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Corporations—Legal Services Corporation—Lobbying

Legal Services Corporation (LSC) and its recipients organized a grass roots lobbying campaign in support of LSC reauthorization and appropriation pending before Congress, contending these activities are authorized by 42 U.S.C. 2996e(c)(2)(B) and 2996f(a)(5)(B)(ii). While these provisions allow LSC and recipients to provide testimony and appropriate comment to Congress concerning LSC legislation, they prohibit LSC and recipients from expending funds for grass roots lobbying activities.

Lobbying—Appropriation Prohibition

Despite Legal Services Corporation (LSC) contentions to the contrary, the lobbying restriction in section 607(a) of the annual Treasury, Postal Service, and General Government Appropriation Act, that prohibits the use of funds in all appropriation acts for any given year, applies to funds appropriated for LSC. LSC is required to implement this provision and insure that no appropriated funds are used by the Corporation or recipients to engage in grass roots lobbying.

Corporations—Legal Services Corporation—Lobbying—Appropriation—Prohibition—Moorhead Amendment

The Moorhead Amendment is a direct lobbying restriction included in the annual Legal Services Corporation (LSC) appropriation that prohibits LSC and recipients from expending Federal funds for grass roots lobbying activities. LSC has an obligation to implement this restriction and insure that its appropriations are not used for such lobbying activities.

To The Honorable F. James Sensenbrenner, Jr., House of Representatives, May 1, 1981:

This is in response to your request that this Office investigate the possible misuse of appropriated funds by the Legal Services Corporation (LSC) for lobbying and political activities. In support of your allegations, you provided us with copies of a number of LSC memoranda covering the period from March 1980 until March 1981. After reviewing this material we have concluded that LSC has itself engaged and allowed its grant recipients to engage in lobbying activities prohibited by Federal law. However, we did not find that LSC had engaged in prohibited political activities.

The LSC memoranda indicate that LSC developed a detailed plan designed to urge members of the public interested in its legal assistance programs to contact Members of Congress and communicate their support for LSC reauthorization legislation and LSC appropriations measures being considered by the Congress. Over the years, LSC has encouraged groups interested in legal assistance at the local, regional, and state levels to support its legislative program. The organizations include such groups as LSC fund recipients; clients' councils; the National Legal Aid and Defense Association (NLADA), an organization of poverty lawyers; the National Organization of Legal Services Workers, an employee organization of legal assistance workers; mi-

grant farm worker groups; bar associations; and similar groups. The effectiveness of the organization depends heavily on a State Coordinator to serve as link between LSC headquarters and the State organization. Normally, the State Coordinator is an employee or official of a recipient organization, as opposed to being an employee of the LSC itself. Officials of LSC's Office of Government Relations communicate frequently with State Coordinators and develop strategy about how local members of the State's Congressional delegation can best be approached, how the local support base can be increased, and how certain methods have proven successful in other states. In addition to serving as a communications link and coordinating the activities of local groups, State Coordinators are also responsible for reporting information back to LSC headquarters.

Early in 1980, LSC formed a coalition with the Project Advisory Group (PAG), a national organization of legal services programs, to direct a lobbying campaign in support of LSC reauthorization and appropriation legislation being considered by the Congress. In April 1980, Dan J. Bradley, President, LSC, and Charles H. Dorsey, Chairperson, PAG, sent a joint letter to Legal Services Project Directors, the heads of recipient organizations, initiating the lobbying efforts as follows:

> The Legal Services Corporation and the Project Advisory Group are engaged in a joint effort to protect the interests of legal services programs and clients in current Congressional consideration of the Legal Services Corporation Act and appropriations for fiscal year 1981. We are sending this letter to bring you up to date on this pending legislation and to inform you particularly of the serious efforts in Congress to impose further restrictions on legal services work and to limit our appropriation.
>
> On the issue of funding, a major threat is posed by the general budget-cutting pressures on Congress and the Administration. Even strong supporters of legal services have agreed to a balanced budget in 1981. This means that both the House and Senate Budget Committees are looking more critically at funding for legal services than ever before, and could restrict the Appropriations Committees' ability to adequately fund the program for next year. You will recall that the Corporation requested $353 million for 1981. PAG is urging $403 million. The White House is supporting $321 million. Some members of the House Budget Committee proposed termination of legal services. That was not seriously debated, but a subsequent effort to reduce funds to $278 million lost narrowly by a vote of 11 to 14.
>
> At the time of this writing, resolutions from both the House and Senate Budget Committees would permit appropriations of as much as $321 million. It is certain, however, that further efforts to cut the budget will be made on the floor of both the House and the Senate. Such proposed cuts could be specified to legal services or could be across-the-board reductions for all spending. The budget resolutions will be debated on the floor in late April or early May.
>
> The House and Senate Appropriations Committees will set the actual 1981 appropriations figure for legal services once Congress has adopted the budget resolution setting the outer limits. Markup on appropriations bills will probably occur in mid to late May.
>
> The House Judiciary Committee and the Senate Labor and Human Resources Committee are considering bills to extend the Legal Services Corporation Act. The leaders of both Committees want a simple extension of the law, with no amendments—a position supported by both the Corporation and PAG. The House Bill, H.R. 6386, is a three-year authorization. The Senate bill, S. 2337, is a two-

year bill. Both have been reported from the appropriate subcommittee and will be considered by the respective full committees hopefully before the end of April.

We have clear indications that a number of crippling amendments will be proposed—either in full Committee or on the floor of the House and Senate. Among those now being discussed are further restrictions on legislative representation, representation in certain abortion cases, representation of aliens, and recovery of attorneys' fees. None of these are easy issues. All of them are important to effective legal services work. We must not underestimate the risk that such amendments present this year.

Both the Corporation and PAG have added temporary personnel in Washington to better assure that the interests of legal services programs and clients are heard as these issues are debated in the coming weeks and months. * * *

On April 3, 1980, LSC sent out a packet of materials addressed to: "Persons Coordinating Congressional Relations" that included instructions on effective lobbying of members of Congress at the local level for LSC legislation. The materials provided were as follows:

1. A statement of "what needs to be done" and "what to send us."
2. A Legislative update of April 3, 1980, from Anh Tu.
3. Fact sheets and background information on the LSC reauthorization and appropriation, including membership lists of the appropriate House and Senate Committees.
4. One page fact sheet/handouts on possible restrictive amendments.
5. Examples of supportive Bar letters and resolutions.
6. Examples of favorable editorials.
7. Examples of supportive letters from public officials.
8. A list of state coordinators for the legislative effort. (State coordinators will also receive materials excerpted from the *Congressional Staff Directory*, indicating the Washington and local office addresses and phone numbers, and the key staff of each member of their state's Congressional delegation.)

NOTE.—PLEASE be in touch with your state coordinator before initiating Congressional contacts, editorials, or support from other suggested sources so that efforts can be coordinated among the various legal service supporters in your state.

The "what needs to be done" brochure gives specific and detailed guidance to local lobbyists. The brochure reads as follows:

1. *Visiting Members of Congress.* During the Congressional recess, April 4–14, many members of Congress will be in their districts and can be approached by constituents supportive of legal services. For example, visits on behalf of legal services might be made by delegations of bar and law school leaders, public officials, prominent figures in the party of the member, heads of major contributing organizations (e.g. labor unions), heads of broad-based constituent organizations (e.g. council of churches, League of Women Voters, Common Cause) and individual campaign contributors.

NOTE.—It is important to consider which of the above will be more influential with respect to a given member of Congress. Many members will want to hear from legal services staff themselves, but in most cases, it is better to rely on your supporters in the bar and other constituent groups to make Congressional contacts. (INSTRUCTIONS attached)

2. *Securing Local and State Bar Support.* Supportive resolutions of local and state bar association and contacts by bar leaders with members of Congress are effective means of indicating concern to Congress.

3. *Obtaining Supportive Editorials.* Seek editorial support in local papers.

4. *Alerting Constituents.* Many Congressional constituents will be concerned about legal services if they are alerted to the problems we face. These include: local and state labor organizations; businesses and business organizations; church groups including local council of churches or statewide conferences, such as the statewide Catholic conference which exists in most states; broad-based constituent organizations (such as the League of Women Voters, Common Cause); civil rights organizations; anti-hunger coalitions; social service orga-

nizations (most states have some organizations involved in the delivery of human resources); and individual campaign contributors.

Also, client and poor people's organizations, such as the National Clients Council chapters, blockclubs, community economic development corporations, should be informed.

5. *Alerting Public Officials.* State legislators, governors, local legislators, and prominent individuals in the political party of the Representative or Senator may be concerned about legal services if they are alerted to the problems our clients will face if LSC's budget is cut or our services are restricted.

6. *Informing Us of Problems.* Finally, it is important to determine if members of Congress or their staff have heard allegations of wrongdoing by a legal services program, and promptly provide a memorandum of fact to us along with as much supporting evidence as possible.

LSC also instructed local lobbyists in the "what to send us" brochure that they were responsible for providing LSC with after-action reports of their lobbying efforts. The data desired were as follows:

Please provide State Coordinators and the LSC Office of Government Relations with all actual products of your efforts, including editorials, communications by individuals and organizations, and other information.

Specifically, with regard to all House and Senate contacts please provide us with a report of:

(1) the member of Congress (and staff) contacted,
(2) persons (and their positions) making the contacts,
(3) the Member's (and staff's) attitude toward
    (a) Legal services in general, and
    (b) any specific provisions of the legislation or amendments discussed, and
(4) materials or information we should deliver to the member's Washington office.

The packet contained instructions on the preparation which supporters of LSC legislation should make before visiting their Congressmen or Senators. Lobbyists were advised to familiarize themselves with the background of the Member and select highly respected persons from the district to accompany the visiting delegation. The delegation was to familiarize itself with LSC reauthorization and appropriation issues and emphasize the significance of these issues to the Member.

The packet also included background information on the LSC reauthorization and appropriation issues. This material urged support for H.R. 6386 without amendment in the House and S. 2337 as reported out of the Senate Subcommittee on Employment, Poverty and Migratory Labor. The background information also urged opposition to any amendment that would (1) restrict legislative representation, (2) restrict the ability of legal services programs to represent aliens, (3) restrict the right of a legal services program to receive court-awarded fees upon successful completion of litigation, (4) limit the right of employees of legal services programs to join labor unions, (5) limit legal services representation in abortion proceedings, or (6) require legal services attorneys to negotiate prior to the initiation of litigation.

The packet included several examples of support for LSC reauthor-

ization and appropriations in the form of editorials, local and State bar association letters, and letters from public officials. It was pointed out that such items had been helpful in demonstrating to Members of Congress the support for LSC in the local area.

Similar packets were sent out from the LSC Office of Government Relations and PAG to State Coordinators about once each month. These subsequent packets contained specific guidance, depending on the then-current status of LSC legislation, as to the lobbying efforts that were needed at the local level.

There is little question that the communications set forth in detail above constitute "lobbying," as the term is used in the applicable restrictive legislation and construed in our decisions. "Lobbying" activities are prohibited by provisions of the Legal Services Corporation Act of 1974, as amended (42 U.S.C. § 2996 *et seq.*) and restrictions contained in various appropriation Acts applicable to Federal funds expended by the Corporation. (See later discussions of these statutes.)

Under the provisions of 42 U.S.C. § 2996e(c), the Corporation itself, as distinguished from recipients of funding through the Corporation, is prohibited from attempting to influence the passage or defeat of any legislation before the Congress, except that Corporation personnel

> * * * may testify or make other *appropriate* communication (A) when formally requested to do so by a legislative body, a committee, or a member thereof or (B) in connection with legislation or appropriations directly affecting the activities of the Corporation. [Italic supplied.]

In construing the exception, we think the phrase "* * * testify or make other appropriate communication * * *" is significant. Clearly, Congress did not intend the statutory prohibition against lobbying to preclude Corporation personnel from testifying before that body nor do we think that the Congress meant to preclude the Corporation from providing to the Congress the kind of data that Executive agencies and Departments normally supply when requested to do so or when they desire to express their views on legislative proposals. In construing other statutory restrictions against lobbying by officials of Executive agencies and departments (for example, § 607(a) (31 U.S.C. 724), of the Treasury, Postal Service, and General Government Appropriation Act, discussed *infra*), we have consistently recognized that these officials have a legitimate interest in communicating with the public and with legislators regarding their policies and activities. When their policies or activities are affected by pending or proposed legislation, discussion by officials of that policy or activity will necessarily, either explicitly or by implication, refer to such legislation and will presumably be either in support of or in opposition to it. Accordingly, we have always construed other anti-lobbying restrictions as permitting officials to express their views on pending or proposed leg-

islation as it affects their policies and activities directly to Congress or to the public. 56 Comp. Gen. 889 (1977); B–128938, July 12, 1976.

On the other hand, we have construed these other statutory anti-lobbying restrictions as prohibiting agency and department officials from engaging in "grass roots" lobbying, involving appeals addressed to the public at large or to selected individuals suggesting that they contact their elected representatives and indicate their support of or opposition to legislation being considered by the Congress. 59 Comp. Gen. 115 (1979). In other words, direct communication of its views by Corporation personnel to Members or Committees of the Congress is permissible; drumming up support for the same purpose outside the Corporation is not.

Accordingly, we do not think that the efforts by Corporation officials or employees to appeal to members of the public or the legal assistance community to contact their elected representatives in the Congress on behalf of legislative positions of the Corporation constitute "other appropriate communication."

LSC has broadly construed the exception in 42 U.S.C. § 2996e(c)(2), which reads "* * * except that personnel of the Corporation may testify to make other appropriate communication * * * in connection with legislation or appropriations directly affecting the activities of the Corporation", contending that this exception authorizes Corporation personnel to engage in all activities necessary to influence legislation and appropriation measures that directly affect the Corporation, including grass roots lobbying activities. We are unaware of any support for such a broad construction in the legislative history of this provision or elsewhere.

Indeed, the Conference Report to accompany H.R. 7824, the Legal Services Corporation Act of 1974 (S. Rep. No. 93–845, 92d Cong., 2d Sess. 22), supports our construction of the exception. The report states:

> Both the House bill and the Senate amendment prohibit the Corporation from undertaking to influence the passage or defeat of any legislation by the Congress or by any State or local legislative body. The Senate amendment allowed the Corporation to testify *and make appropriate comment in connection with legislation or appropriations directly affecting the activity of the Corporation.* The House bill contained no comparable provision. The House recedes. [Italic supplied.]

As can be seen from the Conference Report, the exception was understood to allow only testimony and appropriate comment on legislation affecting the Corporation, which is consistent with our construction.

With regard to the use of funds by recipients of LSC assistance, under the provisions of 42 U.S.C. § 2996f(a)(5), the Corporation is charged with the responsibility of insuring that recipients do not use

appropriated funds to influence the passage or defeat of legislation pending before the Congress except when representing a client or when:

> (B) a govermental agency, legislative body, a committee, or a member thereof
> (i) requests personnel of the recipient to testify, draft, or review measures or to make representations to such agency, body, committee, or member, or
> (ii) is considering a measure directly affecting the activities under this title of the recipient or the Corporation.

The exception in 42 U.S.C. § 2996f(a)(5)(B)(ii), quoted above, should be given the same construction as the similar provision applicable to LSC personnel in 42 U.S.C. § 2996e(c)(2)(B), discussed above. That is, it should be construed so as to preclude expenditures of appropriated funds by recipients for grass roots lobbying. Here again, the Corporation has erroneously construed this exception broadly to permit recipients to expend appropriated funds to solicit others to contact their congressmen in connection with legislation affecting the recipient or the Corporation. For the reasons outlined above, we believe the Corporation's construction is improper. LSC has, however, promulgated regulations in 45 CFR § 1612.4 that implement its erroneous interpretation of this statutory provision as follows:

> (a) No funds made available to a recipient by the Corporation shall be used, directly or indirectly, to support activities intended to influence the issuance, amendment, or revocation of any executive or administrative order or regulation of a Federal, State or local agency, or to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative body or State proposals by initiative petition.
>
> * * * * * * *
>
> (3) An employee may engage in such activities if a government agency, legislative body, committee, or member thereof is considering a measure directly affecting the activities under the Act of the recipient or the Corporation.

As currently worded, these regulations authorize LSC fund recipients to expend appropriated funds for grass roots lobbying campaigns in support of legislation or appropriation measures that directly affect the activities of the recipient or the Corporation. In our opinion, to Representative Gilman, B-163762, November 24, 1980, (copy enclosed), we noted certain deficiencies in these regulations and wrote to the President of the Corporation recommending that he take appropriate action to amend the regulations to implement adequately the statutory restrictions on lobbying. The Corporation has not, however, acted on our recommendations.

In addition to the limitations on lobbying activities in the above cited statutory provisions, annual appropriation act restrictions have, throughout the existence of the legal assistance program, also curtailed such activities. Section 607(a) of the Treasury, Postal Service,

and General Government Appropriation Act, the language of which has been included in the Act every year since 1972, provides as follows:

> No part of any appropriation contained in this *or any other Act, or of the funds available for expenditure by any corporation or agency,* shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress. [Italic supplied.]

We have construed section 607(a) as prohibiting the expenditure of Federal funds by Executive agencies and Government corporations for activities involving appeals addressed to members of the public suggesting that they contact Members of Congress and indicate support of or opposition to legislation pending before Congress, or that they urge their congressional representatives to vote in a particular manner. 56 Comp. Gen. 889, *supra.*

We understand from discussions with the LSC General Counsel that LSC does not consider the restriction against lobbying activities contained in § 607(a) to be applicable to its appropriations because, when § 607(a) was first enacted in 1972, the Legal Services Corporation Act of 1974 (42 U.S.C. § 2996 *et seq.*) had not been enacted into law. The fallacy in LSC's argument is that appropriation Acts are enacted annually and restrictions in them apply to the use of funds for the fiscal year for which the appropriation was made. An appropriation restriction may forbid the use of funds by an agency even for some activity authorized in its organic legislation. In such a case, the restriction takes precedence over the organic legislation; that is, the agency would have substantive authority to carry on a certain activity but would have no funds available to spend on it. Section 607(a) has been enacted in the same form each year since 1972 and is, by its terms, applicable to appropriations contained in all appropriation acts. The § 607(a) restriction against the use of Federal funds for lobbying has thus been applicable to each annual appropriation the LSC has received.

Apparently LSC's interpretation that § 607(a) was not applicable to its appropriations and aggressive legislative representation by program personnel at the State level led the Congress to enact a provision similar to § 607(a), but expanded to cover State legislatures as well as the Congress, as a proviso to fiscal year 1979 appropriations provided for LSC in the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1979 (Pub. L. 95-431, October 10, 1978, 92 Stat. 1021). This proviso, known as the Moorhead Amendment, reads as follows:

> * * * *Provided,* No part of this appropriation shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress or any State legislature.

The Moorhead amendment has been applicable to the Corporation's appropriations each year since it was first introduced and enacted in 1978. Under this restriction, appropriated funds may not be used by recipients to appeal to members of the public to urge their elected representatives to support or defeat legislation pending in the Congress or in any State legislature. LSC has also failed to implement this restriction.

In summary, through the use of recipient organizations and their contacts at the State and local level, LSC has developed an extensive lobbying campaign to support reauthorization legislation for the corporation and related appropriation measures being considered by the Congress. This activity violates the anti-lobbying statutory and appropriation restrictions described above.

Because LSC's regulations and current policies appear to authorize recipients to expend appropriated funds for prohibited lobbying activities in derogation of the above-cited restrictions, we do not think, as a practical matter, that the Government would be successful in attempting to recover the illegally expended sums from the recipients. Also, because we are not authorized to settle the accounts of the Corporation, we are unable to take exception to these illegal payments. We have however, written the President of the Corporation informing him that we are advising both the Senate and House Appropriations and Judiciary Committees that the Corporation is expending Federal funds in violation of the above cited statutory and appropriations restrictions. In that same letter, we reiterate the recommendations in our opinion, B–163762, November 24, 1980.

We also reviewed the memoranda that you gave us for possible violations of restrictions on political activities contained in 42 U.S.C. § 2996e(e) and 42 U.S.C. § 2996f(a) by employees of either the Corporation or recipients. These restrictions are primarily designed to prohibit the Corporation or its recipients from assisting a political party or a candidate for public office. Our review did not uncover any evidence of such violations.

We trust this opinion is responsive to your request. If we can be of further assistance, please call on us.

[B–195692]

Government Printing Office—Employees—Overtime Compensation—Actual Work Requirement—Security Police Uniforms—Acquisition Time—Not "Overtime Work"

Security police employees of the United States Government Printing Office who, as a result of their work schedule, must acquire their uniforms during their off-duty hours are not entitled to overtime compensation for the time spent in acquir-

ing their uniforms. The time involved does not constitute "overtime work" for the purposes of 5 U.S.C. 5544 (1976). In addition, the time spent by the employees is not compensable as overtime hours worked under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

Matter of: United States Government Printing Office Security Police Employees, May 5, 1981:

The issue in the present case is whether security police employees of the United States Government Printing Office (GPO) are entitled to receive overtime compensation for off-duty time spent acquiring uniforms prescribed by the GPO to be worn in the performance of official duties. For the following reasons, there is no basis to pay the employees overtime compensation under either 5 U.S.C. § 5544 (1976) or the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1976).

The question was presented by Vincent T. McCarthy, Esq., General Counsel, United States Government Printing Office.

Prior to January 1979, GPO security police employees were paid a uniform allowance in accordance with 44 U.S.C. § 309(a) and 5 U.S.C. § 5901. Each employee then purchased his/her uniform from private vendors on off-duty time without compensation. Subsequently, the GPO standardized its uniforms with those of the General Services Administration (GSA). In connection with this, GPO entered into an arrangement with the GSA whereby the GPO security police uniform items could be obtained from the GSA store in Bladensburg, Maryland.

The GSA store is open Monday through Friday from 7:30 a.m. to 4 p.m. Since the store operates only during these days and hours, GPO allows its day-shift security police employees to acquire uniform items during their regular working hours. The night-shift employees, on the other hand, must acquire their uniforms during their off-duty hours. However, all of the security employees are on rotating shifts which rotate on a regular basis. Thus, all of the security employees are, at some time, on the day shift and as such are entitled to receive administrative leave to acquire uniform items during this time. The employees' union, Local 2738 (American Federation of Governmental Employees), asserts that the night-shift employees are entitled to be paid for the time they spend including traveltime acquiring their uniforms.

We have been informed that the security police are general graded employees and are paid under the provisions of 44 U.S.C. § 305, commonly referred to as the Kiess Act. As such, the payment of overtime compensation to these employees is governed by the provisions of

5 U.S.C. § 5544. See B–191619, May 9, 1978, and cases cited therein. Section 5544 provides, in pertinent part, as follows:

> (a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under section 5343 or 5349 of this title, or by a wage board or similar administrative authority serving the same purpose, is entitled to overtime pay for *overtime work* in excess of 8 hours a day or 40 hours a week. [Italic supplied.]

Thus, the question is whether the time spent obtaining uniform items outside regular working hours constitutes "overtime work" within the meaning of section 5544. Section 5544 does not fully set out the standards as to what constitutes compensable overtime work. However, the courts have applied essentially the same standards to determine whether certain types of activities are compensable overtime work under 5 U.S.C. § 5544 and 5 U.S.C. § 5542 applicable to General Schedule employees. See *Detling* v. *United States*, 432 F. 2d 462 (Ct. Cl. 1970) and *Rapp* v. *United States*, 167 Ct. Cl. 852 (1964). The major factor considered by the courts is whether the time spent by the employee in performing the activity is predominantly for the employer's benefit. See *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944); *Baylor* v. *United States*, 198 Ct. Cl. 331, 357 (1972); and *Rapp* v. *United States*, *supra*. This determination depends upon the facts and circumstances of each case.

We do not consider the time spent by employees purchasing clothing to wear to work as hours of work so as to entitle the individual to overtime pay. There are a number of activities which an employee must undertake on his own time to prepare himself for work and for which he may not expect compensation. One of these tasks is for the employee to dress himself in the appropriate attire required by his job. In some circumstances this may require the purchasing of new clothing or, as in this instance, a new uniform. The fact that an employee must purchase his clothes in a specific store during limited hours does not alter the fact that by purchasing the clothing the employee is fulfilling his responsibility to be properly dressed for work. Thus, in these circumstances the time spent by these employees in purchasing their uniforms may not be viewed as time spent predominantly for the employer's benefit.

Therefore, the time spent by GPO security police employees in acquiring their uniforms is not considered "overtime work" for the purposes of 5 U.S.C. § 5544, and the employees are not entitled to receive overtime compensation for such time. Moreover, since the purchase of uniform items is not considered work, any travel which might be involved would not be considered work for purposes of paying overtime compensation.

In addition to being subject to the provisions of 5 U.S.C. § 5544, the

security police employees of the GPO are also covered by the provisions of the Fair Labor Standards Act (Act). 29 U.S.C. § 203(e)(2)(A)(iii). The Fair Labor Standards Act requires payment of overtime for hours in excess of 40 hours per week, for all work which the employee performs. 29 U.S.C. § 207.

Under 29 U.S.C. § 204(f), the Office of Personnel Management (OPM) is authorized to administer the provisions of the Act with respect to most Federal employees. We requested OPM's opinion concerning payment of overtime compensation under the Act in this particular situation. We were advised that the time spent by these employees acquiring their uniforms is not considered to be compensable hours worked under the Act. We agree with this opinion.

Accordingly, since the off-duty time spent by the employees acquiring their uniform items does not satisfy the requirements of either 5 U.S.C. § 5544 or the Fair Labor Standards Act for payment of overtime compensation, the employees are not entitled to receive such compensation.

[B-199360]

Compensation—Overtime—Fair Labor Standards Act—Travel-time—Nonworkday Travel—Training Courses

Army civilian intern who traveled to training on nonworkday at time and via route selected by agency is entitled credit for hours worked under the Fair Labor Standards Act (FLSA) for travel time during hours corresponding to regular work hours. Where intern, for personal reasons, traveled at time or via route other than time or route selected by agency, she will be credited with lesser of (1) that portion of *actual* travel time which is considered to be working time, or (2) that portion of *estimated* travel time which would have been considered working time had she traveled at time and by route selected by Army.

Compensation—Overtime—Fair Labor Standards Act—Fair Labor Standards Act *v.* Other Pay Laws

An interpretation of 5 U.S.C. 5542(b)(2)(B)(iv) that travel to a training course which is scheduled by employee's agency does not qualify as compensable travel under that section has no relation to whether such travel time is hours worked under the FLSA.

Compensation—Overtime—Fair Labor Standards Act—Travel-time—Nonworkday Travel—Employee *v.* Agency Scheduling

If an agency allows an employee to schedule travel and the employee travels during corresponding hours on a nonworkday, the agency may not subsequently defeat the employee's entitlement to overtime compensation by stating that the travel should not have been scheduled in the manner the employee chose. If, however, the employee travels by a route or at a time other than that directed by the agency, or if she travels by privately owned vehicle as a matter of personal preference, then a constructive travel time of the agency preferred schedule or mode of travel must be used to determine the amount of hours worked under FLSA.

Matter of: Dian Estrada—Entitlement to overtime pay for travel to training, May 5, 1981:

This decision addresses the issue of overtime entitlement for travel on nonworkdays to and from training assignments. It involves a consideration of overtime entitlement under both title 5, U.S. Code, and under the Fair Labor Standards Act (FLSA), title 29, U.S. Code.

Mr. Leon Avelar, Jr., a Finance and Accounting Officer with the Department of the Army, requests an advance decision regarding the claim of Ms. Dian Estrada, an intern with the Department of the Army Materiel and Readiness Command (DARCOM), for overtime pay for travel to and from training on nonworkdays. Ms. Estrada claims a total of 24 hours 45 minutes of overtime for five separate trips from her duty station in Corpus Christi, Texas, to various Government scheduled training programs elsewhere. The hours of overtime claimed by Ms. Estrada, the routing and time of actual travel, and the Army's constructed routing and time for her training trips are as follows:

(a) Trip to Rock Island, IL. on Sunday, November 26, 1978: Hours claimed: 7.00 (Constructed Travel Time). Actual travel: Depart San Antonio—1450, Arrive Moline, IL.—2030. Army's constructed routing: Depart Corpus Christi, TX.—1445, Arrive Moline, IL.—1941.

(b) Trip to Dallas on Sunday, February 25, 1979: Hours claimed: 2.00 (Constructed Travel Time). Actual travel: Depart Corpus Christi, TX.—0900, Arrive Dallas, TX.—1450. Army's constructed routing: Depart Corpus Christi, TX.—1435, Arrive Dallas, TX.—1620.

(c) Trip to Rock Island, IL. on Sunday, March 18, 1979: Hours claimed: 7.00 (Constructed Travel Time). Actual travel: Depart Corpus Christi, TX.—1000, Arrive Moline, IL.—1925.

(d) Trip to Fort Benjamin Harrison, IN. on Sunday, June 3, 1979: Hours claimed: 6.75. Actual travel: Depart Corpus Christi, TX.—0645, Arrive Fort Benjamin Harrison, IN.—1330.

(e) Trip to Fort Worth, TX. on Sunday, September 9, 1979: Hours claimed: 2.00 (Constructed Travel Time). Actual travel: Depart Corpus Christi, TX.—0800, Arrive Fort Worth, TX.—1830. Army's constructed routing: Depart Corpus Christi, TX.—1553, Arrive Dallas-Fort Worth—1615.

Ms. Estrada was authorized to travel by air on the first four trips and by personally owned vehicle on the fifth. The record indicates that the common carrier terminal designated by the Commander of the Corpus Christi Army Depot for use by official duty travelers was Corpus Christi International Airport. The record also reflects that Ms.

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Estrada's regular work hours were 0700–1530, Monday through Friday, with a break for lunch between 1130 and 1200.

Mr. Avelar asks whether DARCOM interns are entitled to overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, as amended by Public Law 93–259, approved April 8, 1974, for time spent traveling to training courses where the scheduling is administratively controlled. In this regard the record shows that DARCOM interns are covered (non-exempt) under FLSA. Mr. Avelar points to the Federal Personnel Manual (FPM) Supplement 990–2, Book 550, Subchapter S1–3, page 550–8.03 (added July 1969) as authority for the proposition that overtime should not be paid for such travel. The latter reference addresses the issue of employee entitlement to overtime compensation for time spent traveling to Government controlled trained courses outside normal work hours as follows:

> * * * training courses throughout the country generally are scheduled to start at the beginning of the workweek, and usually start at 9 a.m. daily. Attendance at training centers located away from an employee's duty station, therefore, usually will require the employee to travel outside his normal work hours. Since the agency which is conducting the training course can schedule the hours of training, the training course is an event which can be scheduled or controlled administratively; and employees who attend the course will not be paid for time in travel status regardless of whether employed by the agency conducting the training course or another agency.

This FPM provision relates to overtime compensation entitlement under title 5, U.S. Code, however, and not to overtime compensation under FLSA. We have held that where FLSA provides an employee with a greater pay benefit than that to which he is entitled under 5 U.S.C. § 5542, the employee is entitled to the FLSA benefit. 54 Comp. Gen. 371, 375 (1974). Thus, it is clear that Ms. Estrada would not be entitled to overtime pay under 5 U.S.C. § 5542(b)(2)(B)(iv). See *e.g.* B–193127, May 31, 1979. However, a separate determination must still be made as to whether or not she is entitled under FLSA.

We begin by noting that the Civil Service Commission (now Office of Personnel Management) has determined that 5 U.S.C. § 4109(a) "prohibits the payment of overtime pay to an employee selected and assigned for training, for the period of training, *regardless of whether the employee's eligibility for overtime pay is based on provisions found in title 5 of the United States Code, or based on the Fair Labor Standards Act, as amended by Public Law 93–259.*" FPM Letter No. 551–3, August 29, 1974. The Commission, however, has also determined that this prohibition "*does not* prevent payment of overtime pay to employees traveling to and from places of training." FPM Supplement 990–2, Book 550, Subchapter S1–3, page 550–8.05. Ac-

cordingly, 5 U.S.C. § 4109(a) does not bar the payment of overtime compensation to Ms. Estrada for periods of travel to and from training assignments.

Time spent traveling outside regular working hours is "hours of work" under FLSA if a nonexempt employee:

> (1) performs work while traveling (including travel as a driver of a vehicle), (2) travels as a passenger to a temporary duty station and returns during the same day, or (3) travels as a passenger on nonworkdays during hours which correspond to his/her regular working hours. FPM Letter No. 551–10, April 30, 1976.

In *Eugene L. Mellinger*, B–183493, July 28, 1976, the Comptroller General followed the Civil Service Commission's definition of "hours of work" in determining that "[i]f the employee is traveling as a passenger on a nonworkday * * *, he may only be compensated for the traveltime that is within the corresponding hours of work on his workday." Time spent traveling on a nonworkday during hours which do not correspond to regular working hours is considered hours of work only if the employee actually works while traveling. Meal periods are not included in hours worked.

The Army, however, contends that since Ms. Estrada could have scheduled her travel outside of her corresponding work hours in several cases, much of the travel performed here should not be compensated.

When an employee travels by a mode of transportation or at a time other than that selected by the employing agency, special rules prescribed by the Office of Personnel Management apply. When an employee, for personal reasons, does not use the mode of transportation designated by the agency, the employee is credited with the lesser of "(1) that portion of the *actual* travel time which is to be considered working time under these instructions [FPM Letter 551–10], *or* (2) that portion of the *estimated* travel time which would have been considered working time under these instructions had the employee used the mode of transportation selected by the employing agency." Similarly, when an employee, for personal reasons, travels at a time or via a route other than the time or route selected by the employing agency, the employee is credited with the lesser of "(1) that portion of the *actual* travel time which is to be considered working time under these instructions [FPM Letter 551–10] *or* (2) that portion of the *estimated* travel time which would have been considered working time under these instructions had the employee traveled at the time and by the route selected by the employing agency." FPM Letter 551–10, p. 4.

The Office of Personnel Management (OPM) has supplied us with

the following interpretation of the above rules as applied to Ms. Estrada's case:

> * * * DARCOM appears to be maintaining that an employee should schedule his or her travel in such a manner as to assure that it is not compensable under the FLSA. It should be noted that 5 U.S.C. § 6101(b)(2) urges agencies to schedule travel away from the official duty station during an employee's regularly scheduled workweek (i.e., in order to make it compensable). While this is not a binding requirement, it does establish the principle that Federal employees should not be asked to travel on their own time unless there is no alternative. In any case, nothing in title 5 or the FLSA requires an employee to schedule his or her travel so as to render it non-compensable. It is true that an agency can schedule travel outside regular hours or "corresponding hours," but if the agency allows the employee to schedule the travel during corresponding hours, it is responsible for any overtime entitlement that may be "suffered or permitted" under the FLSA.

We agree with OPM that if an agency allows an employee to schedule travel and the employee travels during corresponding hours on a nonworkday, the agency may not subsequently defeat the employee's entitlement to overtime compensation by stating that the travel should not have been scheduled in the manner the employee chose. If, however, it is because of the employee's personal preference that she travels by a route or at a time other than that which the agency directs, or by POV, then a constructive travel time of the agency preferred route, or time or mode of travel must be used to determine hours of compensable work. FPM Letter 551–10, p. 4.

When the above rules are applied to Ms. Estrada's five trips, therefore, the following entitlements under FLSA result:

(1) On Sunday November 26, 1978, Ms. Estrada traveled for only 40 minutes of her corresponding work hours, 1450–1530 and therefore only 40 minutes of the travel may be credited as hours worked. The routing from San Antonio was apparently for Ms. Estrada's personal reasons as she should have left from Corpus Christi. However, the constructive travel from Corpus Christi to Moline would have had Ms. Estrada traveling for 45 minutes during her corresponding work hours and since the lesser of the actual or constructive travel time is the 40 minutes of actual travel time, Ms. Estrada is only entitled to 40 minutes. FPM Letter 551–10, p. 4.

(2) For Ms. Estrada's trip to Dallas on February 25, 1979, she is entitled to 55 minutes credited as work time. She traveled by an indirect route (*i.e.*, via San Antonio) for her personal convenience. Accordingly, she is credited with the time which would have been considered hours worked had she traveled at the time and by the route selected by the agency. Ms. Estrada should have departed Corpus Christi at 1435, and her regular working hours ended at 1530, giving a constructive work time of 55 minutes.

(3) For the trip to Rock Island, Illinois, on March 18, 1979, Ms. Estrada is entitled to credit for 5 hours worked as follows: travel time between 1000, when she departed, and 1530, the end of her regular working hours, less 30 minutes for lunch.

(4) For the trip to Fort Benjamin Harrison, Indiana, on June 3, 1979, Ms. Estrada is entitled to credit for 6 hours worked as follows: she is credited with time between 0700, the beginning of her regular workday, at which point she had already been traveling 15 minutes, and 1330, the hour at which she arrived at Fort Benjamin Harrison, less 30 minutes for lunch.

(5) For the trip to Fort Worth, Texas, on September 9, 1979, Ms. Estrada is not entitled to any credit for hours worked. Although Ms. Estrada traveled in an automobile during 7 of her corresponding hours of work (the record does not show whether she was the driver), she was authorized the use of POV because of her personal preference. On her travel orders the following mileage reimbursement was authorized her:

> Mileage reimbursement and per diem limited to constructive cost of common carrier transportation and related per diem as determined in JTR. Travel time limited as indicated in JTR.

Paragraph C4660 of JTR Vol. 11 reads as follows:

> When temporary duty travel is performed by privately owned conveyance, travel time will be allowed as follows:
> 1. actual time necessary to perform the travel when the use of a privately owned conveyance is determined to be advantageous to the Government;
> 2. constructive scheduled travel time of the common carrier used in computing per diem when temporary duty travel by privately owned conveyance is not determined to be advantageous to the Government, except for travel under par. C2158.

Accordingly, the Army had in effect allowed Ms. Estrada to travel by POV in lieu of requiring her to use common carrier because of her personal preference. Under these circumstances, Ms. Estrada's travel time must be computed as "* * * that portion of the *estimated* travel time which would have been considered working time under these instructions had the employee used the mode of transportation selected by the employing agency." FPM Letter 551–10, p. 4. Since Ms. Estrada would have been scheduled to travel by common carrier after her corresponding work hours, there is no FLSA entitlement for the last trip.

Ms. Estrada is entitled to have 12 hours and 35 minutes credited as hours worked under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, (1976). Any of these hours worked which caused her total hours worked to exceed 40 in a week are compensable as overtime under FLSA. However, it must be borne in mind that leave and holidays are not counted as hours of work under FLSA. FPM Letter 551–1, Attachment 5. B., May 15, 1974.

[B-201260]

Appropriations — Deficiencies — Anti-Deficiency Act — Violations—Statutory Restrictions—Violation

Incurring obligation for purpose for which funds are specifically made not available by appropriation act constitutes violation of Antideficiency Act. By incurring obligation for administrative expenses to pay overtime to individual in excess of $20,000, for which purpose funds were not available under fiscal year 1980 appropriation act, Customs Service violated Antideficiency Act.

Matter of: Customs Service Payment of Overtime Pay in Excess of Limit in Appropriation Act, May 6, 1981:

The Commissioner of Customs has requested our opinion as to whether the Customs Service's violation of a proviso in its fiscal year 1980 appropriation act relating to the payment of overtime pay also constitutes a violation of the so-called Antideficiency Act, 31 U.S.C. § 665 (1976). The proviso in question, which is attached to the appropriation making funds available for the necessary expenses of the Customs Service, states:

> *Provided,* That none of the funds made available by this Act shall be available for administrative expenses to pay any employee overtime pay in an amount in excess of $20,000.

The Treasury Department Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559, 560.

For the reasons indicated below we conclude that by incurring an obligation for administrative expenses to pay overtime compensation to an individual in excess of $20,000 in fiscal year 1980, the Customs Service has violated the Antideficiency Act.

Overtime pay for customs officers and employees is authorized by 19 U.S.C. § 267 (1976). Under this provision, the overtime compensation is ultimately paid by the master, owner, agent, or consignee of the vessel or vehicle which requires the overtime service.

In fiscal year 1980 one customs inspector was inadvertently permitted to work an overtime assignment which, when added to his other assignments for the year, entitled him to total overtime compensation of $20,194.17. The Customs Service paid the inspector for the overtime assignment, including the $194.17 in excess of $20,000, and was reimbursed by the user of the overtime services.

The overtime assignment in excess of $20,000 occurred despite safeguards instituted by the Customs Service to prevent such assignments, being caused by erroneous calculations of the amount of overtime pay that had already been earned by the inspector. The Customs Service has not determined the amount of expenses which it may have incurred in violation of the appropriation act proviso (*i.e.*, the adminis-

trative expenses of paying the excess $194.17 in overtime compensation) but estimates that these expenses were minimal.

The so-called Antideficiency Act provides that:

> No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law. (31 U.S.C. § 665(a).)

This, and similar statutes,

> * * * evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose * * *. (42 Comp. Gen. 272, 275 (1962); *see* B-197841, March 3, 1980.)

The proviso in the Customs Service appropriation act limits the availability of funds for the expenses of paying overtime compensation. In other words, under the language of the proviso Congress has not appropriated funds for the administrative expenses of paying overtime compensation to any individual in excess of $20,000 in one year.

When an appropriation act specifies that an agency's appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. Since the Congress has not appropriated funds for the designated purpose, the obligation may be viewed either as being in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose. In either case the Antideficiency Act is violated.

The Commissioner has enclosed a memorandum from the Chief Counsel of the U.S. Customs Service giving his opinion that violation of the appropriation act prohibition does not constitute violation of the Antideficiency Act. In his memorandum the Chief Counsel examines decisions of the Attorney General and of the Comptroller General and states that the Antideficiency Act was intended only to control deficiency spending and obligations beyond available appropriations. He concludes:

> We believe the Antideficiency Act should be viewed as restricting the obligation of funds which are not appropriated and thus not available, requiring Congress to appropriate funds in the future to meet the obligation, while not deal-

ing with the circumstance of the obligation of available funds contrary to a statutory limitation. * * *

We cannot agree with the Chief Counsel's conclusion. In our opinion the Antideficiency Act prohibits not only expenditures which exceed the amount appropriated, but also expenditures which violate statutory restrictions or limitations on obligations or spending.

We conclude that by incurring an obligation for administrative expenses to pay overtime compensation in excess of $20,000 to an individual, the Customs Service has violated the Antideficiency Act.

[B-201708]

Appointments—Delay—Backpay—Entitlement—Age Limitations

Individual's appointment as Deputy U.S. Marshal was delayed after agency sought to remove his name from list of eligibles on grounds he was over agency age limitation for appointment. Although Civil Service Commission ruled individual must be considered for appointment, agency retained discretion to appoint. Since individual has no vested right to appointment, he is not entitled to retroactive appointment, backpay, or other benefits under the Back Pay Act.

Matter of: Michael Kovalovsky—Claim for backpay and other benefits incident to delayed appointment, May 6, 1981:

ISSUE

The issue in this decision is whether an applicant for employment with the U.S. Marshals Service is entitled to backpay and other benefits where the agency erroneously applied a maximum age limitation on appointments and delayed his appointment nearly 2 years. We hold that the employee is not entitled to a retroactive appointment and backpay under the Back Pay Act, 5 U.S.C. § 5596, where the agency retained the discretion to appoint.

BACKGROUND

This decision is in response to a request from the American Federation of Government Employees (union) concerning the claim of Mr. Michael Kovalovsky for backpay and other benefits incident to his delayed appointment as a Deputy U.S. Marshal. This decision has been handled as a labor-relations matter under our procedures contained in 4 CFR Part 21 (1980), as amended in 45 Fed. Reg. 55689, August 21, 1980, and in this regard we have received comments on this matter from the U.S. Marshals Service (agency) and the Office of Personnel Management (OPM).

The request from the union states that Mr. Kovalovsky was tested by the Civil Service Commission (now Office of Personnel Management) in 1973 and that his name appeared on a certificate of eligibles

issued to the U.S. Marshals Service on March 24, 1975. The union further states that Mr. Kovalovsky soon received a letter of inquiry from the agency and that he was interviewed for the position. The union also argues that Mr. Kovalovsky was tentatively selected for appointment on October 20, 1975, but we note that there is no documentary evidence in the record before us to support that contention.

It appears that instead of appointing Mr. Kovalovsky, the Marshals Service requested from the Civil Service Commission that his name be removed from the list of eligibles on the grounds that he exceeded the maximum entry age requirement established under Public Law 93–350 (codified in 5 U.S.C. § 3307(d)) and a Department of Justice order dated July 16, 1975. Under the provisions of 5 U.S.C. § 3307(d), agencies, with the concurrence of the Civil Service Commission, may designate minimum and maximum age limits for appointments to law enforcement and fire fighter positions. However, the Commission refused to remove Mr. Kovalovsky's name from the list of eligibles because the Commission had not made the requisite determination under Public Law 93–350 with regard to Deputy U.S. Marshals until January 27, 1976. Therefore, the Commission held that the maximum entry age requirement did not apply to Deputy U.S. Marshal positions until on or after January 27, 1976, and the Marshals Service had no valid basis to object to candidates on the basis of age prior to that date.

Mr. Kovalovsky was again interviewed for the position and was eventually appointed on June 18, 1978. The union argues that the failure of the Marshals Service to comply with Commission *directives* caused a lengthy and unnecessary delay in Mr. Kovalovsky's appointment. The union contends that several employees who were lower on the register were hired prior to Mr. Kovalovsky, and, therefore, the union seeks on behalf of Mr. Kovalovsky backpay and other benefits which would have accrued but for the errors committed by the Marshals Service and the Commission.

We requested a report on this matter from the Office of Personnel Management (successor to the Civil Service Commission), and that report states that the Commission did determine that the age limitation could not be utilized prior to January 27, 1976. However, the report from OPM denies that the decision was a mandate or directive to the Marshals Service as to when or how soon the certified eligibles had to be considered for appointment since generally each agency makes the final decision as to who to select and when the appointments are effected. The report from OPM states that their decision related only to *who* had to be considered for appointment.

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DISCUSSION

Generally, appointments are effective from the date of acceptance and entrance on duty, and appointments may be made retroactively effective only in limited circumstances. See *David R. Homan*, 59 Comp. Gen. 62 (1979), and decision cited therein. For example, under the provisions of 42 U.S.C. § 2000e-16(b), the Civil Service Commission (now Office of Personnel Management) has the authority to order retroactive appointments with backpay based on findings of discrimination because of race, color, religion, sex or national origin. However, there has been no finding that Mr. Kovalovsky was discriminated against on these grounds. See *Homan*, *supra*. Similarly there has been no finding by an appropriate authority that Mr. Kovalovsky has been discriminated against on the basis of age under the provisions of 29 U.S.C. § 633a, as amended.

The union seeks a remedy on behalf of Mr. Kovalovsky based on the provisions of the Back Pay Act, 5 U.S.C. § 5596. However, our Office has held that the Back Pay Act is applicable only to employees, not applicants for employment, and that the Act allows retroactive appointments and backpay only where the individual has a vested right to employment status by virtue of statute or regulation. See *Homan*, *supra*. Our Office has permitted such a remedy in situations where an agency has violated a statutory right of reemployment, violated a mandatory policy on effecting appointments without a break in service following retirement, or improperly restrained an employee from entering upon the performance of his duties. See 54 Comp. Gen. 1028 (1975); B-175373, April 21, 1972; and B-158925, July 16, 1968.

We find no violation of a statute, regulation, or mandatory policy in this case. Instead, the facts in this case are similar to those in *Homan*, *supra*, where the Civil Service Commission ruled that the applicant was improperly denied consideration for a competitive service position in violation of veteran preference rules. Unlike the present case, in *Homan* the Commission ordered corrective action by one of three methods (the choice was left to the agency's discretion) and the agency appointed Mr. Homan 16 months after he claimed he should have been appointed. In *Homan* we held that since the agency retained the discretion to appoint, there was no basis to retroactively appoint and award backpay. See also *James L. Hancox*, B-197884, July 15, 1980.

In the present case there was no mandate or directive from the Civil Service Commission ordering corrective action or specifying that Mr. Kovalovsky must be appointed on a certain date. As in *Homan*, the agency in the present case retained the discretion to appoint, and, ab-

sent any evidence that Mr. Kovalovsky had a vested right to be appointed on a certain date, he is not entitled to relief under the Back Pay Act. See *Raymond J. DeLucia*, B–191378, January 8, 1979.

Accordingly, Mr. Kovalovsky's claim for a retroactive appointment, backpay, and other benefits is denied.

[B–201777]

Transportation—Travel Agencies—Restrictions on Use—Applicable Regulations—Notice Status—Civilian Employees of Department of Defense

Civilian employee of Department of Army who purchased transportation with personal funds from travel agent in connection with official travel may be reimbursed under principle of this Office embodied in paragraph C2207–4 of Vol. 2, Joint Travel Regulations, that a Government employee, unaware of the general prohibition against use of travel agents, who inadvertently purchases transportation with personal funds from a travel agent, may be paid for travel costs which would have been properly chargeable had requested service been obtained by traveler directly from carrier. 59 Comp. Gen. 433 is modified.

Transportation—Travel Agencies—Restriction on Use—Violations by Government Travelers—Reimbursement Claims—Criteria for Allowance

In the future this Office will review claims of Government travelers who violate the general prohibition by purchasing transportation with personal funds from a travel agent and claim reimbursement under exceptions such as that provided in paragraph C2207–4 of Vol. 2, Joint Travel Regulations, to determine not only that the use of the travel agent was inadvertent and resulted from a lack of notice of the general prohibition, but also that these contentions regarding the use of the travel agent were themselves reasonable in the circumstances of the individual travel's claim.

Matter of: Ernest Michael Ward—Reimbursement of Government Employees for Transportation Purchased Through Travel Agents, May 6, 1981:

Ernest Michael Ward, a civilian employee of the Department of the Army, requests reconsideration of our Claims Group's adjudication (Z–2827761) of November 17, 1980, denying his claim for reimbursement of additional airfare in connection with official travel he performed in July 1980.

Briefly, Mr. Ward performed round-trip air travel from El Paso, Texas, to Washington, D.C., in July 1980 incident to a temporary duty assignment in the Washington, D.C., area. Mr. Ward purchased a round-trip airline ticket with his own funds from a local travel agent prior to his departure date. Upon submission of his travel voucher Mr. Ward was reimbursed for only $416 of his total $554 expenditure. The agency pointed out that the particular airlines which Mr. Ward used offers a discount rate for the round-trip fare to Wash-

ington, D.C., when a Government transportation request is used. As a result, in accordance with paragraph C2207–4 of Volume 2, Joint Travel Regulations (JTR), his reimbursement was limited to the amount which he actually paid not to exceed the cost which would have been incurred if the transportation had been purchased directly from the carrier. This conclusion was reaffirmed by our Claims Group's adjudication of November 17, 1980, which determined that the agency had correctly applied the provisions of paragraph C2207–4 of 2 JTR.

In support of his present appeal Mr. Ward contends as follows:

> Your examination of my claim disallowed reimbursement by applying Joint Travel Regulation Vol. 2, page C2207, para 4. The paragraph that is used to disallow my claim states "When an employee purchases transportation with personal funds from a travel agent that employee will be reimbursed the amount paid not to exceed the cost which would have been incurred if the transportation had been purchased (sic) directly from the air carrier." I am not in violation of this paragraph. There was no charge by the travel agent. The tickets would have cost the same if I had purchased them directly from the carrier. In your letter you stated that your "office may settle claims only on a legal basis * * * and may not modify the regulations (sic) * * *" However, it appears that you have modified this regulation because you will not allow my claim although I am not in violation of the referenced regulation.

While we recognize the point Mr. Ward is making in regard to the fact that he may have had to expend the same amount (i.e., $554) of personal funds to secure his ticket directly from the airlines, we do not agree that the price he paid was the lowest price available to the Government, nor do we accept his contention that he was not in violation of the controlling provisions of paragraph C2207, 2 JTR. Thus, we are disallowing Mr. Ward's appeal pursuant to the following analysis of reimbursement of Government employees for transportation purchased through travel agents.

Subchapter I of chapter 57 of title 5, United States Code (5 U.S.C. §§ 5701–5709), provides the comprehensive statutory authority pursuant to which employees are reimbursed for expenses incurred in connection with officially sanctioned Government travel. Pursuant to a statutory delegation of authority implementing regulations have been promulgated in the Federal Travel Regulations, as amended and supplemented (FPMR 101–7, May 1973). Volume 2 of the JTR is a restatement and implementation of the Federal Travel Regulations and consistent therewith provides among other things for the travel entitlements of civilian employees of the Department of Defense. As regulations implementing specific statutory authorities, the Federal Travel Regulations and Volume 2 of the JTR have the force and effect of law and may not be waived or modified by the General Accounting Office, an employing agency, or any employee.

Paragraph C2207 (change 131, September 1, 1976) of Volume 2 of

the JTR provides that travel agencies may not be used to secure any passenger transportation service within the United States. However, in our decision, B–103315, August 1, 1978, we held that members or civilian employees of the uniformed services who individually and inadvertently purchase official transportation from a travel agent with personal funds without prior approval by the administrative office can be reimbursed in an amount which does not exceed charges which would have been payable if the transportation had been purchased directly from the carrier. We did require that those granted the individual exemption should be admonished that official Government travel ordinarily is purchased directly from the carrier in the absence of an advance administrative determination that group or charter fares sold by the travel agents will result in a lower cost to the Government and will not interfere with official business. Our decision has been incorporated in paragraph C2207–4 (change 171, January 1, 1980) of Volume 2 of the JTR. See also, *Dr. Kenneth J. Bart*, 58 Comp. Gen. 710 (1979).

More recently in a decision addressed to the Department of the Interior concerning the inadvertent use of travel agents, 59 Comp. Gen. 433 (1980), we discussed in depth the specific guidance available as to the use of travel agents with respect to civilian employees of the United States covered by the Federal Travel Regulations. We went on to state as follows:

> More specific guidance as to the use of travel agents is found in the General Services Administration (GSA) transportation audit regulations, specifically, 41 CFR 101–41.203.1(a), which states that transportation services whether procured by the use of cash, the Government Transportation Request or otherwise, generally must be procured direct from carriers and that travel agencies may be used only to the extent permitted by the regulations of the General Accounting Office (GAO) (4 CFR 52.3) or GAO's specific exemption therefrom. Our regulations prohibit the use of travel agencies within North America, from the United States or its possessions to foreign countries, and between the United States and its possessions, and between and within its possessions, 4 CFR 52.3(a). *However, both the GSA and GAO regulations are addressed to Federal agencies generally, not specifically to individual Government travelers, whose travel procedures are found in the FTR or the JTR. Therefore, we are not prepared to say individual travelers on official Government business can be charged with notice of these provisions.* [Italic supplied.]

Thus, we concluded that the principle set out in our decisions in B–103315, *supra*, and 58 Comp. Gen. 710, *supra*, was appropriately applied in reaching the following result:

> * * * A Government employee, unaware of the general prohibition against the use of travel agents, who inadvertently purchases transportation with personal funds from a travel agent, may be paid for travel costs which would have been properly chargeable had the requested services been obtained by the traveler directly from the carrier.

In applying the rationale set out above we believe there are clear requirements that a traveler must demonstrate for purposes of claim-

ing reimbursement under the exception contained in paragraph C2207–4 of Volume 2, JTR, to the general prohibition against the use of travel agents: First, that he was unaware of the general prohibition; and secondly, that in consequence of that ignorance the traveler's use of the travel agent was inadvertent"—a word commonly defined through reference to "a lack of intent." Moreover, we believe that it is equally necessary that the traveler's qualification under the exception to the general prohibition against the use of travel agents must—in the circumstances of each case—be reasonable. Specifically, with reference to our analysis in the *Department of the Interior* case discussed above, the standard of reasonableness is evidenced when individual travelers on official Government business do not know and do not have sufficient reason to know of the applicable regulatory provisions precluding use of travel agents.

With this understanding we turn now to the facts of Mr. Ward's case. As we have indicated, the use of travel agents to secure passenger transportation within the United States has been prohibited under paragraph C2207 of Volume 2 of the JTR since 1976. Effective January 1, 1980, paragraph C2207–4 of Volume 2 of the JTR has provided for reimbursement for the purchase of transportation with personal funds from a travel agent to the extent stated and under the following policy guidelines:

> Except as provided herein, *it is the policy of the Department of Defense that transportation for official Government travel will be purchased directly from the carrier.* If an employee is not aware of this policy and purchases transportation for official travel with personal funds from a travel agent, that employee will be reimbursed the amount paid not to exceed the cost which would have been incurred if the transportation had been purchased directly from the carrier. *In such cases, the employee will be advised that recurrence of such use of travel agents will result in denial of any reimbursement for the transportation so procured unless it can be demonstrated that the employee had no alternative* (MS Comp. Gen. B–103315, 1 August 1978). [Italic supplied.]

In marked contrast to the provisions of paragraph C2207 of Volume 2 of the JTR, Mr. Ward's claim submission to the agency states in part as follows:

> 2. In order to perform my duties I am required to travel frequently. I average over 14 trips a year. Each trip is approximately 1 week in duration with about 3 different TDY points in as many different locations. Since my travel is so extensive I have used the services of a travel agent, without incident, for over a year. Utilizing travel agencies have benefited the Government in several ways including:
>
> * * * * * * *
>
> 3. The travel agency was queried about the discrepancy in price. They were unaware of a Government discount and after investigating found out that it only applied when tickets were purchased with a GTR [Government Transportation Request]. Therefore the discount is only available through SATO [the agency]. They assured me that this was a very unusual circumstance and that in the future they would ensure no Government discounts are available before issuing tickets.

This Office has consistently stated that the non-use of travel agencies is premised on the determination that procurement directly from the carriers is more efficient and economical than purchases from the travel agencies. In the circumstances of Mr. Ward's case the conclusion is inescapable that had he coordinated his travel through his agency and dealth directly with the airlines the mistake would have been avoided and the available discount savings to the Government would have been realized.

Thus, we conclude that for the uninitiated and infrequent Government traveler who inadvertently purchases transportation with personal funds from a travel agent, the provisions of paragraph C2207–4 of Volume 2, JTR, affords relief through an exception to the preclusive provisions *on a one time basis*—recurrence of such use of travel agents resulting in the denial of any reimbursement for transportation so procured. However, for the experienced and frequent Government traveler it is not presumptively reasonable for him to consistently fail to take notice of his agency's travel policy and implementing regulations. And, where such a traveler's consistent actions amount to a violation of a clearly proscribed course of conduct in using travel agents, the exception represented by paragraph C2207–4 of the regulations is not available because the twin contentions of ignorance and inadvertence are patently unreasonable.

Therefore, in the circumstances of Mr. Ward's case we find that he had or should have had notice of the prohibition provisions of paragraph C2207 of Volume 2, JTR, and that his intentional use of the travel agency to purchase the passenger transportation in question was contrary to those binding provisions and not subject to the relief permitted by the one-time exception provided in paragraph C2207–4 of the regulations. As a result, Mr. Ward's claim for reimbursement for the round-trip travel in question was properly subject to denial in total by the agency.

However, since this definitive analysis extends our construction set out in 59 Comp. Gen. 433, *supra*, and postdates the travel which Mr. Ward performed in July 1980, and with consideration for the fact that the travel performed benefited the Government in the amount already reimbursed to Mr. Ward, we will not object to Mr. Ward's retention of that amount of $416. But, in accordance with our decision here, we are sustaining our Claims Group's disallowance of Mr. Ward's claim for amounts paid to a travel agent for round-trip air travel in excess of the cost which would have been incurred if the transportation had been purchased directly from the carrier.

[B-202273]

Checks—Delivery—Banks—Salary Payments—Expenses Incidental to Delivery Delay—Government Liability

An employee seeks reimbursement of $129 in check overdraft charges which resulted from the inadvertent failure of the Federal Aviation Administration to deposit the employee's paycheck with the employee's bank. The failure was due to the processing of the employee's address change one pay period earlier than requested. The employee may not recover the $129 since, absent statutory authority to the contrary, the Government is not liable for the unauthorized acts of its officers and employees even though committed in the performance of their official duties. *German Bank* v. *United States,* 148 U.S. 573 (1893).

Matter of: Robert G. Raske, Jr., May 7, 1981:

This action is brought by the Professional Air Traffic Controllers Organization on behalf of Robert G. Raske, Jr. A decision is being rendered pursuant to Part 21 of title 4 of the Code of Federal Regulations, as amended August 21, 1980. See 45 FR 55689. In accordance with 4 CFR 21.4 the Federal Aviation Administration (FAA) has been served with a copy of the request for a decision which concerns its denial of Mr. Raske's claim for reimbursement of $129 in overdraft charges which he incurred when that agency erroneously failed to deposit his paycheck with his bank. For the reasons discussed below, we affirm the disallowance of Mr. Raske's claim.

On July 17, 1980, Mr. Raske, an FAA Air Traffic Control Specialist, submitted a Form 1370–8 (Salary Disposition Record) to his payroll office in anticipation of his impending permanent change of station from Charlotte, North Carolina, to Vero Beach, Florida. By Form 1370–8 Mr. Raske, whose paychecks were then being mailed to the First Union National Bank in Charlotte, requested that his paycheck be mailed to him at a post office box in Vero Beach, effective pay period 17 for the paycheck dated August 18, 1980. Due to an administrative error, the payroll office processed the address change in pay period 16 which resulted in Mr. Raske's paycheck for that period not being deposited with the First Union National Bank. Mr. Raske, unaware of the error, wrote several checks on his First Union National Bank account for which funds were insufficient and for which he incurred $129 in overdraft charges.

The applicable statutory authority which entitles a Government employee to elect to have his or her paycheck deposited directly into that employee's bank account is found in 31 U.S.C. § 492(b)(1) (1976). Section 209.4 of title 31 of the Code of Federal Regulations establishes certain procedures for the use of this direct deposit service. However, neither that statute nor the regulations authorize the Government to reimburse its employees for service charges on checks drawn on insufficient funds where the Government has undertaken but

failed to deposit employees' paychecks directly with the employees' banks. In addition, we are unaware of any other statutory authority that would authorize this Office to allow Mr. Raske's claim. Without the proper statutory authority, we are unable to reimburse an employee even under the most compelling circumstances. See B–187245, October 7, 1976; B–173783, March 2, 1976.

While it is regrettable that the claimant incurred substantial charges which he feels resulted solely from the error of a Government employee, it may be noted that under the direct paycheck deposit authority the employee remains responsible for making sure that his bank balance is sufficient to cover the checks he writes. Further, the rule is well established that the Government is not liable for the unauthorized acts of its officers and employees even though those acts were committed in the performance of their official duties. *German Bank* v. *United States*, 148 U.S. 573 (1893); *United States* v. *Hall*, 588 F.2d 1214 (1978); *Posey* v. *United States*, 449 F.2d 228 (1971).

We affirm the disallowance of Mr. Raske's claim.

[B–201809]

Officers and Employees—Transfers—Relocation Expenses—Cooperatively Owned Dwelling—Condominiums/Cooperatives—Membership Fees

Employee may not be reimbursed a cooperative home membership fee required on purchase of home at new duty station. Such fees are personal and outside the scope of costs or expenses allowable as relocation expenses under the Federal Travel Regulations.

Matter of: Herbert W. Everett—Relocation Expenses—Membership Fee, Cooperative Home, May 8, 1981:

The issue presented in this case upon a request of an authorized certifying officer of the Department of Agriculture is whether a membership fee required to be paid on the purchase of a home in a cooperative home development is reimbursable as a relocation expense. The answer is no.

Mr. Herbert W. Everett, an employee of the Department of Agriculture's Soil Conservation Service, was authorized a permanent change of station from Portland, Oregon, to Washington, D.C. In connection with his transfer he purchased a cooperative home for which he was required to pay a membership fee of $300 to the developer at the time of purchase. This membership fee is a one-time fee, nonrefundable and nontransferable, if and when Mr. Everett sells his interest in the property.

Pursuant to 5 U.S.C. § 5724a (1976), paragraph 2–6.2 of the Fed-

eral Travel Regulations (FPMR 101–7, May 1973) provides for reimbursement of certain expenses incurred by employees in connection with residence transactions. Membership fees such as Mr. Everett paid are not included as reimbursable expenses under those regulations. Instead, membership fees in condominium or cooperatively owned homes or apartments are regarded as items of added value continuing to benefit the purchaser. As such, they are considered a part of the purchase price and not a part of the cost or expenses of purchasing. In the circumstances where a membership fee is transferable, we have held that the expenses of selling such membership is reimbursable. See B–183812, May 4, 1976. However, the cost of a membership is considered a personal expense of the employee and not reimbursable. B–200082, February 25, 1981. Compare B–171808, March 21, 1971, for membership fees in non-real estate type organizations.

In the present case, the membership fee had no relationship to any expense or charge for services required for the purchase of the property. It was a requirement for occupancy and participation in the management of the cooperative development. Accordingly, such membership fee is not reimbursable as a relocation expense under the Federal Travel Regulations.

[B–174226]

Appropriations—Obligation—Social Security Disability Benefit Determinations—Medical Examinations—Purchase Orders

District of Columbia may obligate fiscal year funding authority allocated to it for purpose of making determination of individual's eligibility for Social Security disability benefits at the time it issues purchase order for medical examination of individual, notwithstanding fact that examination may be performed in next fiscal year. In this case need for examination arises at time person makes claim for disability benefits and scheduling of examination is beyond control of District. 58 Comp. Gen. 321 (1979) distinguished.

Matter of: District of Columbia's Reporting and Recording Obligations for Disability Determination Services, May 11, 1981:

This decision is to Audrey Rowe, Commissioner, Commission on Social Services, District of Columbia Department of Human Services (DHS), concerning a possible conflict between the procedures set forth in the decisions of this Office and followed by the District when obligating appropriations by contracts or orders for services and the procedures set forth in the Social Security Administration's (SSA) Disability Insurance State Manual (DISM) to be followed by States when recording and reporting as obligations orders for medical examinations. The Commissioner is under the impression that our decisions require all orders for services to be recorded as obligations against the appropriation current at the time the services were rendered. The

DISM, on the other hand, requires that States report and record orders for medical examinations as obligations when they are made. The Commissioner therefore asks which method should be followed.

Section 221(b) of the Social Security Act (Act), 42 U.S.C. § 421 (b), authorizes the Secretary of Health and Human Services (Secretary) to enter into agreements with States to have determinations made as to the nature and duration of an individual's disability for the purpose of various provisions of the Act performed by State agencies, including, for purposes of Title II of the Act, the District of Columbia, 42 U.S.C. § 410(h). The law also provides that each State which agrees to make disability determinations is entitled to receive from trust funds (either the Federal Disability Trust Fund or the Federal Old-Age and Survivors Insurance Trust Fund) reimbursement of costs incurred in carrying out the agreements. 42 U.S.C. § 421(e). The Congress prescribes in annual appropriation acts, under the heading "Limitation on Administrative Expenses" (LAE), the total amount in all the trust funds that is available during the fiscal year for the purpose of administering various SSA programs, including the program under which States agree to make determinations of eligibility for disability benefits. See Department of Health, Education, and Welfare Appropriations Act, 1979, Pub. L. No. 95-480, Title II, October 18, 1978, 92 Stat. 1571.

We have been informally advised by SSA officials that funding authority for reimbursing States their costs for providing disability determination services is initially allocated from the LAE to the Office of Operation Policy and Procedures. That office then allocates this funding authority among the 10 SSA Regional Offices which, in turn, allocate funding authority among individual States. Currently, funding authority is allocated on a quarterly basis and States may not exceed these allocations.

The District submits its annual estimates of costs to the SSA Regional Office in Philadelphia which, after considering all pertinent information, determines the amount to make available to the District for the purpose of administering its agreement. The Regional Office then notifies the District of the amount of funding authority it has approved on a quarterly basis. The District has agreed not to make expenditures exceeding this amount unless approved by the Secretary. Under the program requirements set forth in DISM 406.2, the District is required to file a quarterly statement of obligations which permits SSA to review the rate at which the District is using the funding authority allocated to it. This procedure, required of all other States, facilitates SSA's shifting of funding authority from States which are

underutilizing their allocations to States that need additional funding authority because of increased demands.

A person seeking to have his or her eligibility for disability benefits established is initially interviewed and screened by a caseworker and thereafter provided an appointment for a medical examination. This examination is required in order to provide information necessary to help determine the extent and duration of the person's disability. A list of doctors approved for performing these examinations is provided the disability staff. The caseworker calls the doctors on the list until one is reached who can perform the examination without delay (a program requirement, DISM 425.312). The doctors on the list are reimbursed for services rendered at fixed rates and are not paid by the District for cancelled appointments.

At the time the appointment is made, a purchase order authorizing payment for the examination is prepared. However, while the purchase order may be executed at the end of one fiscal year, the examination may not be scheduled until the next fiscal year. This is because persons may come in for the initial screening too late in the fiscal year to permit their being scheduled for an appointment before the first quarter of the next fiscal year. Also contributing to this problem are persons who fail to keep appointments late in the fiscal year and who must be rescheduled for an appointment during the next fiscal year, or persons whose initial examination late in the fiscal year discloses conditions requiring further examinations by the specialists for whom appointments must be made for examinations during the next fiscal year. The question which then arises is against which fiscal year's allocation or funding authority should the purchase order be recorded and reported as an obligation?

SSA has defined "obligation" for the purpose of recording and reporting obligations under the program, to include:

> * * * payments for goods or services received and commitments to pay for goods or services ordered. They result from the employment of individuals; authohrization to travel; *ordering services*, e.g., *consultative examinations;* entering into a contract; and similar transactions which require the present or future disbursement of money. In addition to orders and contracts for future performance, obligations incurred include the value of goods and services received, and other liabilities arising without a formal order. DISM 441.21. [Italic supplied.]

Additionally, DISM 441.323B1 provides that consultative examinations may be recorded as obligations as of the date a purchase order is issued. Thus for purposes of recording and reporting obligations by States under the program to SSA, an obligation is incurred when the purchase order for the examination is issued.

The District has questioned the propriety of recording and reporting obligations as required by the DISM because of its reading of our

decisions concerning the recording of obligations by Federal agencies against fiscal year appropriations. For example, the District points to our decision B-174226, dated March 13, 1972. It is true that we held that the appropriation current at the time the services are rendered is properly chargeable with the cost. However, that decision involved the provision of evaluation services to the Office of Economic Opportunity for a specified period of time—July 12 through July 16—which at that time was in the next fiscal year. By the very terms of the purchase order, therefore, the services were intended to fill a bona fide need of a subsequent fiscal year. Thus, this case is clearly distinguishable. The general rule as stated in the decisions cited by the District only precludes recording as obligations contracts for services which do not meet a bona fide need arising during the fiscal year in which the contract is made. See 27 Comp. Gen. 765 (1948).

The circumstances in the present case are very different. Once the person seeks to have his eligibility established by presenting himself at the disability office and is interviewed and screened, it becomes necessary for a medical examination to be performed. DHS has no control over this. This situation is analogous to the procurement of goods when the need arises in one fiscal year but actual delivery cannot possibly be made until the next fiscal year. There the agency is permitted to obligate the full amount of the contract against the appropriation current at the time the contract is made or the order placed rather than the appropriation current at the time the goods are delivered and expenditures made. It follows therefore that the purchase order covering a medical appointment should be treated in the same manner. The District should obligate when the need for this disability determination arises, that is, when an applicant requests an eligibility determination.

Thus, the situation here is to be distinguished from that in the matter of *Norton Sound Health Corporation*, 58 Comp. Gen. 321 (1979). There a contract for providing medical services to Indians was entered into between the Indian Health Service of the Department of Health, Education, and Welfare and the Norton Sound Health Corporation. When HEW proposed obligating one fiscal year's funds to provide services during the next fiscal year we disapproved. However, there the need which provided the underlying basis for recording an obligation did not arise until a person actually sought medical services. Here the providing of the medical examination is merely one phase of an eligibility determination, the necessity for which arises in the fiscal year in which the person presents himself to claim benefits under the program.

Consequently, in our opinion, the District should record and report

obligations as required by the DISM, when the caseworker makes the medical appointment, and should not wait until the examination is made.

[B-201528]

Voluntary Services—Prohibition Against Accepting

In the absence of specific statutory authority, Federal agencies are prohibited from accepting voluntary service from individuals except in certain emergencies. Whenever an agency is authorized by statute to accept voluntary personal services as an exception to that prohibition, the specific terms of the particular statutory authorization govern the conditions of the arrangement, including the scope of services which may be performed by the volunteers and the matter of whether the agency may pay for the volunteers' transportation, meals, and lodgings. 31 U.S.C. 665(b).

Voluntary Services—Prohibition Against Accepting—Statutory Exceptions—Civil Service Reform Act of 1978—Student Volunteers

Section 301(a) of the Civil Service Reform Act of 1978, 5 U.S.C. 3111, authorizes a limited exception to the prohibition against the acceptance of voluntary service by Federal agencies, by allowing agencies to establish certain education programs for high school and college student volunteers. Sponsoring agencies may not pay for the student volunteers' traveling or living expenses, since the statute and its legislative history make no provision for payment of those expenses, and the statute specifically excludes the volunteers from being considered Federal employees for most purposes including travel and transportation entitlements.

Matter of: Student Volunteers—Traveling and Living Expenses, May 11, 1981:

This action is in response to a letter dated December 9, 1980, from the Deputy Director of the Office of Personnel Management (OPM), requesting a decision on the question of—

(W)hether the head of an agency who accepts voluntary services of students as authorized by section 3111(b) of title 5, United States Code, may provide travel and subsistence expenses, quarters, or any other reimbursements or payments in kind to such volunteers.

We have concluded that expenditures of the type in question may not be made.

In requesting a decision in this matter, the Deputy Director notes that the Civil Service Reform Act of 1978 added section 3111 to title 5 of the United States Code relative to the services of student volunteers. Under 5 U.S.C. 3111(b) the head of an agency may, subject to regulations issued by OPM, accept the voluntary, uncompensated services of students in educational programs established by the agency. The Deputy Director suggests that many volunteers, while able to work without pay or employee benefits, will be financially unable to undertake any assignment at personal expense involving service at a location away from their normal place of residence. Consequently, he suggests that the flexibility and scope of the student volunteer pro-

grams will be greatly enhanced if the students' traveling and living expenses when they are away from their normal places of residence are paid by the Government. He therefore asks whether OPM may issue regulations under 5 U.S.C. 3111(b) which would permit the students to be reimbursed for their out-of-pocket traveling and living expenses—or to be provided with transportation, meals, and quarters in kind—by the Government while they are participating in the volunteer programs.

Other OPM officials in subsequent informal communications have noted that the Department of Agriculture and the Veterans Administration have volunteer service programs in which uncompensated volunteers are furnished with some transportation, meals, and quarters at agency expense. Those officials have also noted that 5 U.S.C. 5703 authorizes persons serving the Government without pay to be granted travel allowances under invitational orders. They therefore ask whether the features of those other volunteer programs or the provisions of 5 U.S.C. 5703 may be extended to the student volunteers to serve as a basis for the issuance of regulations by OPM which would permit the students to have travel allowances or be furnished with transportation, meals, and quarters in kind by the Government.

Section 665(b) of title 31, United States Code, (section 3679, Revised Statutes), provides that:

> No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

This prohibits Federal agencies from accepting voluntary services from individuals in the absence of specific statutory authority, except in the emergencies mentioned. See B–159715, December 18, 1978.

Section 301(a) of the Civil Service Reform Act of 1978, Pub. L. No. 95–454, October 13, 1978, 92 Stat. 1144, added section 3111 to title 5 of the United States Code to specifically give Federal agencies authority to accept the voluntary services of students for the purpose of enhancing their educational experiences. Previously, agencies had generally been prohibited by 31 U.S.C. 665(b) from accepting student volunteers who were interested in gaining such experiences. See B–159715, *supra;* and B–139261, June 26, 1959.

Although 5 U.S.C. 3111 now authorizes Federal agencies to accept the voluntary service of students, specific limitations are imposed on the scope and conditions of that service. For example, they are to serve without compensation in programs established by an agency specifically designed to provide them with educational experiences. 5 U.S.C. 3111(b). Also, they are not to be considered Federal employees for any

purpose other than 5 U.S.C. 8101–8193 (compensation for work injury) and 28 U.S.C. 2671–2680 (tort claims). 5 U.S.C. 3111(c).

The terms of 5 U.S.C. 3111 make no provision for payment of the student volunteers' traveling or living expenses. Moreover, the legislative history of the statute reflects the congressional intent that expenditures thereunder be limited to payment of the sudents' injury compensation and of tort claims resulting from their activities. See sec. VIII, Sen. Rep. No. 95–969, July 10, 1978. Thus, it is our view that 5 U.S.C. 3111 in and of itself provides no authority for payment of the expenses here in question.

A number of other specific statutory enactments authorize certain Federal agencies to accept the services of volunteers as an exception to the prohibition set forth in 31 U.S.C. 665(b). The Department of Agriculture under the express statutory authority of 16 U.S.C. 558a and 558b may accept the services of uncompensated volunteers in furtherance of the National Forest Program, and the agency is given express statutory authority to provide for the forest service volunteers' "incidental expenses, such as transportation, uniforms, lodging, and subsistence." Also, 38 U.S.C. 213 expressly authorizes the Veterans Administration to accept such voluntary services as may be deemed necessary in carrying out its responsibilities, and we have previously expressed the view that under this statutory authorization meals may be furnished without charge to volunteer workers as may be necessary in certain circumstances at veterans' hospitals and clinics. See 43 Comp. Gen. 305 (1963). In these and other situations when Federal agencies are authorized to accept voluntary services, the specific terms of the particular statutory authorization govern the conditions of the arrangement, including the scope of services which may be performed by the volunteers and the matter of whether the agency may pay for their transportation, lodgings, meals, uniforms, etc. Compare B–173933, December 21, 1971. Hence, in our view particular provisions of law which may variously allow payment in some measure of the transportation or living expenses of volunteer workers in forestry projects or veterans' hospitals have no application to students enrolled in educational programs under 5 U.S.C. 3111.

As to the possible application of 5 U.S.C. 5703, that statute provides Federal agencies generally with authority to pay the travel expenses of a person serving the Government without pay. Application of the statute is limited to persons who may properly be regarded as experts, consultants, witnesses, attendants, or other advisors and aides, when they are called away from their homes at the request of an agency to perform a direct service for the Government. See 55 Comp. Gen. 750, 752 (1976) and 59 Comp. Gen. 675 (1980). High school and college

students permitted to participate in educational programs under 5 U.S.C. 3111 are not necessarily performing a direct service for the Government, and, as mentioned, the congressional intent was not to authorize the students to travel at Government expense but rather to limit the expense of the educational programs to payment of the students' injury compensation and of tort claims arising from their activities. Hence, it is our view that provisions of 5 U.S.C. 5703 have no application to students participating in educational programs under 5 U.S.C. 3111.

In conclusion, it is evident that in enacting 5 U.S.C. 3111 the Congress intended only to permit a limited exception to the prohibition against the acceptance of voluntary service by Federal agencies, in order to allow agencies to establish education programs in cooperation with school authorities for the benefit of high school and college students. No provision was made in 5 U.S.C. 3111 for the students' traveling and living expenses to be borne by the Government, and it does not appear that any such provision was intended. Furthermore, the proposed expenditures are not allowable under any other provision of law.

Accordingly, regulations may not be issued under 5 U.S.C. 3111(b), which would permit Federal agencies to pay travel allowances to the student volunteers, or to provide them with transportation, meals, and quarters in kind.

[B–198962]

Subsistence—Per Diem—"Lodgings-Plus" Basis—Staying With Friends, Relatives, etc.—Evacuated Employees—Agency for International Development

Agency for International Development evacuees who had initially been authorized the special subsistence allowance on a flat rate basis were advised that the Secretary of State had authorized future payment on lodging-plus basis and that those who stayed with friends or relatives would not be reimbursed any amount for lodgings. Since regulations contemplate payment on per diem basis, Secretary acted properly in authorizing reimbursement based on the lodging-plus system now in effect. Secretary's determination to prohibit reimbursement for noncommercial lodgings is within his authority and consistent with per diem regulation of certain other Federal agencies.

Matter of: Evacuation Allowances for AID Employees and Other Dependents Lodging With Friends and Relatives, May 12, 1981:

Mr. William A. Miller, Certifying Officer, U.S. Agency for International Development Mission to Bangladesh, requests an advance decision on whether employees evacuated from Bangladesh and authorized a special subsistence expense allowance may be denied lodging expenses while occupying noncommercial facilities. Since the denial of these expenses was mandated by the Secretary of State under a valid use of his authority in the Standardized Regulations (Government

Civilians, Foreign Areas), there exists no basis to authorize the expenses.

Between November 29, 1979, and December 6, 1979, employees of the U.S. Agency for International Development (AID) stationed in Bangladesh were evacuated because of unsettled conditions in the Near East and South Asia. The evacuees, employees and their dependents, were authorized travel expenses to a safehaven post and a special subsistence expense allowance (subsistence allowance) to maintain themselves at the safehaven location.

Upon arrival in Washington, D.C., the first evacuees received an AID instruction sheet dated December 1, 1979, which indicated that lodging receipts would not be required for payment of the subsistence allowance and that employees who elected to stay with friends and relatives would receive a safehaven subsistence allowance as follows:

—$35 per day per adult employee or dependent over 11 years.
—$17.50 per day per child 11 and under.
—60% of the above after 30 days.
—Maximum of 180 days' subsistence.

These instructions indicated that evacuees staying with friends and relatives would receive the same allowances as those staying in commercial facilities.

This instruction sheet of December 1, 1979, was superseded on December 10, 1979, by new instructions. The new instructions terminated reimbursement on a fixed rate basis and provided that effective December 15, 1979, the subsistence allowance was to be treated in the same manner as a per diem allowance under the lodging-plus system. Employees and adult dependents could be reimbursed up to $35 a day for the first 30 days. The specifics were that the rate was $16 a day for subsistence and up to $19 per day for commercial lodging. For minor dependents, the rates were $9.50 a day for subsistence and up to $8 for commercial lodging. These maximum rates were reduced by 40 percent after the first 30 days. Unlike the earlier instructions these required lodging expenses to be documented with receipts from commercial establishments. The superseding instruction states that its issuance was prompted by the determination that AID evacuees should be paid on the same basis as those of other agencies.

On January 10, 1980, the personnel for the AID Mission to Bangladesh who were responsible for processing payment for the evacuees' subsistence allowance cabled AID headquarters and set forth two proposed methods for reimbursing evacuees for lodging expenses incurred in noncommercial facilities. Essentially, the alternate methods were (1) to allow the evacuees staying in noncommercial facilities reimbursement for lodging costs based on amounts paid to friends or relatives to cover the additional expenses incurred by the

host or (2) to give the evacuees staying in noncommercial facilities a reduced fixed rate of $12 for lodgings without receipts. AID headquarters refused to distribute the cable to the evacuees and informed the Mission to Bangladesh that the Secretary of State had determined not to reimburse lodging expenses to evacuees who stayed in noncommercial facilities.

The Secretary of State sent a confirmatory telegram to the AID Mission in Bangladesh on January 17, 1980, which set forth his determination not to authorize reimbursement of lodging expenses in noncommercial facilities. After receiving this telegram, the personnel for the AID Mission to Bangladesh sought on several occasions to have the AID headquarters administratively reverse this policy without success.

In requesting this decision, the Certifying Officer indicates that he believes a reversal of the prior action is mandated because the action of the Secretary of State and AID headquarters is contrary to the applicable regulations and that the prior action violates fundamental fairness when applied to the evacuees. The Certifying Officer suggests that the law and regulations give the Secretary of State authority only to establish a maximum daily rate but not to define the circumstances under which all or a part of that amount may be reimbursed. Specifically, he questions whether the Secretary of State may determine "that one employee may be paid no lodging portion of the allowance and that another may be paid the maximum even though both incurred expenses as a result of the evacuation." In this latter regard, he points to our holding in 55 Comp. Gen. 856 (1976) and states that employees who stay with friends or relatives usually feel obliged to compensate their hosts for the additional expense and inconvenience caused by their stay, even though those expenses may be difficult to quantify.

The general statutory authority for payment of monetary amounts to evacuees from foreign areas is found at 5 U.S.C. § 5523(a). Essentially, the statute provides that the head of an agency may provide for payments to employees or their dependents where an evacuation is ordered because of imminent danger to the employees or their dependents. Among other things, 5 U.S.C. §§ 5527(a) and (b) provide that the President shall coordinate the programs of executive agencies regarding evacuation allowances and issue implementing regulations for executive agencies. Under 5 U.S.C. § 5527(c), the head of each executive agency is authorized to issue internal regulations not inconsistent with those promulgated under the authority of subsection 5527(b).

In Executive Order No. 10982, 27 FR 3 (December 25, 1961), as

amended, the President delegated the authority to promulgate regulations to the Secretary of State. Section 3(a) of the Executive order requires the Secretary of State, the Office of Personnel Management and heads of other Federal agencies to exercise their authority with respect to evacuees so that employees of different agencies evacuated from the same geographic area under the same general circumstances may be treated uniformly.

The Secretary of State has promulgated regulations for adoption within the executive branch to implement the authority to pay special allowances incident to an evacuation. These regulations are contained in the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 600 and they have been adopted by AID. Of these regulations, our concern is with Sections 130 and 131(b) (1), (2), and (3) which are as follows:

130. *Purpose of Special Allowances*
Special allowances specified in sections 131 and 133 are paid to evacuated employees to offset any direct added expenses which are incurred by the employee as a result of his evacuation or the evacuation of his dependents.

* * * * * * *

131. *Determining Direct Added Expenses*

* * * * * * *

(b) *Subsistence Expense Allowance*
Unless otherwise directed by the Secretary of State, a subsistence expense allowance for the evacuated employee or his dependents shall be determined at applicable travel per diem rates for the safehaven post or a station other than the safehaven post; which has been approved by appropriate authority. Such subsistence expense allowance shall be paid as of the date following arrival and may continue until terminated under these regulations. The daily amount of the subsistence expense allowance shall be:

(1) The maximum rate of travel per diem for the employee and each dependent who is 11 years of age and over; and one-half such rate for each dependent under 11 years of age. Normally this prescribed maximum rate shall be paid for the first 30 days of evacuation.

(2) After 30 days, unless continued payment at the maximum or other rate has been authorized, the subsistence expense allowance shall be computed at 60 percent of the rates prescribed in subparagraph (1). This prescribed rate shall be paid until a determination is made by competent authority that subsistence allowances are no longer authorized but may not exceed in any case 180 days after the evacuation.

(3) The daily rate of the subsistence expense allowance actually paid an employee shall be either the maximum rate determined in accordance with 1 and 2 above, or a lower rate if, in the judgment of the authorizing officer, such lower rate would be more in keeping with the employee's necessary living expenses.

Those regulations were issued prior to adoption of the lodging-plus system for per diem reimbursement and do not specifically define what lodging costs may be reimbursed as part of the special subsistence expenses allowance. They do contemplate that, in general, the special subsistence expenses allowance paid to evacuees will be based on the per diem rate for the locality to which the employee and his dependents have been evacuated.

At the time of the particular evacuation in question, the maximum

per diem rate payable within the continental United States was $35. See 5 U.S.C. 5702 in effect at the time. In providing that the maximum rate for the first 30 days of evacuation was limited to $35 per day and that reimbursement after December 15 would be made on a lodging-plus basis, the Secretary of State did not inappropriately limit the subsistence allowance provided for by Section 131(b)(1), quoted above. He merely implemented that regulation in the context of the lodging-plus system of per diem reimbursement then in effect.

Under the lodging-plus system, we have held that an employee who stays with a friend or relative may not be reimbursed lodging expenses based on the cost of commercial lodgings. In 55 Comp. Gen. 856 (1976) referred to by the Certifying Officer, we specifically held that to be reimbursable the charge for such noncommercial lodgings must be reasonable in amount and necessarily incurred and should reflect the host's additional costs occasioned by the employee's stay. That decision was addressed to the case in which an agency has not exercised its discretion to establish a specific per diem rate under paragraph 1–7.3c of the Federal Travel Regulations (FTR) (FPMR 101–7, May 1973 as amended) or otherwise limited reimbursement on the basis of its responsibility at paragraph 1–7.3a to avoid fixing per diem rates in excess of those required to meet the necessary authorized subsistence expenses.

The Uniform State/AID/USIA Foreign Service Travel Regulations, 6 FAM, do not specifically address the subject of lodging cost reimbursement when AID and other covered employees stay with friends or relatives, and we are advised that AID employees who lodge with relatives while on temporary duty are reimbursed lodging expenses consistent with the general principles discussed in 55 Comp. Gen. 856, *supra*. That fact does not, however, preclude the Secretary of State from exercising his authority under Section 131(b) of Chapter 600 of the Standardized Regulations to proscribe reimbursement for noncommercial lodgings. We note that the Department of Defense is one agency which disallows any reimbursement for lodgings when its civilian employees stay with friends or relatives. Paragraph C4552n of Volume II of the Joint Travel Regulations specifically provides that, for an employee who lodges with friends or relatives, the average cost of lodging will be zero. In B–198349, November 3, 1980, 60 Comp. Gen. 57, we recognized that the Department of Defense acted properly in similarly precluding reimbursement for lodgings costs when a military member lodges as the guest of friends or relatives.

Given the breadth of the Secretary of State's authority under Section 131(b) to define the special subsistence expenses allowance and the

Executive order's admonition to uniformly administer the allowance with respect to evacuees from different agencies, we are unable to find any impropriety in the Secretary's determination to pay that allowance on the same basis as certain other agencies pay travel per diem.

As for the action of AID headquarters, this action was not only proper but required under the regulations. This is the import of Standardized Regulation, Section 131(b)(3), which provides for the authorizing officer to pay a lower rate for employees whose necessary living expenses are less than the maximum rate determined by the Secretary of State under Sections 131(b) (1) and (2). The discretion afforded the evacuees' agency, through the authorizing officer, is to limit reimbursement where appropriate but not to increase it. Therefore, when the Secretary of State validly used his authority to preclude reimbursement of lodging expenses for evacuees staying with friends and relatives, the only discretion available to the authorizing officer was to further limit that reimbursement.

Accordingly, the evacuees may not be reimbursed for noncommercial lodging expenses they may have incurred after December 15, 1979.

[B-194153]

Loans—Government Insured—Limitations—Two Notes Representing One Loan—Different Interest Rates—Propriety

Economic Development Administration (EDA) has authority to allow guaranteed loans to be represented by two notes, with fully guaranteed note—representing 90 percent of loan amount, having a lower interest rate than unguaranteed note—representing remaining 10 percent of loan. Notwithstanding statements to contrary in B-194153, Sept. 6, 1979, in which we said two-note procedure could be used only if substantive terms of notes, including maturity dates and interest rates, were same, EDA is not prohibited from using split interest rates provided other substantive terms remain same.

Matter of: Split-interest rates on guaranteed and non-guaranteed portions of loan, May 13, 1981:

This decision to the Administrator of the Economic Development Administration (EDA), an agency within the Department of Commerce, is in response to a request from its former General Counsel that we reconsider a statement we made in an opinion, B-194153, September 6, 1979, to Senator Charles H. Percy concerning the establishment of a then proposed pilot program designed to bring new industrial development projects to several depressed areas in the City of Chicago.

One of the issues we considered in that case was whether EDA's

statutory authority under 42 U.S.C. § 3142 (1976) to guarantee loans to private borrowers "by private lending institutions" would allow EDA to implement a program whereby EDA would guarantee loans made by commercial banks with the guaranteed portions of those loans to be subsequently assigned to the City of Chicago, which would finance their purchase with funds raised through the "public credit markets." We held that, since the City of Chicago "is not private, is not a lending institution and could not have qualified for a guarantee initially," the proposed program, which would require EDA to guarantee notes held by the City, would allow EDA to do indirectly that which it could not do directly, and would therefore exceed its statutory authority.

EDA is not now questioning the ultimate conclusion we reached in that opinion. However, one issue we also considered was whether an EDA guaranteed loan could legally be evidenced by two notes—with one note representing 90 percent of the loan to be fully guaranteed by EDA, and the other note representing the remaining 10 percent of the loan to be wholly non-guaranteed. In this connection, we said the following in our decision:

> In our view, whether two notes should be combined and treated as one loan (or one note considered to represent two loans) depends on the substance of a particular transaction, including the apparent intention of the parties to the transaction and the purpose of the statutory provision involved. In the matter at hand, we do not believe that the proposal to evidence each guaranteed loan by two notes is legally objectionable. Whether one note with a 90 percent guarantee, or two notes representing 90 percent and 10 percent of the total loan amount respectively—the first fully guaranteed and the second without any guarantee—are involved, the end result is precisely the same in our view and conforms to the statutory requirement that no more than 90 percent of the outstanding balance of a loan be guaranteed by EDA. Finally, it appears that the primary purpose of the proposed two-note arrangement is to effectuate the basic legislative purpose rather than to circumvent it. Therefore, we have no objection to the use of two notes to represent one loan. * * *
>
> Having reached this conclusion, we do have several caveats to point out, however. First, since the two notes involved represent only one loan, we believe that *the substantive terms of the two notes, such as the maturity dates and interest rates, must be the same.* Secondly, the Government's potential liability must in no way be increased by adoption of the two-note mechanism. [Italic supplied.]

EDA's question here is whether we intended the underlined portion of the opinion to prohibit the use of two notes whenever the interest rate on each note varies—even if the interest rate on the EDA guaranteed note is lower than the interest rate on the unguaranteed note for the same loan. In this respect, EDA's submission reads in pertinent part as follows:

> * * * Obviously, it would be improper for the agency to consider a loan guarantee where the terms applicable to an EDA guaranteed note were in any way less favorable than the term applicable to a note representing the same loan, which note is not EDA guaranteed. We believe that this is the intent of the quoted portion of your opinion.
>
> It is presently proposed, however, to use two notes—one EDA guaranteed and one non-guaranteed—to represent a single loan under provisions where the sub-

stantive terms of the two notes are the same, save only that the interest rate applicable to the guaranteed note would be lower than the interst rate applicable to the unguaranteed note.

Because of the guarantee, a note representing a guaranteed portion of a loan would carry a lower interest rate than a note for the unguaranteed portion. If the single interest rate is required for both the guaranteed and unguaranteed portions of a loan, that interest rate will be an average of the higher rate which would have applied to the unguaranteed portion and the lower rate for the guaranteed portion. Therefore, the allowance of varying rates of interest for the two notes can result in a lower interest rate for the guaranteed portion and therefore lower cost for the Government if EDA is required to redeem the guarantee.

We are aware of no substantive objection to the practice, but obviously it would violate the strict meaning of the language in your opinion.

EDA is authorized by 42 U.S.C. § 3142(c) (1976) to guarantee up to 90 percent of the outstanding unpaid balance of a loan. For this reason we stated in our opinion to Senator Percy that EDA could only use the two-note mechanism if the substantive terms of the two notes are the same. From a conceptual standpoint, it would be very difficult, if not impossible, to view two notes having substantially different terms as representing one and the same loan. Logically, if the two notes were significantly different, we would have to conclude that each represented a separate loan, one fully guaranteed and one not guaranteed at all. Of course, in that event the two-note mechanism would necessarily fail, since, as noted, EDA may only guarantee up to 90 percent of any loan.

For the reasons set forth hereafter, however, we are now inclined to agree with the view espoused by EDA that it is not prohibited from allowing a guaranteed loan to be represented by two notes, each with a different interest rate, provided that the fully guaranteed note has a lower interest rate than the unguaranteed note.

First, nothing in either the statute or its legislative history suggests that Congress intended to prohibit the establishment of different interest rates for the guaranteed and non-guaranteed portions of a loan, regardless of whether each loan was represented by one or two notes. In fact, Congress never even expressed any intention to impose any limitations on lenders concerning the much more basic question of the establishment of maximum interest rates for guaranteed loans. Although the interest rate on direct loans made under this statute is limited pursuant to 42 U.S.C. § 3142(b) (8), Congress chose not to set any such limit on the amount of interest charged by private lenders on guaranteed loans when it enacted the Public Works and Economic Development Act of 1965, Pub. L. No. 89-136, August 26, 1965, 79 Stat. 556 (42 U.S. Code 3121 note). See H. Rep. No. 539, 89th Cong., 1st Sess. (1965). No such statutory restriction or limitation on the interest rates for guaranteed loans has ever been imposed on this program.*

Moreover, when the matter is considered from a broad programmatic perspective, we see no legal reason to prohibit the split-interest rate

*We note that the applicable regulations adopted by EDA with respect to interest rates on guaranteed loans as set forth at 13 CFR § 306.11(c) (1980) as follows:

mechanism. The primary reason most Federal loan guarantee programs are not made on a 100 percent guaranteed basis but require some private participation, is to insure that both borrowers and lenders, in addition to the Federal Government, are exposed to some degree of commercial risk. The General Accounting Office has consistently taken the position that such risk-sharing is a very important element of any loan guarantee program, since otherwise "the normal incentives for successful completion and management of the project * * * are absent" and "the probability that the loan guarantee program will achieve its intended objective is diminished." (See audit report entitled "Government Agency Transactions With the Federal Financing Bank Should Be Included On the Budget," PAD-77-70, August 3, 1977, at p. 16.) As we understand it, the split interest rate mechanism will in no way harm or injure this principle of risk sharing, since at least 10 percent of every loan will still have to be represented by a fully unguaranteed note, albeit at a high rate of return for the lender. In this connection, we agree with EDA that it is reasonable to allow the holder of the unguaranteed note to receive a higher interest rate than the holder of the guaranteed note because of the substantially higher risk of the former. It is understood that all payments under either note will be credited so as to retain the appropriate ratio between the guaranteed and unguaranteed undertakings.

Interest on guaranteed loans by private lending institutions must be at not more than their prevailing rates and must be reasonable with respect to the project.

Furthermore, we also agree with the statement made by EDA that the Government actually stands to gain under the split interest mechanism since the interest rate for the guaranteed portion would be lower than would be the case if a uniform "average" interest rate was charged for the entire loan, including both the guaranteed and non-guaranteed portions. Accordingly, the cost to the Government would be less in the event of a default requiring EDA to honor its guarantee.

Finally, we understand that for some time the loan guarantee programs of other agencies which operate under similar statutory authority, have allowed for split interest rates, on the guaranteed and non-guaranteed portions of a loan. For example, in its business loan program authorized pursuant to 15 U.S.C. § 636(a), the Small Business Administration (SBA) allows lenders to establish different interest rates on the guaranteed and non-guaranteed portions of a loan. Although SBA's procedure is to use only one note representing the entire loan, SBA allows the initial lender to sell the guaranteed portion of the loan to other participating lending institutions with which SBA has entered into what is known as a "Secondary Participation Guarantee Agreement."

The Farmers Home Administration (FmHA) has a loan guarantee program that operates in a manner that is even closer to what EDA is proposing here. In its Business and Industrial Loan program established pursuant to 7 U.S.C. § 1932, FmHA allows lenders to use a multi-note system, with one note representing the non-guaranteed portion and up to 10 notes for the guaranteed portion. Moreover, its regulations specifically provide for the establishment of different interest rates for the guaranteed and non-guaranteed notes. In this connection, 7 C.F.R. § 1980.423(a)(4) (1980) provides in pertinent part as follows:

> (4) It is permissible to have one interest rate on the guaranteed portion of a loan and another interest rate on the unguaranteed portion of the loan, provided the Lender and borrower agree and:
> (i) The rate on the unguaranteed portion does not exceed that currently being charged on loans of similar size and purpose for borrowers under similar circumstances.
> (ii) The rate on the guaranteed portion of the loan will not exceed the rate on the unguaranteed portion.

Thus, with statutory authority not unlike that under which EDA operates, FmHA (and to a lesser extent SBA) is carrying out a program, without objection, that is substantially the same as that which EDA is now proposing to adopt.

In accordance with the foregoing, and notwithstanding anything to the contrary in B-194153, September 6, 1979, which decision should now be considered as modified, it is our view that EDA is not prohibited from allowing the interest rates on the guaranteed portions of a loan—represented by one note—to be less than the interest rate on the non-guaranteed portion of the loan—which is represented by a separate note. However, as stated above, in order for us to continue to view the two notes as representing one and the same loan, the other substantive terms of the notes should remain the same. Furthermore, based on the existing language in EDA's regulations (13 CFR § 306.11 (1980)) and following the model established by FmHA, the interest rate on the non-guaranteed note should not exceed the prevailing rates on comparable private sector loans and the overall effective interest rate (based on the average of the guaranteed and non-guaranteed loan rates) should not be greater than would be the case had only one uniform rate for the entire loan been used.

[B-195982.2]

Contracts—Protests—Court Injunction Denied—Effect on Merits of Complaint

Although denial of motion for preliminary injunction does not go to merits of case, when arguments presented to court deal with identical issues raised in protest, General Accounting Office (GAO) will consider court's findings.

Contracts—Protests—Timeliness—Significant Issue Exception

When protest involves questions regarding timing of Government-supervised benchmark which have not previously been considered by GAO, matter is significant and will be considered even though protest is untimely.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Actions Not Requiring—Clarification Requests

Contracting agency may seek clarification of proposals from offerors, and when contacts between agency and offerors are for limited purpose of seeking and providing clarification, discussions need not be held with all offerors in competitive range.

Contracts—Negotiation—Reopening—What Constitutes

When information is requested and provided which is essential to determining acceptability of proposals, negotiations have been reopened and discussions have occurred; actions of the parties, not characterizations of contracting officer, must be considered.

Contracts—Negotiation—Offers or Proposals—Unacceptable Proposals—Precluded From Reinstatement

When offeror has been given opportunity to clarify aspects of proposal with which contracting agency is concerned, and responses lead to discovery of technical unacceptability, agency has no obligation to conduct further discussions and may drop proposal from competitive range without allowing offeror to submit revised proposal.

Contracts—Specifications—Tests—Benchmark—After Best and Final Offers—Reopening Negotiations

If, in connection with Government-supervised benchmark, questions are likely to arise or additional information to be needed, benchmark is inherent part of negotiation process during which deficiencies must be identified and offerors given an opportunity to correct them. In this case, benchmark should precede best and final offers or agency should be prepared to reopen negotiations.

Matter of: CompuServe Data Systems, Inc., May 14, 1981:

CompuServe Data Systems, Inc. protests the award by the General Services Administration (GSA) of a contract for teleprocessing services to Boeing Computer Services Company. The dispute primarily concerns CompuServe's interpretation of and ability to meet solicitation provisions designed to enable GSA to audit charges under the contract. CompuServe also alleges that GSA improperly conducted discussions after best and final offers and permitted Boeing—but not CompuServe—to make changes in its proposal. For the following reasons we are denying the protest.

I. Background:

The procurement was conducted by GSA for the Army Military Personnel Center, which uses a computerized reservation system, REQUEST/RETAIN, to identify and allocate training spaces for enlisted personnel and new recruits. This was a new competition for services previously provided by Computer Science Corporation on its

Infonet system. Award to Boeing was based on its offering a system meeting all mandatory technical requirements at the lowest evaluated life-cycle cost.

Two benchmarks, with programs which simulated actual REQUEST/RETAIN operations, were scheduled during this procurement. Offerors ran the first before completing their proposals, submitting cost tables based on the results, printouts, and written descriptions of their execution of the required programs to GSA. A second, Government-supervised benchmark was held after best and final offers.

II. Resource Consumption Routine Requirement:

CompuServe's first basis of protest is that after it had completed both benchmarks, GSA informed the firm that its proposal was technically unacceptable because of deficiencies in its resource consumption routine (RCR). The solicitation required offerors to provide such a routine, which would measure and print out (1) the elapsed time for execution of each program included in the benchmark and (2) the types and quantities of all computer resources consumed by the programs. GSA indicated that this information would be used to monitor the successful contractor's performance and charges.

After protesting to our Office, CompuServe sought but was denied a court order suspending performance by Boeing pending our decision. *CompuServe Data Systems, Inc.* v. *Freeman*, No. 80–2327 (D.D.C., October 17, 1980) (memorandum opinion and order denying preliminary injunction).

The specific deficiencies which GSA found in CompuServe's resource consumption routine, as described in a letter dated April 3, 1980, involve "dynamic calculation [sic] of core" and the "bundling of element T_a." CompuServe alleges that with regard to both of these, the agency is now imposing new and more stringent requirements than were in the original solicitation.

As a matter of law, CompuServe argues that GSA should have amended the solicitation to reflect its new requirements. If the solicitation is regarded as ambiguous as to what the resource consumption routine required, CompuServe continues, it should be construed against GSA, which drafted it. In any case, the firm argues, the requirements exceed GSA's minimum needs and unduly restrict competition. Alternatively, CompuServe contends that GSA either knew or should have known of the so-called deficiencies in its proposal when it accepted results of the pre-proposal benchmark, and should have discussed them before best and final offers.

GSA, on the other hand, indicates that none of the problems with CompuServe's resource consumption routine was apparent from its

proposal. Rather, the agency states, it was only after the Government-supervised benchmark that it was able to determine that CompuServe's routine did not provide data in the form required by the solicitation.

According to GSA, satisfactory "repairs" [1] to CompuServe's Government-supervised benchmark could have been made only if the firm had concurrently changed its technical and cost proposals; since best and final offers had been submitted before GSA made this determination, the agency refused to allow any changes on grounds that they would be late modifications.

III. Alleged Deficiencies in CompuServe's Proposal:

A. *Dynamic Allocation of Core:*

Dynamic allocation of core (main memory) was a mandatory feature of the system GSA sought. This means that instead of a system in which it was charged for a fixed amount of core, GSA required one which, before program execution, would calculate the amount of core needed to complete the program and allocate it accordingly, so that the Government would not be charged for more than it actually used.

As the court observed in its memorandum opinion, CompuServe offered what appeared to be an even more efficient system, one which allocated and de-allocated core as needed throughout program execution. CompuServe, however, did not display changes in core usage as they occurred, but merely summarized them in a printout at the end of the program. This, according to GSA, did not comply with the solicitation and was not sufficient for audit purposes. CompuServe, on the other hand, contends that the requirement for displaying and quantifying resources every time the amount consumed changes during program execution is new.

B. *The Bundling of Element T_a:*

Section F.2.2.4.4.b. of the solicitation required that offerors display "specifically and separately all unique resource elements for which a charge [was] made." Any elements which were "bundled" to produce a compound billing unit of any kind were to be "unbundled," and offerors were required to certify that all elements were presented in this form.

According to GSA, its ability to audit CompuServe also was limited because the firm combined the elements E, representing the number of instructions the computer is directed to execute, and M, representing the amount of memory exercised, to form a unit identified in its billing alogrithm by the algebraic term T_a.

CompuServe argues that since neither E nor M is separately re-

[1] Repair is a broad general term which may be used to mean anything from manual correction or change to a complete re-running of a benchmark.

corded or billed, the element T_a should not be considered a bundled unit. The firm concludes that it fully complied with the solicitation, since it provided a routine which measured and printed out resources consumed at the end of program execution and which included all elements for which it charged.

IV. GAO Analysis of RCR Requirements:

In the words of the District Court, the Government was clearly dissatisfied with its ability to audit the precise elements of the charges for which it had been billed under the Computer Sciences Corporation contract. The requirements for a resource consumption routine were intended to facilitate examination of charges under the new contract and to insure accurate billing. The court found that CompuServe did not meet these requirements.

We recognize that a denial of a motion for a preliminary injunction, such as was issued here, is by its nature interlocutory and provisional, and does not go to the merits of a case. Nevertheless, since the extensive oral and written arguments presented to the court deal with the identical issues which have been raised in this protest, we believe it is appropriate to consider the court's findings. *See CSA Reporting Corporation*, 59 Comp. Gen. 338 (1980), 80-1 CPD 225.

With regard to dynamic allocation of core, the court stated:

> * * * Apparently, the Government had to take CompuServe's system on faith that the final charge for memory space used was an accurate calculation of the various component charges set during the stages of the program.

As for the bundling of element T_a, the court found:

> * * * CompuServe admits that nowhere does it display or calculate these two units [E and M] separately. The fact that the CPU [central processing unit] is divided into two units * * * at all, appears to bundle elements in apparent violation of the RFP [request for proposals], abrogating the Government's determined ability to audit separately each aspect of the calculated computer charge.

The court concluded:

> * * * The language of the RFP is unambiguous—the Government wanted to audit *each separate component* of the final charge, and it appears that in both the calculation of CPU and the allocation of memory space, CompuServe bundled elements of the final figure in such a manner as to preclude the Government from auditing the usage precisely. [Italic supplied.]

A computer scientist for the National Bureau of Standards concurs in these findings; in an affidavit prepared for submission to the court, he stated:

> * * * In my professional judgment, CompuServe's element T_a is a bundled element. It is my judgment that the separate display of the component elements of T_a, namely E and M, is necessary to satisfy the Resource Consumption Routine (RCR) requirements of the RFP.
>
> In my professional judgment, the core value printed out at the termination of the benchmark programs provided to the Government does not comply with the Resource Consumption Routine (RCR) provisions of the RFP and does not pro-

vide enough information to perform a detailed audit per the requirements stated in the RFP.

In my professional judgment, the description of the SRU [system resource usage] algorithm provided to the Army by CompuServe in its cost proposal, along with its technical proposal and its Resource Consumption Routine (RCR) and benchmark listings, was not sufficient information for the Army to know:

(a) that T_n was a bundled unit; and

(b) that the algorithm recomputed SRU's when dynamic core allocation took place within a program.

It is my professional judgment that the Army's evaluation that CompuServe's Resource Consumption Routine (RCR) should be capable of quantifying and displaying at the termination of a program its usage of the elements making up the SRU * * * is not a change in the requirements set forth in the RFP. Rather, the Army's evaluation was totally consistent with the RFP requirements in that the display of those elements was necessary for CompuServe to submit an acceptable Resource Consumption Routine (RCR).

We agree with the court and the National Bureau of Standards, and find that the resource consumption routine requirements were neither new nor ambiguous. Moreover, we do not believe these requirements exceeded GSA's minimum needs or were unduly restrictive. With compound billing units, it would be possible to change the weights in a billing algorithm to make actual programs cost relatively more than benchmark programs, which will be rerun for the purpose of validating costs. Since there will be no adjustments to the contractor's invoices unless actual costs exceed benchmark costs by more than five percent, substantial overcharges could result. We find that GSA's audit methodology is a reasonable attempt to prevent this type of manipulation.

The final question with regard to CompuServe's first basis of protest is whether CompuServe met solicitation requirements.

In written responses to GSA's questions following the Government-supervised benchmark, CompuServe acknowledged that there were no programs available at that time which could be used by the Army for verification of its SRU algorithm. CompuServe merely offered to provide, 30 days after award, a software interrupt capability which would allow the Government to detect changes in core allocation as they occurred and to determine precisely the amounts used in CompuServe's calculations. Nor did CompuServe show, in its responses to GSA's questions, that it met the Government's requirements for presentation of all elements in unbundled form. Rather, CompuServe stated, "Our operating system specialists have indicated that we could provide the factors 'E' and 'M' to the Army; however, this would require prohibitively high processor overhead."

In view of these admissions, we cannot conclude that CompuServe's resource consumption routine met solicitation requirements.

V. Discussions:

CompuServe's second broad basis of protest is that GSA improperly conducted discussions after best and final offers without affording the firm an opportunity to revise its proposal. The firm cites questions

posed in a letter from the technical evaluation team to CompuServe and various exchanges between GSA and Boeing which resulted in repair of Boeing's Government-supervised benchmark and reconciliation of its cost proposal. GSA's actions, CompuServe alleges, violated procurement regulations in that all offerors were not treated fairly and equally.

GSA argues that this basis of protest is untimely, since it was not raised within 10 days after CompuServe knew of the alleged improper communications. The agency also asserts that it was merely seeking clarification and that it did not conduct discussions, since it permitted no changes in proposals. Such clarification was an essential part of the evaluation of best and final offers, the agency continues, and had deliberately been deferred until the Government-supervised benchmark in order to safeguard proprietary information until the latest possible stage of the procurement process.

While CompuServe's protest may be untimely, we believe it raises significant issues, not previously considered by our Office, in terms of when a Government-supervised benchmark should be conducted and what type of questions may follow it. We therefore will consider the matter. See *Association of Soil and Foundation Engineers*, B-199548, September 15, 1980, 80-2 CPD 196; 4 CFR § 20.2(c) (1980).

In our opinion, GSA did conduct discussions with CompuServ after best and final offers. The chronology was as follows: best and finals were submitted on December 28, 1979; CompuServe ran its Government-supervised benchmark on February 8, 1980. By letter dated February 29, 1980, the contracting officer advised CompuServe that results of that benchmark had been analyzed and that all but two capabilities described in its proposal had been successfully demonstrated. The first is not at issue here; the second was CompuServe's resource consumption routine. The contracting officer posed 11 specific questions regarding CompuServe's billing algorithm and resource consumption routine which he indicated must be successfully clarified for the firm to remain in the competition. On March 10, 1980, CompuServe responded to those questions in writing, leading to a determination by the technical evaluation team on March 19, 1980, that CompuServe's resource consumption routine was unacceptable, primarily because it did not provide the audit capability which the Government sought.

Contracting agencies are permitted to seek clarification of proposals from offerors, and when contacts between the agencies and offerors are for the limited purpose of seeking and providing clarification, discussions need not be held with all competitive range offerors. *John Fluke Manufacturing Company, Inc.*, B-195091, November 20, 1979, 79-2

CPD 367. On the other hand, when an offeror is permitted to change a proposal or when information is requested and provided which is essential to determining the acceptability of a proposal, the contacts go beyond mere clarification and, as we have often held, negotiations have been reopened and discussions have occurred. *ABT Associates, Inc.*, B-196365, May 27, 1980, 80-1 CPD 362 and cases cited therein; *Raytheon Service Company et al.*, 59 Comp. Gen. 316 (1980), 80-1 CPD 214 at 20. The actions of the parties, not the characterizations of the contracting officer, are what must be considered. *ABT Associates, Inc., supra.*

In this case, the questions asked and the written responses provided related to how CompuServe calculated costs; they went to the heart of CompuServe's proposal. CompuServe's responses offered various alternatives and considerable elaboration and detail not offered in its initial proposal, and had a substantial effect on GSA's finding of unacceptability. In our opinion, this exchange therefore constituted discussions and not mere clarification. See *The Human Resources Company*, B-187153, November 30, 1976, 76-2 CPD 459.

This does not mean, however, that GSA was required to give CompuServe an opportunity to revise its proposal after this evaluation was completed. When an offeror has been given an opportunity to clarify aspects of its proposal with which the contracting agency is concerned, and its responses lead to a determination of technical unacceptability, the agency has no obligation to conduct further discussions. *Genesee Computer Center, Inc.*, B-188797, September 28, 1977, 77-2 CPD 234. Although it was not until after the Government-supervised benchmark that the technical evaluation team discovered that CompuServe's proposal was unacceptable with respect to the resource consumption routine requirements, and that a complete revision would be needed for it to meet those requirements, the agency could properly drop the proposal from the competitive range at that point without allowing the offeror to submit a revised proposal. *General Electric Company*, 55 Comp. Gen. 1450 at 1456 (1976), 76-2 CPD 269; *Electronic Communications, Inc.*, 55 Comp. Gen. 636 (1976), 76-1 CPD 15; *cf. Proprietary Computer Systems, Inc.*, 57 Comp. Gen. 800 (1978), 78-2 CPD 212, involving a proposal which the agency doubted was acceptable and dropped after discussions confirmed this.

CompuServe has argued that GSA either knew or should have known of the deficiencies in its proposal before it requested best and final offers, and thus suggests that GSA failed to conduct meaningful discussions with it. However, the technical evaluation report, included in the record, indicates that until the Government-super-

vised benchmark, GSA believed that CompuServe had submitted the information required, both in narrative form in its cost and technical proposals and in its resource consumption routine.

For example, according to GSA, CompuServe indicated that it provided dynamic allocation of core, but did not explain how it dynamically allocated and de-allocated core during program execution. Therefore, according to GSA, this feature was never evaluated in relation to CompuServe's resource consumption routine, and it was only during the Government-supervised benchmark (and the discussions which followed) that GSA determined that CompuServe could not be audited to the extent required by the solicitation. Under these circumstances, we cannot conclude that GSA did not meet its duty to conduct meaningful discussions.

In view of our finding that GSA had no obligation to allow CompuServe to revise its proposal following the post-benchmark discussions, CompuServe's complaint that it was denied an opportunity that was given Boeing is without merit.

We believe, however, that this procurement demonstrates the need to run a Government-supervised benchmark earlier in the procurement process than was done here. If such a benchmark is merely to be used to validate results of an earlier one, it may logically be considered part of the evaluation of best and final offers. We understand, however, that in the majority of cases it is likely that questions will arise or additional information will be needed upon completion of the benchmark. In those cases, as here, the benchmark becomes an inherent part of the negotiation process, during which deficiencies should be pointed out and offerors given a chance to correct them if possible. *See The Computer Company—Reconsideration*, B–198876.3, January 2, 1981, 60 Comp. Gen. 151 (1981), 81–1 CPD 1. In such cases, therefore, the benchmark should precede best and final offers or the agency should be prepared to reopen negotiations if necessary. By letter of today, we are so advising the Administrator of General Services.

The protest is denied.

[B–199531]

Non-appropriated Fund Activities—Sharing Facilities, Services, etc. With Appropriated Fund Activity—Cost Sharing Basis for Reimbursement—Personal Services

Appropriated fund (AF) and non-appropriated fund (NAF) personnel on Army base operate separate billeting facilities in single hotel/motel type quarters. NAF and AF clerks, working alone, handle both NAF and AF transactions on their respective shifts. Certifying officer asks whether AF can reimburse NAF for AF work performed by NAF employees, in light of GAO decision 58 Comp Gen. 94, that purchases of services from NAFs, when authorized, must be treated as procurements, and of finding that this procurement is unauthorized because

it involves personal services. Reimbursement is authorized. Transaction should not be treated as procurement of personal services, but as method of allocating expenses of operating respective facilities on a cost sharing basis.

Matter of: Department of the Army: Services provided by non-appropriated fund employees, May 19, 1981:

This decision is in response to a request from a United States Army Finance and Accounting Officer for an advance decision. His request concerns the propriety of reimbursing a non-appropriated fund instrumentality (NAFI) with appropriated funds, for work performed by NAFI employees in support of appropriated fund activities.

Specifically, this case involves billeting activities at an Army base. There are two types of accommodations available on the base, both housed in a single hotel/motel type accommodation. One type, which includes Visiting Officer Quarters, Bachelor Officer Quarters, Distinguished Visitors Quarters, and Enlisted Bachelors Quarters, is operated with appropriated funds. The other is a NAFI enterprise operated to provide guest accommodations for relatives of military personnel stationed on the base and other transient needs. The volume of transactions, we are told, does not justify having two desk clerks, one paid from appropriations and the other a NAFI employee, on duty at all times to provide "check in-check out" services for the respective operations. Instead:

> [t]here are two appropriated fund desk clerks and three nonappropriated fund desk clerks, each working alone for an 8-hour shift. Each desk clerk handles both appropriated (52% of the workload) and nonappropriated (48% of the workload) fund transactions as they occur during the shift. * * *

Consequently, NAFI employees on their shift provide some of these services for accommodations receiving appropriated funds.

The Finance and Accounting Officer has before him a voucher for reimbursement of the NAFI for services involving the appropriated fund accommodations from October 1 to December 31, 1979. The Contracting Officer, citing the lack of authority for "personal services" contracts, has refused to authorize procurement of these services from the NAFI for subsequent periods. The Finance and Accounting Officer asks whether he may certify the voucher for payment, and further, whether the NAFI can properly be reimbursed from appropriated funds in the future; whether the transaction is in essence a procurement from a source outside the Government; and, if so, whether it should be treated as an Order for Supplies and Services rather than as an Order for Reimbursable Services from within the Government. The answer is that the voucher should not be paid, but not for the reasons suggested in the submission.

The Finance and Accounting Officer cites our decision, 58 Comp.

Gen. 94 (1978) (listed in his submission as B–148581, B–189651, and B–190650) as directing that NAFIs be treated as non-Government contractors for purposes of securing services from them. The dilemma arises because the contracting officer refuses to authorize a procurement of these services from the NAFI because he is not authorized to enter into personal service contracts.

It is not necessary to resolve the question of whether the billeting services of the NAFI desk clerks should be regarded as "personal services" for which the Army may not contract. In fact, 58 Comp. Gen. 94 and the Defense Acquisition Regulation (DAR) governing procurements from non-Governmental sources are not pertinent at all, because, in our view, no procurement is involved.

A decision has obviously been made to operate a single hotel/motel type accommodation with some billeting facilities for appropriated fund guests and some for non-appropriated fund guests. Obviously, an arrangement is necessary to allocate costs for common expense items, such as lobby maintenance and repair. Since the volume of traffic does not justify assigning two desk clerks for every shift, according to the submission, a cost sharing arrangement is also necessary for the salary expenses of the total number of clerks employed. If the total number of NAFI desk clerks is disproportionate to the total number of NAFI transactions, as alleged, redress can be made by replacing one NAFI desk clerk with one appropriation-funded desk clerk. If the allocation of costs is still inaccurate, payment of the difference may be effected, using DA Form 2544 and Standard Form 1080, treating this as a transfer between funds.

[B–198031]

Officers and Employees—Transfers—Expenses—Relocation *v.* Training

Department of Army employee stationed in Germany and assigned to long-term training in United States is not entitled to full permanent change of station entitlements until the training is completed and he is transferred to a new permanent duty station.

Officers and Employees—Training—Transportation and/or Per Diem—Cost Comparison Requirement

Army employee on long-term training assignment may have orders retroactively amended to authorize per diem where cost comparison required by statute was not made prior to issuing orders authorizing transportation of dependents and household goods.

Officers and Employees—Training—Transportation and/or Per Diem—Cost Comparison Requirement—Exceptions—Entitlements Under Service Agreements

Army employee may have orders issued authorizing advance return of dependents and household goods. Cost studies need not be made when it is agency's intent

not to allow dependent travel and transportation of household goods incident to the training assignment.

Transportation—Automobiles—Overseas Employees—Reimbursement Basis—Return to U.S. for Training Prior to Transfer

Army employee who is not expected to return to overseas assignment after training in United States may be reimbursed transportation costs for shipping privately owned vehicle by American flag vessel on Government bill of lading after training is completed, agreement is signed, and employee is assigned to new permanent duty station.

Storage—Household Effects—Overseas Employees—Nontemporary—Training Periods

Army employee may not be reimbursed for nontemporary storage expenses incident to training. However, agency has broad discretion to authorize period of time expenses can be allowed.

Foreign Differentials and Overseas Allowances—Effective Date—Dependents Return to United States

Army employee's overseas post allowances would cease when employee's family no longer occupies quarters and departs from overseas post.

Officers and Employees—Transfers—Service Agreements—Overseas Employees Transferred to U.S.—Return Travel, etc. Expense Liability—Constructive Cost Reimbursement Basis

Army employee may be reimbursed constructive cost of transportation from his old to his new duty station, less the cost of transportation from his old duty station to his place of residence.

Matter of: Stephen T. Croall—Transfer Entitlements—Overseas Tour of Duty—Long-Term Training in the United States, May 20, 1981:

This decision is in response to a letter dated February 25, 1980, from the Per Diem, Travel and Transportation Allowance Committee, Department of Defense, concerning the entitlement of overseas employees' travel and relocation expenses while on a long-term training assignment in the United States. The request has been assigned PDTATAC Control No. 80-8.

The case of one such employee is presented to clarify the question of authorized entitlements. Mr. Stephen T. Croall, a civilian employee of the Department of the Army stationed in Heidelberg, Germany, was selected to attend the Industrial College of the Armed Forces in Washington, D.C., from August 1979 through June 1980. After his selection, his civilian personnel office issued travel order No. 269-79, dated June 27, 1979, mistakenly authorizing full permanent change of station (PCS) entitlements from Heidelberg to Washington rather than issuing orders for an interim period of training. Mr. Croall who had completed his original overseas tour of duty in 1975, agreed in writing that, upon completion of the training assignment, he would either exercise his reemployment rights to Fort Monroe, Virginia, or

accept another assignment within the continental United States. The location of his new permanent duty station was to be determined shortly before completion of the training assignment. We understand that Mr. Croall has now finished his training assignment and has been assigned to a permanent duty station in Washington, D.C.

The authority for paying expenses of training is found in 5 U.S.C. § 4109 (1976), which provides that the head of an agency may authorize payment of all or part of the necessary costs of travel and per diem to persons undergoing training. In the alternative, the cost of transportation of the employee's immediate family, household goods and personal effects, packing, crating, temporarily storing, draying, and unpacking are authorized to be paid, but only when the estimated costs of transportation and related services are less than the estimated aggregate per diem payments for the period of training. It has been the position of this Office that the travel expenses payable in connection with training assignments are limited strictly to those expenses specifically stated in the training statute. *Michael G. Pond*, 58 Comp. Gen. 253 (1979), reconsideration denied, B-193197, January 10, 1980. However, the Army says that our interpretation, coupled with the Department of Army's policy of authorizing the maximum allowable entitlements, causes a number of problems in cases involving employees assigned to overseas duty stations who are selected to attend long-term training programs in the United States.

We are, therefore, asked the following questions pertaining to Mr. Croall's entitlements:

QUESTION 1

"May the fact that all ties to the overseas duty station are severed upon departure for the training assignment and the fact that the employee already has completed a transportation agreement, serve as a basis for allowing payment of full PCS benefits? For example, could a personnel action reassigning the employee to an activity nearest his training site, coupled with his earned return transportation agreement, establish entitlement to full PCS allowances?"

Answer. We have held in recent decisions that when an employee's transfer is interrupted by an interim period of training at another location before the transfer, the training site is normally regarded as only an intermediate duty station. The permanent change of station is not completed until after the training and the transfer to the new permanent duty location. *Donald C. Cardelli*, B-195976, February 8, 1980; *Ronald L. Esquerra*, B-195479, March 7, 1980; 52 Comp. Gen. 834 (1973).

Since it was the intention of the Army that Mr. Croall be assigned for training purposes, he would not be performing his regular duties. He would, in fact, be assigned to a training site and the permanent change of station would not be completed until after the training and his transfer to a new permanent duty station. In this respect, 2 Joint Travel Regulations, paragraph C4502–3 (change 164, June 1, 1979), provides instructions for civilian employees of the Department of Defense who attend a training program without returning to their old duty station. It is correctly stated therein that:

> * * * Payment of allowances prescribed in Chapter 14, as well as other permanent change of station allowances authorized in conjunction with an employee's transfer, however, may not be authorized until the employee has successfully completed the training program, signed the transportation agreement required under par. C4002, and has been assigned to a new permanent duty station other than the permanent duty station at the time of selection and entry upon the training assignment.

Your first question is answered in the negative.

QUESTION 2

"If the answer to the above question is negative, it appears that the original PCS order is in violation of 5 U.S.C. § 4109 and, therefore, must be amended, as a minimum, to delete the authorization for temporary quarters subsistence expense (TQSE), miscellaneous expenses, and shipment of the privately owned vehicle (POV). However, the cost comparison required by 5 U.S.C. § 4109 (per diem expenses versus movement of dependents and household goods (HHG)) was not performed. Since it has now been determined that authorizing per diem expenses would be more cost effective than authorizing movement, may Mr. Croall's order be retroactively amended, at this time, to authorize per diem?"

Answer. The above issue was discussed recently in our decision *Ms. Lynn C. Willis et al.*, 59 Comp. Gen. 619 (1980). We cite the general rule that orders may be modified when they are clearly in conflict with a law or regulation to make them consistent with the applicable law or regulation. We found that proper cost comparisons had not been made as required by 5 U.S.C. § 4109 (1976) prior to the issuance of orders authorizing the transportation of the employee's dependents and household goods incident to a training assignment, and held that such orders were not competent and may be retroactively modified to allow payment of per diem. We noted that a cost comparison showed that per diem would have been less costly, but apparently the actual as opposed to the estimated transportation costs were less than the per diem.

Since the proper cost comparison required by statute was not made

prior to issuing orders authorizing payment for transportation of Mr. Croall's dependents and household goods, the facts are essentially analogous to *Willis*. Further, there is no authority under the provisions of 5 U.S.C. § 4109 (1976), to pay transportation costs for the employee's privately owned vehicle (POV), or temporary quarters subsistence expenses. *Michael S. Pond, supra; Robert V. Brown*, B–185281, May 24, 1976. However, in the instant case, see discussion under Question 3 relating to advance return transportation.

The travel orders may be retroactively amended accordingly to authorize per diem under the provisions of 5 U.S.C. § 4109.

QUESTION 3

"If the answer to question #2 is positive, Mr. Croall desires to also utilize his entitlement to advance return transportation of dependents and HHG, authorized by 5 U.S.C. § 5729, based upon having completed a basic transportation agreement incident to his overseas period of service. May a travel order be cut at this time to retroactively authorize this advance return?"

Answer. The authority to reimburse an employee for the advance return of members of his family and shipping his household goods and personal effects is set forth at 5 U.S.C. § 5729 (1976). Subsection 5729(a) provides that, under such regulations as the President may prescribe, an agency shall pay such expenses, not more than once, prior to the return of the employee, when the employee has acquired eligibility for return transportation or when the public interest requires the return of the immediate family for compelling personal reasons of a humanitarian or compassionate nature. The appropriate regulations concerning this statutory requirement are found in the Federal Travel Regulations (FPMR 101–7, May 1973) (FTR), paragraph 2–1.5g(5), and 2 JTR, paragraph C7003–4 (change 142, August 1, 1977).

We have held that the benefits arising from a transportation agreement are part of the bargained-for consideration incident to employment and that these rights may be divested or revoked only in very limited circumstances. 54 Comp. Gen. 814 (1975). Thus, in effect, Mr. Croall acquired a vested right under 5 U.S.C. § 5729 because he had acquired eligibility for return transportation well before he was ordered to return for training. 54 Comp. Gen. 814 (1975). Although the travel of the dependents and shipment of the household goods did not precede Mr. Croall, under the statute, entitlement to return transportation of dependents and household goods at Government expense is not dependent upon the employee himself performing such travel. 36 Comp. Gen. 10 (1956).

Mr. Croall completed his obligation under his service agreement and, therefore, became entitled to the benefits under 5 U.S.C. § 5729 (1976). The travel orders may be amended accordingly.

QUESTION 4

"If the answer to question No. 3 is positive, Mr. Croall would, in essence, receive both per diem (under 5 U.S.C. 4109) and movement (under 5 U.S.C. 5729). To preclude this dual expenditure, is it permissible to disregard the costs of movement of dependents and HHG in performing the cost comparison required by 5 U.S.C. 4109 in cases where a previously earned entitlement to movement exists? In these cases movement would automatically be authorized in lieu of per diem, yielding a considerable savings to the Government."

Answer. The authority for paying expenses of training in 5 U.S.C. § 4109 is discretionary and it is up to the head of an agency to determine what part, if any, of the training expenses will be paid. *Raymond F. Moss*, B–180599, November 14, 1974. We have also recognized that agencies may in fact require employees to pay some of the indirect costs of training. *Thomas B. Cox*, B–187213, October 1, 1976. However, an agency may pay for the transportation of an employee's family and household goods pursuant to section 4109, only if the *estimated* cost of that transportation is less than the aggregate cost of per diem for the period of training. *Lynn C. Willis et al.*, *supra.* A *post factum* determination of this has been made herein (question and answer No. 2). But in accordance with our answer to question No. 3, the transportation of an employee's family and household goods may, in appropriate cases, be authorized pursuant to 5 U.S.C. § 5729, and not 5 U.S.C. § 4109. Thus, in future cases of this nature, it would not be necessary to perform a cost comparison because dependent travel and transportation of household goods will be performed under 5 U.S.C. § 5729. The agency retains discretion to authorize full or partial per diem to an employee for the training. We note that the Office of Personnel Management has proposed a regulation which would set per diem for training assignments in excess of 30 days at 55 percent of the full per diem allowed by the Federal Travel Regulations. 45 FR 67669 (October 14, 1980).

QUESTION 5

"In a similar case dealing with long-term training prior to a known PCS (B–185281, 24 May 1976) you stated that the employee's entitlement to TQSE could be utilized in advance of the actual PCS as long

as selection for the training program was tantamount to notice of transfer. May this principle be extended to allow for the advance shipment of Mr. Croall's POV in anticipation of his PCS in June 1980? May transportation expenses incurred in traveling to and from the ports to deliver and pick up the POV be reimbursed, and if so, is reimbursement limited to a construction of the costs which would have been incurred if the employee had travelled directly from the foreign area to the new permanent duty station?"

Answer. In our decision *Robert V. Brown*, B–185281, May 24, 1976, cited above, we allowed reimbursement for temporatory quarters subsistence expenses where the employee's training assignment was in fact ordered in anticipation of his further reassignment to a new but undetermined permanent station. This decision was also based on the fact that an employee transferred to a new permanent duty station may be reimbursed for TQSE prior to reporting for duty at the new duty station regardless of the location of the temporary quarters. We believe that the rationale in that decision can be extended to the shipment of POV's where the employee is assigned to training with the understanding that, upon completion of the training, he or she will be assigned to a new permanent duty station in the United States. Since such reimbursement incident to 5 U.S.C. § 5727(b) (1976), relates to a return from overseas pursuant to transfer to a new duty station, reimbursement should not be made until the training is completed, the appropriate agreement has been signed, and the employee has been assigned to a new permanent duty station. B–166943, February 16, 1971; B–161795, June 29, 1967.

Transportation expenses incurred in traveling to and from the ports to deliver and pick up the POV should be allowed as in any permanent change of station transfer in accordance with the applicable regulations in the FTR, paragraph 2–10.4, and 2 JTR paragraph C11004. See also *Louis DeBeer*, B–193837, July 17, 1979.

QUESTION 6

"While stationed in Germany, Mr. Croall had HHG in nontemporary storage (NTS) authorized by 5 U.S.C. 5726(b). If his orders are amended to authorize per diem, may his goods remain in NTS for the duration of his training assignment? If he is authorized movement of dependents and HHG in lieu of per diem, may that portion of his HHG which are in NTS remain since technically, his permanent duty station remains in Germany until completion of the training?"

Answer. There is no authority to reimburse an employee for nontemporary storage of household goods incident to training under the provisions of 5 U.S.C. § 4109. *Michael G. Pond*, *supra*. Thus, any authority for the nontemporary storage of household goods must arise out of Mr. Croall's entitlement in 5 U.S.C. § 5726(b) (1976). Like the

provisions authorizing travel expenses under section 4109, the provisions of section 5726(b) are discretionary with the head of an agency. The regulations state in 2 JTR, paragraph C8002–c(2) :

(2) *Eligibility.* To be eligible for nontemporary storage one of the following conditions must be met:
1. the permanent duty station is one to which he is not authorized to or at which he is unable to use his household goods,
2. the storage is authorized in the public interest,
3. the estimated cost of storage would be less than the cost of round trip transportation (including temporary storage) of the household goods to the new permanent duty station.

The regulations also state in 2 JTR, paragraph C8002–c(4), that eligibility shall be deemed to terminate on the last day of work at the post of duty. But,

* * * When an employee ceases to be eligible for the allowance, storage at Government expense may continue until the beginning of the second month after the month in which his eligibility terminates, unless, to avoid inequity, the overseas command extends the period. * * *

Since this authority is discretionary, we do not wish to interfere with the exercise of the agency's discretion by establishing parameters in which nontemporary storage must cease. However, if it is determined by the agency in advance that the employee will no longer return to his overseas assignment after the completion of training, then it could be determined that the employee's eligibility terminated on his last day of work at the post of duty.

QUESTION 7

"While assigned to Germany, Mr. Croall received a post allowance and Living Quarters Allowance. If it is determined that Mr. Croall's official duty station continues to be in Germany while he is attending the training, the Department of State Standardized Regulations are unclear as to the point in time the entitlement to these allowances ceases. Does authorized delayed travel of the dependents have an effect on the termination of allowances? Does the type of travel order (per diem versus movement of dependents and HHG) have an effect on the termination of allowances?"

Answer. We agree that the State Department Standardized Regulations (Government Civilians, Foreign Areas), section 130, living quarters allowance, and section 220, post allowance, are unclear as to the point in time the entitlement to these allowances cease when long-term training is involved. However, in response to our inquiry the State Department advised us that:

In general, so long as the employee is assigned to Heidelberg, Germany and is absent on temporary duty (training) orders with per diem and so long as his family continues to reside in Heidelberg with quarters costs incurred, the living quarters allowance and the post (cost of living) allowance would continue. A transfer order (permanent change of station) for employee would terminate allowances (including quarters and post) at employee's old post as of the date of his departure (or earlier if he stopped incurring quarters cost at the old post),

or on the effective date of transfer, if employee is already at the new post. Such transfer order would include authority for transportation of dependents and household goods.

The above is the State Department's interpretation of its own regulations and should be given great weight. However, it is only the general rule and without more information as to a specific case, we would be unable to determine exactly when the allowances terminated. If, as the answer to question No. 3 indicates, a travel order is issued to retroactively authorize advance return travel of dependents and household goods it would seem that the allowances would cease when the employee's family no longer occupies quarters and departs from the overseas post. Effective use of advance return travel for dependents and household goods in future long-term training assignments of this nature could alleviate the necessity for the payment of overseas allowances. If there is still any doubt as to the payment of overseas allowances in Mr. Croall's case, the matter could be submitted at a later date together with more detailed information.

QUESTION 8

"Mr. Croall's actual place of residence is Fort Monroe, Virginia. If he is authorized advance return of dependents and HHG, as contemplated in question #3 above, he will designate an alternate destination of Washington, D.C., and accept responsibility for any difference in cost. Upon completion of the training assignment when the final PCS occurs, can further movement at Government expense be authorized for the dependents and HHG? Would such reimbursement be limited to the constructed cost of transportation from the old to the new duty station? Would such shipment of HHG be limited to the constructed cost of shipment in one lot by the most economical route from the old to the new duty station?"

Answer. The authority for the payment of transportation expenses for the prior return of the employee's family and household goods under 5 U.S.C. § 5729 limits reimbursement. The employee is entitled to transportation expenses from his post of duty to his actual place of residence. Mr. Croall's actual place of residence is Fort Monroe, Virginia. Thus, since Mr. Croall has completed his training, received his permanent change of station orders, and executed the necessary agreement, he may be reimbursed the constructive cost of transportation from his old to his new duty station, less the cost of transportation from his old duty station to his place of residence. 52 Comp. Gen. 834 (1973). The shipment of household goods should be limited to the constructive cost of shipment in one lot by the most economical route from the old to new duty station. *Ramon v. Romero*, B–190330, February 23, 1978; FTR paragraph 2–8.2d.

Your questions are answered accordingly.

[B-200121]

Contracts—Time and Materials—Evaluation Factors—Material Handling Costs—Not Included in Basic Labor Rates—Separate Item for Evaluation Recommended

Evaluation scheme for award of time and materials contract which does not take into account reimbursable material handling costs when not included in basic labor rates violates fundamental principle that all competitors must be evaluated on comparable basis since offerors who do include these costs in hourly labor rates will be evaluated on basis of total cost to Government while others will not. Scheme is further defective because it may not indicate which offer does represent lowest overall cost to Government.

Matter of: Beta Industries, Inc., May 20, 1981:

Beta Industries, Inc. protests the evaluation method of Air Force solicitation No. F33601-80-RX194 which requests proposals for a time and materials type contract to provide quick response engineering and related technical services to support the scientific and engineering staff of the Wright Aeronautical Laboratories, Flight Dynamics Laboratory, Wright-Patterson Air Force Base.

Essentially, Beta contends that under the terms of the RFP it will be evaluated for award on the basis of its offered hourly labor rates which include certain material handling costs, whereas a competitor could be evaluated on the basis of hourly labor rates which do not include material handling costs despite the fact that the competitor will be reimbursed for those indirect costs by the Air Force if awarded the contract.

We sustain the protest.

Defense Acquisition Regulation (DAR) § 3-406.1(a) (1976 ed.) explains the time and materials type of contract as follows:

> The time and materials type of contract provides for the procurement of supplies or services on the basis of (i) direct labor hours at specified fixed hourly rates (which rates shall include wages, overhead, general and administrative expense, and profit) and (ii) material at cost, and, in addition, where appropriate, material handling costs as a part of material cost. Material handling costs may include all indirect costs, including general and administrative expense, allocated to direct materials in accordance with the contractor's usual accounting practices consistent with Section XV [Contract Cost Principles and Procedures]. Such material handling cost should include only costs clearly excluded from the labor hour rate.* * *

The RFP contained the following "Notice to Offerors" regarding material handling costs:

> Reference DAR § 7-901.6 entitled "Payments." Material Handling Costs will be reimbursed separately under the resulting contract, only to the extent that they are excluded from the hourly rate. Material handling costs will be audited upon completion of the contract.* * * Final payment will be withheld pending completion of the audit.

DAR § 7-901.6 defines material handling costs in substantially the same way as does DAR § 3-406.1.

The RFP provided that the "lowest total price will be the controlling factor for an award to [an] offeror whose proposal has been evaluated

as technically acceptable," and that the lowest total price would be determined by multiplying the offered labor rates by the estimated required manhours listed in the schedule of supplies/services and then totaling the products. In addition, the schedule listed an estimated amount of $320,000 for materials, subcontracting and travel.

Beta suggests that an evaluation procedure which does not consider all offerors' material handling costs improperly might prejudice Beta in the competition. Beta points out that where a reasonable estimate of the material handling costs for a time and materials contract is, for example, $200,000, the offer by a firm such as Beta which distributes that amount over labor costs of $800,000 will be evaluated as $1,000,000. However, an offer from a firm which intends to bill material handling costs separately and whose labor costs also are $800,000 will be evaluated as only $800,000. Thus, assuming both offers were technically acceptable, the one excluding material handling costs from its labor rate would be selected for award, not withstanding that both offers represent the same $1,000,000 overall cost to the Government.

The Air Force argues that the solicitation treats offerors equally because each offeror has the option of including material handling costs in its hourly labor rates or billing for these costs outside the hourly rate after receiving the contract, and presumably offerors would structure their proposals to their advantage—by not including handling costs in labor rates—pursuant to the RFP evaluation scheme.

We find the Air Force position to be without merit for two reasons. First, offerors do not necessarily have the option of structuring their proposals as the Air Force suggests. DAR § 3-406.1 permits the billing of material handling costs outside of the hourly labor rate only "in accordance with the contractor's usual accounting practices consistent with Section XV." Thus, a contractor which usually distributes its indirect material handling costs over direct labor hours for billing purposes may not change its accounting approach for bidding on a particular Government contract. Second, even if offerors have such an option, there is no guarantee, given the audit requirement, that *all* offerors would choose to bill separately for the material handling costs. Consequently, under the Air Force evaluation scheme, it is conceivable that an offeror who does so will be evaluated as low even though its offer in fact would not represent the lowest overall cost to the Government because another offeror does not do so.

To insure that offerors compete on an equal basis so that the evaluation will reflect the actual low offer on the basis of all contract costs, we believe the Air Force should require offerors to state in their offers whether they included material handling costs in their hourly labor rates, and to the extent that they intend to seek reimbursement of such costs separately pursuant to the RFP's "Notice to Offerors," to state the estimated amount of material handling costs. In evaluating offers,

the Air Force should analyze offerors' estimated material handling costs to determine their reasonableness and consider them in determining which offer would be most advantageous to the Government. In this respect, the Air Force, for example, may rely on prior procurement data, *see* DAR § 3-807.2(a)(2), or even a limited preaward field audit to determine such costs' reasonableness. *See* DAR § 3-801.5 (b)(2). This is so regardless of whether the Air Force decides, as it did here, that adequate price competition exists, exempting offerors from submitting cost and pricing data. *See* DAR § 3-807.7(a).

Apparently, in a previous procurement the Air Force had required the submission of cost data for evaluation, including projected material handling costs as a fixed percentage of the Government's estimate of required materials, but canceled the solicitation principally for two reasons: DAR § 7-901.6, which authorizes the payment of material handling costs as an element of material cost, does not mention the use of material handling costs in the evaluation process; and the Air Force believed that the solicitation's requirement that material handling costs be estimated as a fixed percentage of material cost would violate the statutory prohibition against the cost-plus-a-percentage-of-cost system of contracting at 10 U.S.C. § 2306(a) (1976).

We think DAR § 7-901.6 and 10 U.S.C. § 2306(a) are inapposite. Simply put, neither of these provisions concerns the manner in which an agency *evaluates* costs; they address the *allowability* of certain costs. The fact that DAR § 7-901.6 authorizes the payment of material handling costs as material costs does not preclude an agency from evaluating the impact of a particular offeror's estimated costs in determining the offer which is most advantageous to the Government. Similarly, the statutory ban on the cost-plus-a-percentage-of-cost system of contracting does not prohibit the evaluation of provisional percentage overhead rates subject to adjustment to reflect actual costs to determine the actual amount of payment. *See* 35 Comp. Gen. 434, 436 (1956).

In its report on the protest, the Air Force introduced another objection to evaluating material handling costs: the Air Force itself allegedly cannot provide a reasonable estimate as to the amount of the material or material handling costs which will be incurred.

We do not understand the Air Force's objection. First, this would not preclude an offeror from furnishing an estimate of material handling costs. Second, to the extent that the Air Force is concerned that it will have difficulty in evaluating the reasonableness of an offeror's estimate, as already noted a limited preaward field audit could be helpful in that regard. Moreover, as illustrated above, the evaluation of proposals under the solicitation as presently constructed essentially frustrates the requirement for equal competition. The Air Force in fact was able to compute and include in the solicitation an

estimate of materials, subcontracting and travel costs ($320,000) and estimates of man-hours for each of the numerous labor categories. We assume that those are based on procurement history, and we do not see why an estimate of materials and material handling costs could not also similarly be computed which would at least equalize the competition to an acceptable degree. In this respect, an estimate need only be based on the best information available to be deemed reasonable and thus properly form a basis for evaluation. See *JETS Services, Inc.*, B–190855, March 31, 1973, 78–1 CPD 259. While there is no guarantee of total accuracy in any estimate used for evaluating costs, that does not alleviate the necessity for an agency to analyze all nonspeculative cost risks. *Cf. Dynatrend, Inc.*, B–192038, January 3, 1979, 79–1 CPD 4 (where we sanctioned the Government's use of cost estimates to evaluate costs while cautioning against undue reliance upon them given the uncertainties associated with cost reimbursement contracting).

In view of the foregoing, we recommend that the Air Force take appropriate steps, including amending the RFP, to provide for an evaluation of the material handling costs as a separate item for those offerors who do not include those costs in their basic labor rates. We are bringing this matter to the attention of the Secretary of the Air Force by separate letter.

The protest is sustained.

[B–201842]

Telephones—Private Residences—Prohibition—Inapplicability—Government-Leased Quarters Overseas—Nonoccupancy Pending Staff Change—Accrued Charges

Because of necessity to ensure telephone service in the Air Deputy's residence upon his occupancy of quarters in Norway, telephone service is secured by the U.S. Government under long-term lease. For 2 months, between incumbents, the residence was vacant but the telephone charges continued to accrue. Although 31 U.S.C. 679 prohibits using appropriated funds for telephone service in a private residence, the statute is not to be applied here where neither the outgoing nor incoming Air Deputy occupied the premises during the period covered by the charges. 11 Comp. Gen. 365 (1932), modified.

Matter of: Charges for Telephone Service in a Private Residence, May 20, 1981:

This case concerns whether the statutory prohibition in 31 U.S.C. § 679, against using appropriated funds to pay for telephone services in a private residence, applies to Government-leased quarters when they are vacant for a short period between the incoming and outgoing occupants to whom the quarters are assigned. As will be explained, the statute is not for application in the limited circumstances presented and appropriated funds may be used.

The case was presented for an advance decision by Captain P. E.

Ruter, Accounting and Finance Officer, Department of the Air Force, Headquarters 86th Tactical Fighter Wing (USAFE), APO New York 09012.

The Air Deputy for the Allied Forces Northern Europe, a United States Air Force general officer, is stationed in Norway and is provided with quarters leased by the Government. For these quarters, the Budget and Finance Office at Headquarters Allied Forces Northern Europe secures telephone service under a long-term lease with the Norwegian Telephone Company for which the Air Deputy pays the charges. The lease is necessary to ensure that each new Air Deputy immedaitely will have the 24-hour telephone service mandated by the nature of his position. If the service were terminated upon the departure of each Air Deputy, there is a likelihood of delay in providing telephone service to the successor.

From July 14 until September 16, 1979, the Air Deputy's quarters were vacant due to a change in command. On September 17, the new Air Deputy moved into the quarters.

Since the telephone service is on a leased basis, the basic monthly charge continues to accrue during the time the residence is vacant. The former Air Deputy paid for the service until he departed and the new Air Deputy assumed the cost of the service when he commenced occupancy. The Finance Officer questions whether, in view of the statutory prohibition in 31 U.S.C. § 679, appropriated funds may be used to pay for the service during the period that the residence was vacant. As he points out, if the service charge may not be paid out of appropriated funds, the charges may be assessed against the current Air Deputy for a period when he did not occupy the residence.

Section 679 of title 31, United States Code (derived from section 7 of the act of August 23, 1912, ch. 350, 37 Stat. 414, as amended) provides in pertinent part:

> Except as otherwise provided by law, no money appropriated by any Act shall be expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone service from private residences or private apartments * * *.

While it is clear that the statutory prohibition would preclude appropriated funds from being used to pay for telephone service supplied to the Air Deputy, this does not resolve this case. Here, the telephone service was maintained during the interim period by the Government and no Government official received the benefit of this service. Thus, the question to be resolved is whether the statutory prohibition is to be applied to this situation.

In sight into the purpose and scope of 31 U.S.C. § 679 is provided in an unpublished decision of the Comptroller of the Treasury of November 12, 1912, 63 Manuscript Decision 575, issued shortly after

the statute was enacted. The decision ruled that the statute did not prohibit the installation of telephones in Government buildings provided to forest rangers as residences but which also served for official purposes. In support of the holding, it was stated in part:

> Section 7 of the Legislative, Executive and Judicial Appropriation Act, set out in your letter, was not passed as I understand for the purpose of requiring government employees to bear the expense of telephone messages on public business, but on the contrary, its plain intent was that the Government should not be chargeable with the cost of private and personal messages of such employees. The provision in question was passed to secure the latter purpose and grew out of the fact that a large number of public officers here in the District of Columbia had installed in their private residences telephones at Government expense under the guise of their use for public purposes, when in truth the Government had provided them with sufficient telephones in their public offices to transact all the public business.

As can be seen, the statute was enacted to stop public officers from obtaining telephone service at Government expense under the guise of the telephone being necessary for public purpose. As further indicated above, this legislative intent must be kept in mind in all cases but should not cause an inflexible rule to be formulated which then results in an officer or employee bearing the cost of a telephone for public (i.e., Government) use. We have recognized and applied these principles in certain situations such as authorizing reimbursement of a telephone reconnection charge to a service member who was required by the Government to move his mobile home from one mobile home park to another. 56 Comp. Gen. 767 (1977). There we indicated that the statute should not be interpreted so as to preclude reimbursement to an individual "for an expense incurred as a result of governmental action over which he had no control."

However, in a case somewhat similar to the present case it was held that the statute prohibited the use of appropriated funds to pay for telephone service in the residence quarters of the United States Ambassador to Mexico from September 1 to October 31, 1930, a period during which there was no occupant of such quarters. 11 Comp. Gen. 365 (1932). That case differs from the present case in that in the 1932 case the telephone service was apparently retained during the interim period primarily due to the inadvertence of the responsible Government official and not due to any long-term contract or pressing Government requirement for the service.

In any event we believe that the instant case does not fall within the statutory prohibition. Clearly, there is no public official who received the benefit of the telephone service. Indeed, no public official received the telephone service and the quarters were not the "private residence" of either the outgoing or incoming officer during the period in question. Thus, there would be no frustration of congressional intent if appropriated funds were used to pay for this telephone service.

While ordinarily telephone service should be cancelled during periods of nonoccupancy of Government-procured quarters to prevent incurring expenses such as these, in this limited situation where public necessity required retention of telephone service during the nonoccupancy, appropriated funds may be used to pay for the telephone service. To the extent that the decision in 11 Comp. Gen. 365 (1932) is inconsistent with this decision, it is modified.

The voucher presented is being returned for payment.

[B-202041]

Fair Labor Standards Act—Comparison With Other Pay Laws—Combining Benefits—Propriety

Employee, nonexempt under Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* (1976), travelled for 6 hours on a nonworkday during his corresponding duty hours. Although such time is hours of work under FLSA, since he had a holiday off and he only worked 38 hours under FLSA during that workweek and he has already been compensated for 40 hours under title 5, U.S. Code, he is not entitled under FLSA to 6 hours pay at his regular rate in addition to the 40 hours basic pay he has received.

Matter of: Louis Pohopek—Compensation for Traveltime, May 20, 1981:

This decision is in response to a request from Mr. A. W. Countryman, Chief Steward and Mr. John P. O'Brien, President, Federal Employees Metal Trades Council, Portsmouth Naval Shipyard, Portsmouth, New Hampshire. They have requested our decision concerning the entitlement of Mr. Louis Pohopek, a pipefitter at the shipyard, to compensation for time he spent on a nonworkday, traveling to a temporary duty site. This question has been handled as a labor-management relations matter under our procedures contained in 4 CFR Part 21 (1980). We did not receive any comments from officials at the Portsmouth Naval Shipyard.

Mr. Pohopek was assigned to temporary duty in Scotland and was directed to begin travel at the end of his workday on Friday, September 9, 1977. He went from his home to Boston and departed for Scotland at 11 p.m. He arrived in Scotland at 2 p.m. on Saturday. Six hours of his traveltime on Saturday corresponded to his regular workday hours.

The union reports that the comptroller of the shipyard stated that Mr. Pohopek, who is nonexempt under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, was not entitled to compensation for his Saturday traveltime under the FLSA since he had worked only 32 hours during the week prior to the travel—the Monday of that week was Labor Day. The comptroller apparently reasoned that because the FLSA provides only for overtime entitlement, the traveltime could

not be counted as hours of work unless 40 hours of actual work had been completed prior to the travel. The union has asked whether Mr. Pohopek's Saturday traveltime can nevertheless be considered hours of work under FLSA, and it therefore asks if Mr. Pohopek can be compensated at his regular rate of pay for that time.

As a nonexempt employee under the Fair Labor Standards Act, Mr. Pohopek is entitled to overtime compensation under the FLSA or title 5, United States Code, whichever provides the greater benefit. 54 Comp. Gen. 371, 375 (1974). It is clear that Mr. Pohopek's Saturday traveltime during his corresponding work hours is "hours of work" under the FLSA. Attachment 4 to FPM Letter 551–1, May 15, 1974, provides at paragraph C that:

> Time spent traveling (but not other time in travel status) away from his official duty station is "hours worked" when it cuts across the employee's workday. The time is not only "hours worked" in regular workdays during normal work hours but also during the corresponding hours on nonwork days.

The same attachment, however, provides that:

> Excused absences with pay (holidays, sick, annual, or other paid leave) are not periods of work even though the employee is compensated for those periods of nonwork.

Therefore, under the FLSA, Mr. Pohopek may be considered to have worked a total of 38 hours—4 workdays of 8 hours each and 6 hours of traveltime.

Under the provisions of 5 U.S.C. 5544(a) (1976), an employee may not be compensated for traveltime away from the official duty station unless the travel:

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

It does not appear that Mr. Pohopek's Saturday travel falls within any of the above categories.

Under title 5, unlike the FLSA, a paid absence for holidays or annual or sick leave is considered employment. FPM Supp. 532–1, subchapter S–8–4.b. (8), May 31, 1978. According to the provisions of title 5, therefore, Mr. Pohopek is entitled to 40 hours of basic pay—8 hours for the holiday he was off and 32 hours for four, 8 hour days worked Tuesday through Friday.

Mr. Pohopek may not receive his regular rate of pay for his traveltime under FLSA in addition to the 40 hours he has been paid under title 5. Such compensation would be an improper combination of the benefits provided by the FLSA and title 5. Since Mr. Pohopek has received compensation for 40 hours under title 5 for the workweek in question and since under FLSA he has only worked 38 hours he has therefore received the greater of the benefits provided by the applicable laws.