the Taylor bid was sent by commercial carrier rather than by mail, consideration of the Taylor late bid for award would not be proper. B-138148, December 24, 1958; B-144842, March 10, 1961; *Matter of Rocket Research Corporation*, B-179405, January 24, 1974.

[B-140583]

Compensation—Wage Board Employees—Prevailing Rate Employees—Transfer to Classification Act Positions—Periodic Step Increases

Holding in 39 Comp. Gen. 270 that wage adjustments for prevailing rate employees under 5 U.S.C. 1082(7) (1958 ed.) were administratively granted and thus equivalent increases for periodic step increases for prevailing rate employees transferring into classified positions will no longer be followed since the prevailing rate system enacted by Public Law 92-392 may be considered a statutory wage system.

In the matter of the review of 39 Comp. Gen. 270 (1959), October 29, 1974:

The United States Civil Service Commission (CSC) has requested our Office to review 39 Comp. Gen. 270 (1959) and determine whether the holding in that decision remains operative after the enactment of Public Law No. 92-392, approved August 19, 1972, 86 Stat. 564, subchapter IV, Chapter 53, Title 5, U.S. Code, pertaining to wage adjustments for prevailing rate employees.

Our decision 39 Comp. Gen. 270, *supra*, involved the question of whether a prior increase in compensation under the prevailing rate systems would be considered an equivalent increase for purposes of a periodic step increase under 5 U.S.C. 5335 (1970), which states that an increase in pay granted by statute is not an equivalent increase in pay within the meaning of the law and this would apply when a prevailing rate employee transfers into a classified position. We held that wage adjustments for prevailing rate employees granted under the provisions of 5 U.S.C. 1082(7) (1958 ed.) were administratively granted and could not be said to have been granted by statute so as

to exclude them from consideration as equivalent increases for periodic step increases. The Civil Service Commission has requested review since it believes that with the enactment of Public Law 92–392, 5 U.S.C. 5341 *et seq.* (1970), cited above, periodic wage adjustments of prevailing rate employees should be considered as increases in pay granted by statute.

Support for the Commission's position can be found in the legislative history of the act. In this regard, Senate Report No. 92–791, 92d Cong., 2d Sess. 1–3 (1972) contains the following statements indicating that it was the intent of Congress to convert the then existing administrative pay adjustment system into a system established by law:

PURPOSE

The purpose of this legislation is to establish by law a system for adjusting rates for prevailing rate employees of the Federal Government, and to include prevailing rate employees of nonappropriated fund activities of the Armed Forces within the prevailing rate pay system.

* * * * * * *

SUMMARY

The bill enacts into law established principles and policies related to blue collar employees of the Federal government which heretofore have been handled administratively. * * *

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BACKGROUND INFORMATION

This legislation is an entirely new concept of administering the prevailing rate employment system. These employees are commonly known as wage board or blue-collar workers, carpenters, truck drivers, welders, aircraft mechanics, electricians, plumbers, and others providing a valuable service to the Government. Today there are more than 650,000 prevailing rate employees in the Federal Government. The Department of Defense employs almost 80 percent of these employees and the balance are employed in other departments and agencies, mainly the Department of the Interior, the General Services Administration, and the Veterans' Administration.

Existing legislation relating to prevailing rate employees has been codified in 5 U.S.C. 5341–5345 and 5544. In order to determine a prevailing rate for wage board workers, a survey is taken of private industry in a local labor market area, generally within a 50-mile radius of the Government activity. The Coordinated Federal Wage System was established in 1968 by the Civil Service Commission as a result of an Executive order issued by President Johnson. This succeeded in requiring equitable coordination of wage board practices among all Federal agencies. *The next logical step is enactment of this legislation to establish the system in law.* [Italic supplied.]

The law prior to the enactment of Public Law 92–392 governing pay adjustments of prevailing rate employees was contained in 5 U.S.C. 1082(7) (1958 ed.), subsequently enacted into positive law as 5 U.S.C. 5341(a) (1970) which provided as follows:

§ 5341. *Trades and crafts.*

(a) The pay of employees excepted from chapter 51 of this title by section 5102(c)(7) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. Subject to section 213(f) of title 29, the rates may not be less than the appropriate rates provided for by section 206(a)(1) of title 29.

From the broad language in the law and the lack of definitive standards, it is apparent that Congress intended to grant the executive branch great discretion in establishing an administrative system governed by regulation for adjusting the pay of prevailing rate employees. This discretionary system, under which the executive branch was free to establish, change and amend wage adjustment procedures was an administrative, as distinguished from a statutory system, in that the resultant pay adjustment which the prior system produced was discretionary with the executive branch and not controlled by legislative guidelines and standards. In contrast, the system established under Public Law 92–392 has been narrowly defined by Congress so that the acts leading to a pay adjustment for prevailing rate employees performed by executive branch personnel are ministerial in nature. For example, the Civil Service Commission is required to define the boundaries of individual local wage areas, and designate a lead agency which will conduct wage surveys, analyze wage survey data, and develop and establish appropriate wage schedules and rates for prevailing rate employees. The law further requires the Commission to schedule full-scale wage surveys every 2 years and interim surveys between each 2 consecutive full-scale wage surveys. Also, the law established the effective date of any wage increase.

It is a general principle of law that an act is ministerial as distinguished from discretionary where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment. *Kaelin* v. *City of Indian Hills*, 286 S.W. 2d 989, 902 (Ky. 1956). Discretionary acts are those wherein there is no hard and fast rule as to the course of conduct that must or must not be taken and, if there is a clearly defined rule, such would eliminate discretion. *Elder* v. *Anderson*, 23 Cal. Rptr. 48, 51 (Dist. Ct. of Appeals, 5th Dist. 1962). When the thrust of a statutory command addresed to a public official or administrative agency is unmistakable, the duty to comply with it is ministerial, and mandamus will lie in such a case. *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F. 2d 342 (D.C. Cir. 1965). Accordingly, we are of the opinion that the detailed standards set forth in Public Law 92–392, as distinguished from the prior law, eliminate discretion on the part of the executive branch so that the adjustment of wage rates of prevailing rate employees may no longer be considered as granted administratively, but rather now must be considered to be an increase in pay granted by statute.

Therefore, a pay adjustment under 5 U.S.C. 5343 (1970) would not be considered an equivalent increase for purposes of establishing the requisite waiting period for periodic step increases under 5 U.S.C. 5335 (1970).

Accordingly, our decision in 39 Comp. Gen. 270, *supra*, is no longer appropriate in view of the statutory amendment discussed above.

[B-182073]

Transportation—Demurrage—Detention Charges—Weekend and Holiday Travel

Weekend or holiday vehicle detention charges for overdimensional shipments are proper only when the carrier has a valid highway permit for the day preceding and the day following the Saturday, Sunday or holiday. Expenses incurred through the use of a transceiver to obtain State highway permits are properly reimbursable, but only where proven.

In the matter of Ultra Special Express, October 29, 1974:

Ultra Special Express (Ultra) requests review of the action of our Transportation and Claims Division (TCD) in disallowing $389.95 of its claim for $2,563.03 on settlement certificate issued February 4, 1974. Our claim number is TK-969565.

Under Government bill of lading No. H-4524626, dated November 2, 1973, covering the transportation of an overdimensional fork lift truck from Bayonne, New Jersey, to Havre de Grace, Maryland, $300 in vehicle detention charges and $36.25 of the charges for the procurement of special highway permits were disallowed. The bill of lading shows that the shipment was picked up by the carrier on Friday, November 2, 1973, and that it was delivered on November 13, 1973. The carrier contends that the detention charges are due because it was not possible to pick up the shipment, obtain the permits, and deliver the shipment on the same day. Weekend or holiday travel of overdimensional shipments through the States involved here is not legal. Delivery was delayed until November 13, 1973, purportedly at the convenience of the consignee, but the permits show that movement actually took place on November 12–13, 1973.

Under Item 1580 of the Heavy and Specialized Carriers Tariff Bureau Tariff 100-F, MF-I.C.C. 36 (Tariff 100-F), incorporated by reference into the carrier's Section 22 tender I.C.C. No. 3, it is the responsibility of the carrier to obtain the necessary permits when requested to do so by the shipper. When a shipment is being transported under special permits, Items 1450 and 1680 of Tariff 100-F provide that the carrier is entitled to detention charges for any weekend or holiday occurring while the shipment is en route.

We have held that for a shipment to qualify for these charges, the carrier must prove that the shipment was permitted to move both before and after the weekend or holiday period for which detention charges are claimed. B-180733, August 5, 1974. Here under the terms

of the permits supplied by the carrier, no transportation was possible until November 12, 1973. Therefore, since no transportation was permitted on November 2 and 5, 1973, no detention charges are payable for the weekend of November 3–4, 1973, and the action of TCD in disallowing these charges is sustained.

Item 1580 of Tariff 100–F governs permits, licenses, bridge, ferry, highway, or tunnel charges, providing in part:

(c) The carrier will advance all expense (including telephone and telegraph tolls) necessary to secure such licenses or permits, or will pay as incurred, all bridge, ferry, highway, tunnel or other public charges of like nature, which are incurred in the handling of any such shipment but all such expense or charges, plus a ten (10) dollar service or messenger charge for each such permit procured, shall be in addition to other charges provided in this tariff, and shall be collected from the shipper or consignee. Evidence of the payment of such charges shall be furnished to shipper upon request.

The carrier originally billed $104.75 under this item and was allowed $68.50. The remainder of the charges, $36.25, was disallowed as unnecessary and unproved.

The disputed part of the charges involves the costs of requesting and receiving the permits. Ultra states that, in order to obtain each permit, it was necessary to call the appropriate State agency to apply for the permit and, subsequently, to receive by some means the permit itself. To facilitate receipt of permits, Ultra rented a transceiver on a per use basis, contending that this method is the most practical, expeditious, and least costly.

Under Tariff 100–F, Ultra is entitled only to those charges which are "necessary." The existence of other cheaper methods of receiving permits does not mean that Ultra's use of a transceiver is unnecessary. Under the terms of the tariff, and within a broad range, the selection of a method of obtaining permits is at the carrier's discretion. Based on the present record, we cannot say that the use of the transceiver is unnecessary nor do we believe that the transceiver charges are unreasonable. Therefore, Ultra is entitled to those transceiver charges for which it can furnish proof.

Further, it does not appear that the 10–dollar service charge provided by Item 1580 is designed to cover transceiver expenses. The carrier is clearly entitled to all provable expenses necessary to secure permits and the 10–dollar service charge is in addition to those expenses. We presume that the charge was imposed to cover overhead and unallocable costs.

On this shipment, the carrier has provided permits from New Jersey, Delaware, and Maryland. The New Jersey permit is identified as received over Ultra's transceiver and, accordingly, the charges of $9.45 for the transceiver and $2.20 for telephone calls are proper, if otherwise correct.

However, the two remaining permits were apparently not received over Ultra's transceiver. The method by which these permits were obtained is uncertain and the expense incurred is unproved. Therefore, and on the basis of the present record, the transceiver charges for these permits were properly disallowed.

The remainder of the disputed charges under this claim arose under Government bill of lading No. H–1666576, dated November 13, 1973, which covered the transportation of an overdimensional motor freight vehicle from Atlantic Highland, New Jersey, to Norfolk, Virginia. Permit charges of $53.70 were disallowed by TCD on the same grounds as stated above. We find that of the amount claimed, Ultra is due no more than $11.65 for its expenses in obtaining the New Jersey permit. The Maryland and Virginia permits were not received on Ultra's transceiver and no copy of the Delware permit has been provided. Therefore, the charges for these three permits were properly disallowed as unproved.

We note that the previous settlement allowed Ultra $5 more than was claimed for toll charges under Government bill of lading No. H–4524627. In revising the certificate to reflect the charges allowed by this decision, the toll charge also should be adjusted.

[B–180997]

Compensation—Rates—Highest Previous Rate—Adjustment—Retroactive

In setting a pay rate under the authority of section 531.203(c), title 5, Code of Federal Regulations—highest previous rate rule—an agency may not require an employee to terminate agency and court actions initiated by him to resolve grievances with the agency in exchange for the employee receiving the benefit of the highest rate, although within agency discretion, since such agency action constitutes an unwarranted exercise of its discretion and a rate set at the minimum of the grade under such circumstances may be adjusted retroactively to the highst previous rate to accord with agency recommendation for correction.

In the matter of a retroactive adjustment—unwarranted exercise of discretionary authority, October 30, 1974:

The Federal Railroad Administration, Department of Transportation, requested our decision as to whether it may adjust retroactively the rate of pay of Harold E. Levine from grade GS–15, step 1, to step 5, effective May 13, 1973, the date he was repromoted to GS–15, to accord with the recommendation of the agency Examiner in a formal grievance proceeding on the matter.

The agency is of the opinion it cannot make the above within-grade adjustment without authorization of our Office in view of our decisions to the effect that when no administrative error occurs at the time the initial salary rate is fixed incident to a personnel action, there is no

authority to change such initial rate either retroactively or prospectively. In this context, administrative error is construed as failure of an agency to carry out written administrative policy of a nondiscretionary nature or to comply with administrative regulations having mandatory effect. Several decisions are cited to substantiate the agency's view, including 31 Comp. Gen. 15 (1951); 52 *id.* 920 (1973); and B–173815, April 18, 1973.

As a statement of the facts in the case the agency submitted a copy of the Examiner's Report on the grievance which shows that Mr. Levine, through a reduction-in-force (RIF), was reduced in grade from GS–15, step 5, to GS–12, step 10. Mr. Levine was apparently the only employee to whom the RIF applied. The RIF action was sustained on appeal to the Civil Service Commission; however, the case apparently has been remanded by a court action to the Commission. Additionally, it is stated that Mr. Levine has been involved in at least two union arbitration cases and, as a result of one of these, he was promoted to grade GS–15, step 1, on May 13, 1973. Mr. Levine filed a formal grievance alleging that under the highest previous rate rule he is entitled to GS–15, step 5, as of May 13, 1973. It is the report on that grievance which is before us. We assume that the agency adopts the findings of fact of the Examiner, in the absence of any statement to the contrary.

The Examiner concludes that there was no administrative error as defined in the Comptroller General decisions cited above which would permit the retroactive adjustment sought. He states, however, that the agency acted deliberately in a discretionary area to deny Mr. Levine step 5 and he found:

> * * * that the agency action in denying the grievant step 5 of GS–15 was unfair and biased, and was made with little, if any, regard for the merits of the action, itself. The agency was concerned primarily with making a deal with the grievant on a *quid pro quo* basis. When the grievant would not give the agency what it wanted—the dropping of arbitration and court cases—the agency did not give the grievant what he wanted: Step 5 of GS–15.

The Examiner recommended that the agency do whatever is necessary to give Mr. Levine step 5 of GS–15 as of May 13, 1973. The agency Administrator wishes to comply with the Examiner's recommendation.

We concur that no administrative error occurred. It does not follow, however, that such fact disposes fully of the matter. The question remains whether an agency may, in exercising its discretionary authority to set a pay rate within a grade incident to a personnel action, require an employee to terminate agency and court actions initiated by him in order to receive the benefit of the highest previous rate rule. We think not.

As the Examiner points out, section 531.203(c), title 5, Code of Federal Regulations, gives broad discretion to agency appointing officials to grant or deny the highest previous rate in a variety of personnel actions, including the subject action. Where agency action is thus committed to agency discretion, the standard to be applied by the reviewing authority in reviewing the action of the agency is whether the action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. *Warren Bank* v. *Camp*, 396 F. 2d 52 (1968). Arbitrariness and capriciousness exist if agency action lacks a rational basis. *Pace Co., Division of Ambac Industries, Inc.* v. *Department of the Army of the United States*, 344 F. Supp. 787, case remanded 453 F. 2d 890, cert. denied 405 U.S. 974 (1971).

An employee's right of access to established agency procedures such as arbitration and to the courts in the resolution of his grievances with the agency are not, in our opinion, proper items of negotiation by an agency with an employee in determining what step rate it shall grant within its discretionary authority under the subject highest previous rate rule. To require the employee to forego such actions in order for him to obtain the benefit of the agency's discretion does not form a rational basis for the agency to predicate an exercise of its discretion and would be manifestly unfair to the employee as well as unwarranted exercise of agency discretion. In the circumstances we find the action setting Mr. Levine's salary at step 1 rather than 5 of grade GS–15 to be an unwarranted personnel action and as such requires correction in accordance with the Back Pay Act of 1966, codified in 5 U.S. Code 5596. Accordingly, we make no objection to a retroactive adjustment of Mr. Levine's compensation to the date of his repromotion.

[B–180010]

Regulations—Promotion Procedures—Collective Bargaining Agreement

When agency agreed in a collective bargaining agreement that it would be policy of the agency to fill vacancies by promotion from within if qualifications of agency applicants are equal to those from outside agency, then at the time that the head of the agency approved the agreement under section 15 of Executive Order No. 11491, such policy, unless otherwise provided in the agreement, became a nondiscretionary agency policy and part of the agency's promotion procedures.

Arbitration—Award—Collective Bargaining Agreement—Violation—Agency Implementation

Regarding weight General Accounting Office (GAO) should give to binding arbitration award in which arbitrator found that agency had violated collective bargaining agreement concerning promotions from within agency, absent finding that award is contrary to applicable law, appropriate regulation, Executive Order No. 11491, or decisions of this Office, GAO believes that binding arbitra-

tion award must be given the same weight as any other exercise of administrative discretion, i.e., authority to implement award should be refused only if agency head's own decision to take same action would be disallowed.

Arbitration—Award—Retroactive Promotion With Backpay—Violation of Collective Bargaining Agreement

Employee who agency admits was not promoted to a position to which she would have been promoted had the agency not violated certain provisions of a collective bargaining agreement between the agency and a labor union may be retroactively promoted back to the time she would have been promoted had there not been a violation and paid commensurate backpay since agency acceptance of the agreement made the provision a nondiscretionary agency policy and violation was unwarranted and unjustified personnel action under Back Pay Act, 5 U.S.C. 5596. 48 Comp. Gen. 502; B-175867, June 19, 1972; B-181972, Aug. 28, 1974; and other conflicting decisions, modified.

Arbitration—Award—Implementation by Agency—Not Automatic

General Accounting Office (GAO) decision authorizing retroactive promotion following arbitrator's award should not be construed as meaning that any award of an arbitrator, even if made pursuant to a binding arbitration agreement, may automatically be implemented by agency involved. While GAO is concerned with giving meaningful effect to Executive Order 11491, arbitrator's awards must be consistent with law, regulation and decisions of this Office and where there is doubt as to whether an award may properly be implemented, a decision from this Office should be sought.

In the matter of a retroactive promotion with backpay pursuant to arbitration award, October 31, 1974:

This matter involves a request for a decision as to whether the National Labor Relations Board (NLRB) has the authority to comply with an arbitrator's award and grant an employee of that agency a retroactive promotion with appropriate backpay.

The question arises as the result of an arbitrator's decision issued pursuant to an arbitration hearing under a collective bargaining contract between the General Counsel of the NLRB and the National Labor Relations Board Union. The arbitrator found that the General Counsel had improperly filled a clerical vacancy in his office by selecting an applicant from outside the agency and thereby rejecting four admittedly "well-qualified" applicants who were already employed by the agency. The arbitrator found that such selection and concurrent rejections violated the contractual provision of the collective bargaining agreement calling for filling vacancies by promotion or reassignment of persons already employed in the agency, provided their qualifications are equal to those of applicants from other sources.

The provision which the arbitrator found was violated is in Article IX of the collective bargaining agreement, which reads as follows:

ARTICLE IX

Clerical Promotions

Section 1. Introduction—The parties agree that the mission and responsibilities of the Office of the General Counsel in the enforcement of the National Labor Relations Act, as amended, demand a high degree of staff effectiveness. It is therefore the policy of the General Counsel:

a. to obtain and retain the best personnel available and to utilize as fully as possible all valuable and appropriate experience.
b. to fill vacancies by promotion or reassignment of persons already employed in the Agency, provided their personal qualifications, training and experience are equal to those of applicants from other sources.
c. that recruitment from outside the Agency is usually resorted to only to fill positions at the entrance level or to fill positions for which eligibles are in short supply or to appoint individuals who will add to the personnel resources of the Agency.

* * * * * * *

Section 2. All promotions will be made in accordance with this agreement, the Agency's Merit Promotion Regulations, and related Civil Service Regulations.

Since the agency admitted that the four agency applicants were at least as well qualified as the applicant from outside the agency, the arbitrator found that the agency should have selected one of the four agency applicants for the position in question in accordance with the agreement. The General Counsel has admitted that the contract was violated but questions whether he may properly implement the arbitration award in its entirety. That award directed the General Counsel to select, on some basis consistent with the agreement and with applicable law, one of the four agency applicants to fill the position given the nonagency applicant and to "make the applicant so selected whole for any loss of wages which she sustained by not being given that position, starting with the date the position was first filled" by the employee selected from outside the agency.

The General Counsel states that in compliance with the award he has selected one of the four agency applicants for the position, but in view of the Court of Claims decision, *Chambers* v. *United States*, 451 F. 2d 1045 (1971), on the question of retroactive backpay, he has decided to submit the matter to this Office for a decision as to the propriety of paying the ordered backpay. The General Counsel points out that prior to the *Chambers* decision, both the Court of Claims and the Comptroller General had ruled consistently that promotions may not be made retroactively effective so far as the payment of backpay is concerned and refers to our decisions, 32 Comp. Gen. 527 (1953), 33 *id.* 140 (1953), and 50 *id.* 850 (1971). He cites the rule stated in 33 Comp. Gen. 140 that this Office "has never sanctioned retroactive promotions so far as the payment of salary is concerned."

It is the position of the General Counsel of the NLRB that his agency should have the authority to comply with the arbitrator's award with respect to the payment of backpay to make the employee whole for the losses suffered by not being selected for the position in question. These views are based on the conviction that in order to give meaningful effect to Executive Order 11491, as amended, and the collective bargaining agreement entered into pursuant thereto, it is essential that "binding" arbitration, when agreed to, means just that. The General Counsel further states that this is especially true in labor-

management relations in the public sector where, unlike the private sector, neither employees nor unions have any self-help and therefore must rest their hopes with the arbitrator. He states that an agency's inability to comply fully with an artbitrator's award does nothing to enhance meaningful and peaceful labor relations in the Federal sector. Therefore he requests that we issue a decision that will authorize the agency to comply fully with the arbitration award in this case by paying backpay to the employee in question as directed by the arbitrator.

Both the National Labor Relations Board Union and the American Federation of Government Employees requested and received permission to submit briefs with this Office in the matter. The National Labor Relations Board Union, in its brief, points out that the decision of the arbitrator in this case does not violate applicable law, regulation, or Executive Order 11491 and that the award of ordering the agency to select one of the four agency applicants for the position in question constitutes a *sine qua non* for insuring adherence to the collective bargaining agreement and thus for giving full implementation to the Executive order. It is argued that not giving effect to the award would allow the agency to violate the contract with impunity and would nullify the effect of the collective bargaining agreement, as to both its substantive provisions and as to an arbitration procedure provided therein. The American Federation of Government Employees stated that at issue is whether an arbitration award made pursuant to a negotiated procedure providing for binding arbitration, as authorized by Executive Order 11491, as amended, represents a valid exercise of an agency's administrative discretion in accordance with stated agency policy and is, therefore, binding upon that agency.

This case involves, in addition to the question of whether the particular employee involved may be granted a retroactive promotion as a result of the agency's violation of the collective bargaining agreement, the broader question, addressed in all the submissions to this Office in the matter, of the value and effect of a provision in a collective bargaining agreement calling for binding arbitration of disputes over the interpretation and application of that agreement, including the authority of an agency to comply with a binding arbitration award, and the relationship of decisions of the Comptroller General of the United States to those awards.

The policies governing relationships between agencies of the executive branch of the Government and Federal employees and organizations representing those employees are outlined in Executive Order 11491, as amended by Executive Order 11616 of August 26, 1971, 3 C.F.R. 254. Section 11 of that order sets forth the guidelines covering negotiation of agreements and provides that an agency and a labor

organization may negotiate with respect to personnel policies and practices and matters affecting working conditions so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and the Executive order. Under section 12, each agreement is subject to certain retained rights of the agency and the administration of all matters covered by the agreement 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.

We believe that once an agreement with a labor organization is approved under section 15 of Executive Order 11491, and the provisions of the agreement are consistent with laws and regulations and within the guidelines of sections 11, 12 and 13 of the Executive order, then, unless otherwise specifically provided in the agreement, such provisions become nondiscretionary agency policies. Further, we believe that when an agency, in its discretion, chooses to agree to binding arbitration, then a decision of an arbitrator, *if otherwise proper*, becomes, in effect, the decision of the head of the agency involved. Therefore, regarding the weight which this Office should give to binding arbitration awards, absent a finding that an arbitration award is contrary to applicable law, appropriate regulation, Executive Order 11491, or decisions of this Office if the award involves payments to be made by the agency involved, we believe that a binding arbitration award must be given the same weight as any other exercise of administrative discretion, i.e., the authority to implement the award should be refused only if the agency head's own decision to take the same action would be disallowed by this Office.

In that regard, section 13(b) of Executive Order 11491 provides that either an agency or an exclusive representative may file an exception to an arbitrator's award with the Federal Labor Relations Council. The exception may relate to a dispute over the facts, over the interpretation of the collective bargaining agreement, or with respect to the legality of the remedy fashioned by the arbitrator. Under 31 U.S. Code § 74, disbursing officers, or the head of any executive department or other establishment not under any of the executive departments, may apply for and the Comptroller General must render his decision upon any question involving a payment to be made by or

under them. When a matter is submitted to this Office involving an arbitration award, the Comptroller General will not rule on the facts or the interpretation of the agreement and by submitting an arbitration award to this Office for a ruling on the legality of its implementation, we will assume that there is no dispute as to these matters since the agency involved did not note an exception with the Federal Labor Relations Council under section 13(b) of the Executive order. Our consideration will be limited, therefore, to the propriety of implementing the particular arbitration award in question. When an agency does choose to first file an exception with the Council, if the Council is unsure as to whether the arbitration award may properly be implemented in accordance with the decisions of this Office, it should either submit the matter directly to this Office for decision or, after ruling on any other issues involved in the exception which involve matters not within the jurisdiction of this Office, it should instruct the agency involved to request a ruling from this Office as to the legality of implementation of the award.

As to the facts of this particular case, it is indicated that following the arbitrator's decision, the General Counsel of the NLRB petitioned the Federal Labor Relations Council for review of the decision. Thereafter the General Counsel withdrew the matter from the Council with the understanding that he would submit the issue of backpay to this Office for a decision.

Authority under which an agency may retroactively adjust an employee's compensation is contained in the Back Pay Act of 1966, codified in 5 U.S.C. § 5596, which provides, in part, as follows:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

The Civil Service Commission has promulgated implementing regulations to that act in title 5 of the Code of Federal Regulations, part 550, subpart H. As to whether those regulations permit an agency head to take cognizance of an arbitrator's finding that an employee has been subjected to an erroneous personnel action by his agency and pay the employee under the Back Pay Act, the Civil Service Commis-

sion has stated, in a letter set forth, in part, in Attachment 2 to FPM Letter No. 711–71, June 3, 1973, as follows:

> The regulation (5 C.F.R. 550.803) says in effect the employee is entitled to back pay when the . . . [agency head] or other appropriate authority makes a decision on his own initiative that the adverse personnel action was unjustified or unwarranted. The context of the regulation shows that the expression *on his own initiative* does not prevent him from acting on the award of an arbitrator, but only distinguishes this case from the case in which he acts on an appellate decision.

In our decision of June 25, 1974, 53 Comp. Gen. 1054, we recognized that where an arbitrator has made a finding that an agency has violated a collective bargaining agreement to the detriment of an employee, the agency head may accept that finding and award the employee backpay for the period of the erroneous personnel action so long as the circumstances surrounding the erroneous action fall within the criteria set forth in the Back Pay Act and the implementing regulations. The criteria for an unjustified or unwarranted personnel action are set forth in 5 C.F.R. § 550.803 (d) and (e) which provide:

> (d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.
>
> (e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

We believe that a violation of a provision in a collective bargaining agreement, so long as that provision is properly includable in the agreement, which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay and that therefore the Back Pay Act is the appropriate statutory authority for compensating the employee for the pay, allowances or differentials he would have received but for the violation of the agreement. In that regard, to the extent that previous decisions of this Office may have been interpreted as holding to the contrary, such decisions will no longer be followed.

In the present case, the agency failed to carry out what had become, through its inclusion in a collective bargaining agreement, a nondiscretionary agency policy by placing an employee from outside the agency in a position for which there were four applicants within the agency qualified for the position. one of whom the General Counsel admits would have been originally promoted to the position had the agency adhered to its policy. Further, the agency subsequently recognized that the policy had not been followed and selected one of those

four agency employees to the position. Since in this particular case the agency has admitted that had it not been for the unjustified or unwarranted personnel action the employee later promoted to the position would have been promoted originally, we would have no objection to the agency at this time processing a retroactive promotion and paying the appropriate backpay.

As to our decisions concerning retroactive promotions and backpay cited by the General Counsel of the NLRB, none are for application under the facts of this case. In 32 Comp. Gen. 527 (1953) and 33 *id.* 140 (1953) we were concerned with statutory and regulatory language which, by its terms, was for prospective application only. The decision in 50 Comp. Gen. 850 (1971) was based on the fact that in that case the agency had retained the discretion to set the effective date of promotions and there was no basis for this Office giving a retroactive promotion pursuant to an *advisory* arbitration award to a date prior to the one set by the agency. Further, that case involved application of Executive Order 10988, January 17, 1962, which was revoked by Executive Order 11491, under which the policies set forth in this decision have been formulated.

However, our decision in this matter should not be construed to mean that any provision in a collective bargaining agreement automatically becomes a nondiscretionary agency policy. As previously indicated, under Executive Order 11491, agreements are limited as to what they may contain and agencies have certain retained rights which they may not bargain away. Section 12(b)(2) of the Executive order provides that management officials must retain the right to "hire, promote, transfer, assign, and retain employees within the agency, and to suspend, demote, discharge, or to take other disciplinary action against employes." Since this case was withdrawn from the Federal Labor Relations Council in order to submit the question of backpay to this Office, it does not appear that the Council ruled on the question of whether or not the promotion provision in the agreement, or the arbitrator's award thereunder, violated the retained right of the agency to promote employees. However, while that question is essentially one for the Council, we note that the agreement and the award would appear to be proper since the provision in the agreement is in consonance with subchapter 3–3e of chapter 335 of the Federal Personnel Manual which provides that it is within the discretion of an agency to limit its consideration of applicants for positions to employees within the organization of applicants for positions only instructed the agency to do that.

We also want to stress that our decision herein should not be construed as meaning that any award of an arbitrator, whether or not made pursuant to a binding arbitration agreement, may automatically

be implemented by the agency involved. While we, like the General Counsel of the NLRB and the other parties who submitted briefs in this matter, are concerned with giving meaningful effect to Executive Order 11491, we point out that arbitrator's awards must be consistent with law, regulation, and, where the award involves, directly or indirectly, the payment of money, decisions of this Office. When there is doubt as to whether an award may be properly implemented, a decision from the Council or from this Office should be sought.

[B-181545]

Bids—Evaluation—Aggregate *v.* Separable Items, Prices, etc.—Base Bid Low

$200,000 amount for Force Account Work, a line item in base bid schedule available for additional work over and above that called for in invitation for bids (contingent sum), was included in evaluation of base bids, and not used to provide funds for award of additive items, as contended by protester.

Bids—Aggregate *v.* Separable Items, Prices, etc.—Additives—Disclosure Requirements

While Armed Services Procurement Regulation 2-201(b)(xli) (1974 ed.) requires disclosure of order of selection priority of additive items, Federal Procurement Regulations have no similar provision and, therefore, invitation for bids issued by civilian agency need not reveal priority of additive items, and failure to indicate priority, with resultant post bid opening discretionary selection of additive items, does not render award of additive items invalid.

Contracts—Protests—Timeliness—Solicitation Improprieties—Apparent Prior to Bid Opening

Contention that invitation for bids failed to provide special instructions concerning the order of selection priority of additive items is untimely raised and will not be considered by General Accounting Office as 4 C.F.R. 20.2(a) cautions bidders that protests based upon alleged improprieties in solicitation apparent prior to bid opening must be filed prior to bid opening.

Appropriations—Availability—Contracts—Base Bid and Additive Items—Recording

Federal Procurement Regulations, unlike Armed Services Procurement Regulation, impose no duty on contracting officer to record amount of funds available for base bid and additive bid items when amount of funding is in doubt. Therefore, when actual funding available increases prior to award from cancellation of another procurement, funds properly made available therefrom to civilian agency for general construction use may be reallocated to affect determination of amount of additive items to be included for award.

Bids—Evaluation—Estimates—Government Cost Estimate—Excessive

Preparation of Government cost estimate (GCE) found to be in accordance with Federal Procurement Regulations 1-18.108 (1971 2d ed., amend. 95) which provides that Government estimate need only be as detailed as prospective contractor's bid; and where bids greatly exceed GCE, procuring activity is placed

on notice of possible error in estimate, and review and revision, if necessary, is appropriate.

Bids—Invitation for Bids—Requirements—Price Range Estimate—Construction Contracts

Estimated price range, required by Federal Procurement Regulations 1-18.109 (1971 2d ed., amend. 95) to be placed in invitation for bids for construction projects expected to exceed $25,000 does not establish absolute ceiling for award, and since IFB does not prevent making of award if estimated price range ceiling is exceeded, and all bidders exceeded ceiling, proposed award in amount in excess of ceiling is not questioned.

Equal Employment Opportunity—Information—Obtaining—Contract Award

Although protester alleges that it was requested to furnish Equal Employment Opportunity (EEO) information indicative of award 2 weeks before proposed awardee in furtherance of allegation of improper manipulation of funding available for additive items and record contains conflicting information as to when EEO information was obtained from bidders, once additional funding became available, increasing amount of additive items to be included for award and displacing protester as low bidder, it was appropriate to secure EEO information from resulting low bidder.

In the matter of H. M. Byars Construction Company, October 31, 1974:

On April 9, 1974, the National Park Service (NPS) of the United States Department of the Interior issued an invitation for bids (IFB) for project No. 8800-0851B. The contract for which bids were invited calls for the construction of the Yosemite Trunk Sewer, Yosemite National Park. The bid schedule for this project included a base bid schedule consisting of 37 separate items, and three additive schedules. Additive schedule IA for "Electrical Duct Bank" and "Pull Boxes" included 10 separate items, numbered 1A through 10A; additive schedule IIA for "Replacement and Connection of Sewer Lines in El Portal Area for El Portal Market and Hotel" included five separate items, numbered 11A through 15A; and additive schedule IIIA for ductile iron pipe included only one item, numbered 16A. For each individual schedule, provision was made for the insertion of the total bid for that schedule. The bid schedule also contained a bid summary page in which totals for the base bid plus various combinations of additive schedules and individual additive items were to be entered.

On May 23, bids were opened. Four responsive bids were received. The low base bid was submitted by H. M. Byars Construction Company (Byars). The low aggregate bid including the base bid and all additive schedules was submitted by Ernest E. Pestana, Inc. (Pestana). The base bids submitted by Byars and Pestana were $3,425,290 and $4,044,728, respectively, or 1.1 percent and 19.4 percent above the Government estimate of $3,387,450. However, for the aggregate bids for all

schedules, Byars' bid of $5,505,975 and Pestana's of $5,333,293 were 49 percent and 44.3 percent, respectively, above the Government estimate of $3,694,890. During the course of this protest, NPS advised our Office that the Government estimate for additive schedule IA was in error in that the estimated prices for five of the schedule's 10 items calling for construction of "Electrical Duct Bank," were $2 per lineal foot whereas the figure should have been $22 per lineal foot. NPS then revised the Government estimate to reflect the $22 per lineal foot figure, resulting in a new estimate of $4,985,690. In light of this revision, the aggregate bids are 10.4 percent (Byars) and 7 percent (Pestana) above the estimate. NPS now considers both bids to be reasonable as concerns price.

Concurrent with the instant procurement, another project (No. 8800-0851A), was advertised for the construction of a pollution control facility at El Portal, the downstream terminus of the trunk sewer project. Both projects were funded as a single overall project for the transporting and treatment of wastewater from Yosemite Valley. The overall project was split into two procurements because of the different types of work involved.

Bids for the trunk sewer project were higher than NPS had anticipated. Therefore, a decision was made to delay proceedings leading to the award of that contract until bids were scheduled to be opened on the pollution control facility on June 6 in the hope that more favorable bids might be received for that portion of the overall project. However, bids received for the pollution control facility project were also high and the question of adequate funding for both portions of the overall project became a matter of serious concern to NPS.

Under the circumstances, it became apparent to NPS that the decision making process with respect to the problem of arranging for adequate funds would be time-consuming. Therefore, in order to avoid any further delay in the award of the trunk sewer contract, NPS states that it requested that both Byars and Pestana submit the necessary documentation required for Equal Employment Opportunity (EEO) clearance.

During the week of June 9, matters relating to the acceptability of the bids for the trunk sewer project, the portions of the work to be performed, and arrangements for funding were considered and a decision was made that award should be made of all items of all schedules except items 9A and 10A of additive schedule IA. Pestana would receive the award on this basis. As to the additive items to be awarded, NPS advised that:

> * * * it was of concern that the Yosemite Valley has been served for a great many years by an aerial electric power line which has now become antiquated and of insufficient capacity. The old line would have required major maintenance and upgrading and even then would have been unreliable because of susceptibility to lightning strikes and wind falls. Hence the need to incorporate into the work of this project provisions for underground power service. * * *

Schedule IA had been added to the bid schedule to provide a system of underground ducts and pullboxes to replace aerial electric power lines which would be placed in the same trench with the trunk sewer line for use by the utility company which would furnish, install, and energize the conductors under a separate procurement. The total length of duct was divided into five increments with as many increments to be awarded as available funding would permit. Each increment consists of a number of lineal feet of duct (one additive item) and a number of pullboxes required to serve the duct (an accompanying additive item).

NPS decided that four of the five increments (represented by additive items 1A through 8A) would be included in the award. The fifth increment (additive items 9A and 10A) was omitted from the award because it had been learned that, for this reach of line which is the reach adjacent to the El Portal terminus, the aerial electric power lines would remain in service whether or not the underground system being procured was also available. According to NPS, the duct for this increment then would have been convenient rather than essential for the balance of the line. Therefore, the decision was made that that increment would not be awarded. Additive schedule IIA (items 11A through 15A) was considered necessary in order to connect certain facilities in the community of EL Portal to the new trunk sewer, and additive schedule IIIA (item 16A) was necessary to provide a small stockpile of additional pipe for emergency use in the event of a slide or washout to return the sewer to service as soon as possible.

On June 14, both Byars and Pestana were informally advised of the decision reached by NPS to make the award under the IFB to Pestana for all scheduled items except additive items 9A and 10A. Both bidders were cautioned, however, that the basis for award would not be certain until clearance of funds was received.

A third project (No. 8800–0853), funded from the same appropriation as the above two projects, for water control facilities at Wawona Development Area, Yosemite (Wawona), was the subject of a procurement during the same time period. This project, however, was postponed indefinitely on June 20. The postponement occurred primarily because the funds previously committed for the project were only one-half of the Government estimate and, in view of spiraling costs on other projects, all excess funds had been used. Also, some as-

pects of the design were not in conformance with the development concept plan for the Wawona development. Subsequently, NPS was requested by the Regional Director to cancel the IFB on June 28. Once the cancellation decision was made, the funds programmed for Wawona were available for transfer under existing authority to eliminate the funding deficiencies for the trunk sewer and pollution control facility projects.

When fully apprised of NPS's intentions. Byars protested to our Office on June 19, 1974.

It should be kept in mind that Byars submitted not only the low base bid but the low bid on any combination of additive items excluding additive items 5A and 6A (1 increment) and 9A and 10A (1 increment). As proposed for award, the NPS selection of all additives but one increment displaced Byars as the low bidder.

Byars, through counsel, has questioned the propriety of the proposed award to Pestana and has detailed a set of circumstances, which, in its opinion, gives the appearance of favoritism and questionable procurement practices such as to taint any award to Pestana. The circumstances which led Byars to this conclusion are as follows:

(1) Byars' bid was the lowest and within the range of the Government cost estimate for the base bid items; however, award was withheld because NPS claimed the bids were higher than anticipated;

(2) When bids were opened on the trunk sewer project on June 6, it was apparent that additional funds for additive items would not be available;

(3) On June 7, contracting officials requested that Byars submit EEO data which was a prerequisite for award since, allegedly, the contract would be awarded to it;

(4) On June 28, 8 days after bids were supposed to be opened, it was requested that the Wawona project be canceled to provide additional funds for the other two projects under consideration, and finally;

(5) There is no proven need for the additive items, but NPS determined exactly at what juncture, when certain additives were included, Pestana would become the low bidder showing NPS's improper concern over who would be the recipient of the award rather than the extent of the award.

To complement the above, Byars' protest raises the following contentions which, in its opinion, require that award be made to it as the low base bidder with no award on any of the additive items.

I. The Force Account Work item (base bid item 37), although identified as an amount available for additional work over and above that called for in the IFB (contingent sum), should be considered for evaluation purposes in computing the total cost of the work rather than deleted from the base bid schedule to create funds for the award of additive items;

II. Evaluation of the bids submitted was improper, as the proposed award would result from a postbid opening random selection and evaluation of additive bid items in conjunction with the absence of bid evaluation criteria set forth in the IFB;

III. Funds were manipulated after bid opening to allow award on the base items plus just enough selected additive items to displace Byars as low bidder.

IV. The revised Government Cost Estimate was in error with regard to additive schedule IA; thus, award should be precluded on any of the additive items. Moreover, the estimate was not prepared independently by NPS.

V. Award to Pestana cannot be made under the "Description of Work" clause contained in the IFB pursuant to sections 1–18.109 (1971 2d ed., amend. 95) and 1–18.203–1(b)(3) (1968 2d ed., amend. 48) of the Federal Procurement Regulations (FPR). That clause establishes an estimated price range for the contract work which award as contemplated to Pestana would exceed.

VI. Equal Employment Opportunity (EEO) information was not obtained concurrently from both bidders being considered for award further demonstrating a premeditated attempt to exclude Byars from obtaining the award; and

VII. Inclusion of the additive items for award was unnecessary, since such items were unessential to the needs of the Government.

For the reasons set forth below, we cannot agree with the positions asserted by Byars and the protest must be denied.

I. *Force Account Work*

Byars alleges that the $200,000 amount inserted for base bid item 37 must be included in the cost evaluation of any bid submitted and not to be used to create funds for the award of additives. Our review of the record discloses that, in consonance with Byars' position, in the cost evaluation of bids submitted, NPS did consider the $200,000 amount in determining the low bidder, and did not use the $200,000 for award of additive items.

II. Random Selection of Additive Bid Items

Byars contends that the manipulation and random selection of additive bid items gives total discretion to the procuring activity as to who will be the low bidder. Byars states that the allowance of this unbridled discretion, after bid opening, is totally repugnant to the competitive bidding system which is based on an unyielding prohibition of favoritism.

Byars invites our attention to § 2-201(b)(xli) (1974 ed.) of the Armed Services Procurement Regulation (ASPR) which covers additive items. The regulation provides that, when it appears that funds available for a project may be insufficient for all the desired features of construction, the contracting officer may provide in the invitation for a first or base bid item covering the work generally as specified and for one or more additive or deductive items which progressively add or omit specified features of the work in a stated order of priority. Counsel recognizes that the procuring activity in this case is not controlled by ASPR, but rather by the FPR, which does not contain a counterpart to ASPR § 2-201(b)(xli) (1974 ed.). Therefore, Byars, arguing by analogy, asserts that the equitable principles underlying the ASPR provision should be equally applicable to advertised procurements of civilian agencies, and that bidders should be informed of the basis of evaluation prior to, or, at the latest, the time of bid opening without being subjected to postbid opening manipulations in the relative standing of bidders.

The IFB, in discussing evaluation of bids, states:

> * * * Award will be made to one bidder in accordance with Clause 10 of the Instructions to Bidders.

Clause 10 states, in pertinent part:

> (a) Award of contract will be made to that responsible bidder whose bid, conforming to the invitation for bids, is most advantageous to the Government, price and other factors considered.
>
> * * * * * * *
>
> (c) The Government may accept any item or combination of items of a bid, * * *

Byars distinguishes previous GAO decisions (45 Comp. Gen. 651 (1966); B-157227, August 18, 1965; B-148333, April 9, 1962; and B-146343, November 1, 1961) where GAO permitted the postbid opening selection of additive items, because "unlike the present case, the invitations included special provisions which defined how the bids were to be evaluated." In those cases, our Office upheld the selection of the low bidder on the basis of additive alternatives under circum-

stances similar to those involved here. In B–148333, April 9, 1962, the procedure was protested, as here, on the basis that it permitted selection of the low bidder to be controlled by manipulating the selection of alternates after the opening of bids. Our Office observed that the invitation reserved an option to the Government to make the award for such items as it might choose after the opening of bids, as follows:

> * * * Such an election by the contracting agency is not improper. Requirements that contracts for public work be let to the lowest bidder are not violated when specifications are drawn for different work, bids are sought on different bases, and a choice is not made by the contracting officials until after all the bids are opened. 43 Am. Jur., Public Works and Contracts, § 37; 10 McQuillin, Municipal Corporations § 29.55 (3rd ed.); Cohen, Public Construction Contracts and the Laws § 2.14.

In B–146343, November 1, 1961, another decision with contentions similar to those raised by Byars, we said:

> Your attorney contends that it is improper for the Government to reserve until after bid opening the right to choose the particular combination of items on which bids will be evaluated, claiming that the contracting officer might thereby, through a careful selection of items, choose any contractor other than the one who had submitted the lowest aggregate bid for all items. You are undoubtedly aware that it is not at all unusual to solicit bids for certain minimum work, plus optional additional work. The purpose of advertising on this basis ordinarily is to enable award to be made in accordance with the funds available and the best bargain offered by bidders. The net result thereof is to require bidders to quote prices on various combinations of items, subject to the Government's right to choose any particular combination it wishes as the basis of award.
>
> While it may be, as in this case, that different combinations of items will result in different low bidders, we can see no basis for claiming that this is discriminatory as between bidders. Each bidder is competing against each other bidder on each possible combination of items, and the comparative desirability of different items may well depend on the prices quoted therefor. It is obvious that award could not be made on any combination of items to a bidder whose aggregate price for those items was not low, merely because he happened to have offered an offsetting lower price for work which is not to be performed. We believe also that it is the exception rather than the rule when different combinations of items will result, as here, in different low bidders.

See, to the same effect, 45 Comp. Gen., *supra;* and B–157227, *supra.*

As noted above, the IFB provided that award would be made on items in any combination, almost the identical provision to that contained in the advertised solicitations involved in the above decisions relied on by Byars. Therefore, we have no reason to distinguish our prior decisions and find them applicable here. In view of this, it is our opinion that NPS clearly reserved the right to make the award for such items as it might choose after the opening of bids. While we might agree with Byars that an order of priority should be utilized (as adopted by ASPR), in view of our prior decisions, the failure to establish an order of priority here does not render award of the additive items improper or illegal.

Byars also raises the collateral issue that the IFB was defective in that it failed to provide special instructions concerning alternates, over and above those cited above, as required by FPR § 1–18.203–1(b)(9) (1968 ed., amend. 48). However, under our Interim Bid Protest Procedures and Standards, published at 4 C.F.R. § 20.1, *et seq.* (1974), protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening must be filed prior to bid opening to be considered. Since Byars did not protest here prior to the time set for bid opening, its protest in this regard will not be considered.

III. *Manipulation of Funds*

Byars alleges that NPS, subsequent to the opening of bids, manipulated the funding for this project to select enough additive items to be included with the base items for award as to result in the displacement of Byars as the low bidder. Byars states that, at the time set for bid opening, the funding for this project was far short of the proposed $5,109,323 amount now being considered for award. Therefore, Byars argues that, if the award is made for any amount over that sum available when bids were opened, then manipulation of funding and improper favoritism has taken place.

NPS, while not denying that sufficient funds were unavailable when bids were opened, claims that under its transfer authority, sufficient funds were subsequently available to make an award which includes the additive items.

Unlike ASPR § 2–201(b)(xli) (1974 ed.), FPR has no provision which requires the contracting officer, prior to bid opening, to determine and record the amount of funds available for a procurement which involves additive items. Therefore, the amount of funding available for this procurement appears to be within the discretion of the contracting agency. In the instant procurement, funds were obtained under the supplemental appropriation, May 27, 1972, Public Law 92–306, 86 Stat. 168, which stated, in pertinent part, as follows:

NATIONAL PARK SERVICE

CONSTRUCTION

For an additional amount *for "Construction,"* $34,120,000, to remain available *until expended.* [Italic supplied.]

No specific procurements were identified under this appropriation. Therefore, NPS was free to allocate such amounts it felt appropriate for whichever projects it deemed most essential. Funds not used or

remaining from any one project were available for use for other projects. Accordingly, NPS contends that, when it was administratively determined to cancel the Wawona project, the $2,245,000 set aside for that project was then available for use under the instant project. As a result, sufficient funds were then available to make an award here for the base bid items and all additive schedules.

In this case, both Byars and Pestana offered 60-day bid acceptance periods. This gave NPS 60 days to determine exactly how much funding would be available for this project in order to determine how many additive items could be included for award. Therefore, when additional funding became available during the 60-day period, a portion was validly redesignated for this project to enable inclusion of the additive items NPS felt were necessary.

In B–147061, November 13, 1961, like the instant procurement, the amount of funds available for the procurement was increased significantly after bid opening to permit an award on all work described as "additive alternates" which resulted in the displacement of the low base bidder. Our Office concluded that:

> The purpose of advertising on a "basic bid plus additive alternate" basis is to enable an award to be made to the bidder making the best offer within the funds available for the project involved. Since there was a genuine need for the work covered by the additive alternates and the contingency for the selection of additive alternates was specified in the invitation, we would not be justified in questioning the basis of evaluation employed by the contracting agency upon additional funds being made available for the work.

On the record before us, we find no basis to question the legality of the transfer of funds after bid opening.

IV. *Government Cost Estimate*

Byars contends that the revised Government cost estimate (GCE) was in error with regard to electrical duct bank items of additive schedule IA and was not independently prepared by NPS as allegedly required by FPR § 1–18.108 (1971 2d ed., amend. 95), which states, in part:

> An independent Government estimate of construction cost in as much detail as in the case of a prospective contractor's bid shall be prepared for each proposed contract, * * *, anticipated to cost * * * $10,000 or more. * * *

Byars contends that "* * * the supposed cost estimate is nothing more than a copy of the bidding schedule from the Invitation for Bids with the Government's own bid figures inserted thereon." Therefore, it is argued that award should be precluded on any of the additive items.

With regard to the contention that the GCE was not independently

prepared by NPS in accordance with FPR § 1–18.108 (1971 2d ed., amend. 95), we do not agree. Here, the contracting officer had a GCE prepared by the Government engineer for this project. As alleged by Byars, the engineer inserted estimated prices beside each item on the bidding schedule. We find that the preparation of this estimate complied with the provisions of FPR 1–18.108 (1971 2d ed., amend. 95) which only require that the estimate be prepared "* * * in as much detail as in the case of a prospective contractor's bid * * *." This is exactly the manner in which the GCE was prepared and only Government personnel participated in the preparation of the estimate.

Additionally, while Byars contends that the original GCE may not have been erroneous as stated by NPS, we find no evidence in the record to cause us to question the authenticity of NPS's revision of the GCE. The error in the GCE occurred as a result in the estimate being prepared before the specifications were fully completed. Initially, it was believed that the electrical duct bank would simply be placed in the sewer trench. However, as the design concept developed further, a reinforced concrete envelope was included to encase the electrical duct bank. This inclusion was not reflected in the GCE, thus resulting in the erroneous estimate.

When bids were opened, and in view of the pattern of bids on the electrical duct bank items ranging from $14 to $45, it became apparent to NPS that the $2 estimated amount for these items was clearly erroneous. Therefore, NPS advises that it reviewed its estimate, discovered the reason for the error, and corrected the estimated cost to $22. This action was in accord with our position taken in *Matter of C. J. Coakley Company, Inc.*, B–181057, July 23, 1974. There, where bids greatly exceeded the Government estimate, we felt that agencies should be on notice of a possible error in its estimate and should carefully review the estimate for possible revision.

V. *Defective "Description of Work" Clause*

Byars contends that award to Pestana cannot be made under the IFB in light of FPR § 1–18.203(b)(3) (1968 2d ed., amend. 48). This section states, in pertinent part:

> (b) In addition to complying with the requirements of § 1–2.201(a), invitations for bids shall contain the following to the extent applicable:
>
> * * * * * * *
>
> (3) The magnitude of the proposed construction as required by § 1–18.109;

FPR § 1–18.109 (1971 2d ed., amend. 95) provides, as follows:

§ 1–18.109 *Disclosure of size construction projects.*

Where the estimated value of the work is $25,000 or more, advance notices or invitations for bids and requests for proposals shall include a statement of the magnitude in terms of physical characteristics of the proposed construction and by reference to the estimated price range (e.g. $500,000–$1,000,000). In no event shall such statement disclose the Government estimate.

The IFB, on Standard Form 20, Invitation For Bids, contained the following:

Description of Work: The principal features of the work include construction of a trunk sewer consisting of approximately 28,500 L.F. of 15 or 16-inch sewer, 36,200 L.F. of 12-inch sewer, 1,300 L.F. of 8-inch sewer, and a sewage pumping station, communitor bar rack, all of which is estimated to cost from $3,000,000 to $4,500,000.

Therefore, Byars contends that only an award to it within the estimated price range established in the IFB was permitted, while, on the other hand, an award to Pestana would exceed the maximum amount in the estimated price range by 14 percent.

While it is believed that every reasonable effort should be made to disclose to bidders, prior to bidding, adequate information concerning the magnitude, in terms of physical characteristics, of construction projects, it is not required that cost estimates be inflexible or absolute. This position appears to have been taken in FPR § 1–18.109 (1971 2d ed., amend. 95) which calls for an "estimated price range" and not the definitive Government cost estimate.

Neither the IFB nor the above regulation prevents the making of an award if the estimated cost range is exceeded. The estimated cost range does not establish an inflexible ceiling, and none of the bidders appear to have been misled by its inclusion since all bidders exceeded the ceiling of the estimated price range.

VI. *The Obtaining of Equal Employment Opportunity Information*

The next contention raised by Byars is that NPS, contrary to the contracting officer's statement, did not contact both Byars and Pestana simultaneously to obtain EEO information necessary for an award. Byars contends that, while it was contacted on June 7 and advised that it was being considered for award, Pestana was not contacted until June 19, after the decision had been made to cancel the Wawona water control facilities project. This, according to Byars, was evidence of NPS's improper manipulation of funds.

The record is unclear regarding when NPS contacted Pestana for

EEO information, and what Byars was told on June 7. While it may have appeared that Byars was the frontrunner for this procurement when its EEO compliance information was requested, once additional funding was properly obtained as we discussed above, and Pestana was in line for award, it was appropriate to request that information from Pestana. The fact that this information may have been obtained at a point in time after Byars was contacted does not, in and of itself, establish favoritism or unfair procurement practices.

VII. *Additive Items Were Unnecessary*

The final argument that counsel for Byars raises is that the inclusion of the additive schedules in the IFB introduces unnecessary items that are not essential for the procurement, and that "* * * the entire electrical system was an afterthought, and not the 'important and necessary' work which the Park Service now seeks to justify."

Our Interim Bid Protest Procedures and Standards, cited above, provide that where an issue of protest is based upon an alleged impropriety in the IFB which is apparent prior to bid opening, it must be raised prior to bid opening to be considered. Since Byars did not protest the inclusion of the additive item schedules until after the time set for bid opening, its protest in this regard will not be considered.

Returning to Byars' allegation of favoritism and questionable procurement practices such as to taint any award to Pestana, we are unable to discern from the record before us any substantial evidence that the actions taken by NPS were influenced by any consideration other than the best judgment of the contracting officials concerned. On this basis, we find no legal reason to object to the proposed award to Pestana. We can understand the bases for the allegations of prejudice raised by Byars. However, when examined individually, and in light of the regulations applicable to the procurement, we have no basis to conclude that NPS has acted in a manner that is subject to question. Although we found no indication that Byars was deliberately displaced as low bidder, we believe that the approach in the ASPR serves to avoid the possible appearance of prejudice in procurements of this nature.

Therefore, we are recommending, by letter of today, to the Federal Procurement Regulations Division that it consider adopting provisions for the Federal Procurement Regulations similar to those contained in ASPR, relating to procurements involving additive or deductive items.

Accordingly, the protest of Byars is denied.

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