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[B-204189]

Courts—District of Columbia—Superior Court—Criminal Justice Act Application—Adequate Representation of Indigents—Expert Witness Services at Sentencing

The District of Columbia (DC) Criminal Justice Act, D.C. Code Ann. 11-2605 (1981), provides funding for expert and other services necessary for "an adequate defense" for eligible defendants. The purpose of the Act is to assure adequate representation of indigent defendants in the local courts at all stages of the proceedings. We construe the statutory phrase "an adequate defense" to include sentencing. Moreover, the Act plan, which has been implemented as required under D.C. Code Ann. 11-2601, as well as the DC Superior Court Criminal Rules, contemplates defense of the contents of the presentence report and presentation of mitigating factors, at the time of sentencing. Therefore, we would not object if the Superior Court authorizes or approves expert and other services necessary for an adequate defense at the time of sentencing.

Matter of: District of Columbia Criminal Justice Act—Payment for expert and other services at sentencing, July 6, 1982:

The Chief Judge of the Superior Court of the District of Columbia (DC) asked for our opinion on whether an outside organization which performs services requested by defense counsel in connection with a defendant to be sentenced by the judge may be paid for such as an expert witness at the time of sentencing. District of Columbia Criminal Justice Act, D.C. Code Ann. §§ 11-2601 *et seq.* (1981).

The Chief Judge suggests that sentencing is not a part of defense and as such would not fall under expert and other services "necessary for an adequate defense" under D.C. Code § 11-2601. He states that the question in issue appears to be a novel one in the District of Columbia. He further states that he can find no case law either in the District of Columbia or the Federal courts which directly addresses the use of expert witnesses at sentencing.

For the reasons discussed below, it is our position that, if desirable, the Superior Court may pay for services necessary to assure the defendant "an adequate defense" at sentencing.

The Superior Court has discretionary authority under the following provisions of the D.C. Code Annotated to authorize or approve expert and other services necessary for an adequate defense of indigent defendants in criminal cases:

§ 11-2601. Plan for furnishing representation of indigents in criminal cases.

The Joint Committee on Judicial Administration shall place in operation, within ninety days after the effective date of this chapter, in the District of Columbia a plan for furnishing representation to any person in the District of Columbia who is financially unable to obtain adequate representation—

* * * * * * *

Representation under the plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. * * *

§ 11-2603. Duration and substitution of appointments.

A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the court through appeals * * *.

§ 11-2605. Services other than counsel.

(a) Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court shall authorize counsel to obtain the services.

(b) Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services * * * without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed * * * the rate provided by section 3006A(e)(2) of title 18, United States Code * * *.

In *United States* v. *Durant*, 545 F.2d 823, 827 (2d Cir. 1976) (a case construing 18 U.S.C. § 3006A(e), which is for all practical purposes identical to D.C. Code Ann. § 11-2605), the court discussed the phrase "necessary to an adequate defense"[1] as follows:

* * * We recognize, as did the Fifth and Eighth Circuits, that it is difficult to spell out a rigid rule in great detail. Yet, the purpose of the Act, confirmed by its legislative history, * * * is clearly to redress the imbalance in the criminal process when the resources of the United States Government are pitted against an indigent defendant. Therefore, the phrase "necessary to an adequate defense" must be construed with this commendable purpose in mind. "Necessary" should at least mean "reasonably necessary," and "an adequate defense" must include preparation for cross-examination of a government expert as well as presentation of an expert defense witness. This does not mean that applications for expert assistance should be granted automatically, or that frivolous applications should be granted at all. But it does mean that the Act must not be emasculated by niggardly or inappropriate construction.

Sentencing is not technically a part of defense of the charges. However, even at sentencing, a defendant has rights to be protected. See *Mempa* v. *Rhay*, 389 U.S. 128, 88 S. Ct. 254 (1967); *Townsend* v. *Burke*, 334 U.S. 736, 68 S. Ct. 1252 (1948). A defendant for whom counsel is appointed has a right to be represented "at every stage of the proceedings from his initial appearance before the court through appeals." D.C. Code Ann. § 11-2603. Representation includes expert and other services. *See* 50 Comp. Gen. 128 (1970); D.C. Code Ann. § 11-2601.

Further, the DC Criminal Justice Act Plan, which has been implemented as required under D.C. Code Ann. § 11-2601, establishes the following defense practice standards for attorneys in the Superior Court to consider in preparing for sentencing:

10.8 After Conviction

(a) *Sentencing*
Counsel has the duty to consider the following in preparing for sentencing:

* * * * * * *

(ii) The presentence report prepared for the court, with a view to verifying, supplementing, or challenging its contents as appropriate.

(iii) Preparation of a sentencing memorandum in the event there are unique, favorable, mitigating factors known to counsel regarding the defendant that would not otherwise be brought to the court's attention.[2]

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[1] This phrase now reads "necessary for an adequate defense" in 18 U.S.C. § 3006A(e) as well as D.C. Code Ann. § 11-2605.

[2] The Joint Committee on Judicial Administration adopted this plan on April 21, 1981.

Under the DC criminal representation plan, attorneys in the Superior Court are required to review the contents of the presentence report and to inform the sentencing court of any mitigating factors. Similarly, Rule 32 (dated November 11, 1976), Superior Court Criminal Rules, requires the court, before imposing sentence, to afford the defendant or his counsel an opportunity to comment on the presentence report and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in such report. Hence, the DC criminal representation plan and criminal rules contemplate defense of the contents of the presentence report and presentation of mitigating factors at sentencing.

In view of the foregoing, we construe the statutory phrase "an adequate defense" to include sentencing. Accordingly, we would not object if the Superior Court authorizes or approves payment for any necessary expert or other services required by the defense at sentencing. Review of the necessity for any given service is, of course, part of the trial judge's responsibility under the statute.

[B-200199]

Health and Human Services Department—Successor to Community Services Administration—Grants—Crisis Intervention Program—Appropriation Obligation—Litigation Pending

Department of Health and Human Services, as successor to Community Services Administration (CSA), should not recover funds expended pursuant to Stipulation and Agreed Order entered to resolve court action alleging CSA improperly withheld payments due plaintiffs under fiscal year 1979 Crisis Intervention Program. Although Order was subsequently vacated, grant fund appropriation was validly obligated prior to close of fiscal year 1979 by filing evidence of potential liability because of pending litigation, pursuant to 31 U.S.C. 200(a)(6). Funds were therefore still available when grants were made in fiscal year 1980.

Appropriations—Fiscal Year—Availability Beyond—Federal Aid, Grants, etc.—Obligation Under Stipulated and Agreed Order—Payments After Order Vacated

Department of Health and Human Services should make further payments to grantees only to the extent grantee incurred obligations in reliance on the grant agreement. Grants may then be terminated.

Matter of: Community Services Administration—Fiscal Year 1979 Crisis Intervention Program funds, July 7, 1982:

The Director of the Community Services Administration (CSA)[1] requested our decision on what action CSA should take concerning

[1] CSA was terminated effective October 1, 1981. We understand that its remaining affairs are being handled by the Department of Health and Human Services. References to CSA, where appropriate, also include the Department, as successor to the Administration.

the expenditure of funds under the fisal year 1979 Crisis Intervention Program (CIP), which is the subject of a lawsuit, *Simer* v. *Rios*. Under a "Stipulation and Agreed Order" in that litigation CSA committed itself to expend $18 million of CIP funds. In furtherance of the agreements it made in the Stipulation, CSA entered into grant agreements totaling $4.5 million. After part of this sum had been disbursed to the grantees, the trial court vacated the Stipulation and Agreed Order. CSA asked what action it should take with respect to the grants it had made and the funds it had disbursed under the terms of the vacated Order.

For the reasons explained below, the Department need not recover any of the funds already disbursed to grantees. Further payments need be made to grantees who did not yet receive them only to the extent that the grantees incurred obligations in reliance on the grant agreements. Grants should then be terminated in accordance with the Department's standard procedures.

The action, *Simer* v. *Rios*, No. 79 C 3960 (N.D. Ill.) was brought on September 24, 1979, by eight named plaintiffs on behalf of themselves and on behalf of a class of persons. The plaintiffs complained that the CSA had improperly withheld CIP program funds by requiring applicants to furnish unpaid utility bills or a shutoff notice form a utility company in order to qualify for assistance. The plaintiffs filed a motion for partial summary judgment. To avoid the entry of a temporary restraining Order, CSA agreed by Stipulation on September 26, 1979, that it would immediately obligate the approximately $18 million involved to prevent their lapse on September 30. According to the submission, CSA then obligated the funds, "relying on the provisions of title 31 U.S.C. § 200."

At a hearing on January 4, 1980, the trial judge indicated that he intended to grant the motion for summary judgment and that the next step would be to certify a class. The attorneys for both parties informed the court that they believed that it was not feasible to distribute money directly to class members. It was agreed that the case would be continued so that the parties could attempt to reach a settlement.

On April 25, 1980, the judge signed the "Stipulation and Agreed Order" which the parties in the case had agreed to. The Order required CSA to use the "unexpended monies from the 1979 Crisis Intervention Program" to pay $250 towards the heating bills of each of the named plaintiffs, and to effectuate other "Energy Crisis" programs described in the Order in detail.

Specifically, the Order required CSA to provide $4 million for a hypothermia program, $4 million for a program to supply emergency energy conservation kits to needy households, $2 million for solarization program, $6.5 million for low income and elderly consumer advocacy in energy issues, $1 million for emergency Preparedness/Impact Assessment and Community Energy Planning programs, and additional funds for several small projects. Also, the agreement specifically provided that "[n]o proof of a shutoff notice or any evidence of unpaid utility bills is necessary for program eligibility."

On October 29, 1980, the trial judge vacated the April 25 Order, stating that he believed that ordering the relief set forth in the Stipulation was beyond his jurisdiction. In his memorandum opinion he indicated that he viewed the settlement as essentially providing class relief. Since both parties had conceded earlier that the case was unmanageable as a class action, he believed the Order to be improper.

The plaintiffs appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit. On October 7, 1981, the appellate court affirmed the district court's judgment, holding that the court below had acted properly by not certifying the plaintiff's action as a class action. *Simer* v. *Rios,* 661 F.2d 655 (7th Cir. 1981). The Supreme Court has denied certiorari.

Immediately after the judge had signed the Order on April 25, 1980, CSA began the process of implementing the programs described in the Order. CSA made most of the hypothermia and many of the solar grants required by the Order. Before the Order was vacated in October 1980, CSA awarded approximately $4.5 million in grants to various organizations. The attorney for CSA has stated that it awarded funds to some 15 to 20 hypothermia and/or solar grantees. CSA has not committed any more funds since October 29, 1980, and there is a balance of uncommitted funds of approximately $13.5 million. The grantees have expended most, but not all, of the $4.5 million awarded, according to the CSA attorney.

The submission asked whether CSA must recover from its grantees the funds it disbursed before the court vacated the Stipulation and Agreed Order. CSA also asked whether it was obligated to the grantees to whom awards were made but who had not received their funds by October 29, 1980.

Funds for the 1979 Crisis Intervention Program were included in a lump sum for "Community Services Program" appropriated by section 101(a) of Public Law 95-482, 92 Stat. 1603, a continuing resolution. The program itself is authorized by section 222(a)(5) of the Community Services Act of 1974, as amended, 42 U.S.C. § 2809(a)(5) (Supp. III 1979). It allows the Director of CSA to conduct:

> A program to be known as "Emergency Energy Conservation Services" designed to enable low-income individuals and families, including the elderly and the near poor, to participate in energy conservation programs designed to lessen the impact of the high cost of energy on such individuals and families and to reduce individual and family energy consumption.* * *

The subsection furthers provides:

> The Director is authorized to provide financial and other assistance for programs and activities, including, but not limited to, an energy conservation and education program; winterization of old or substandard dwellings, improved space conditioning, and insulation; emergency loans, grants, and revolving funds to install energy conservation technologies and to deal with increased housing expenses relating to the energy crises; alternative fuel supplies, special fuel voucher or stamp programs;

alternative transportation activities designed to save fuel and assure continued access to training, education, and employment; appropriate outreach efforts; furnishing personnel to act as coordinators, providing legal or technical assistance, or otherwise representing the interests of the poor in efforts relating to the energy crisis; nutrition, health, and other supportive services in emergency cases; and evaluation of programs and activities under this paragraph.* * *

It therefore appears that the grants were made for authorized purposes. As made clear by the above quotation, section 222(a)(5) of the Community Services Act is broadly enough worded to provide the authority for the expenditure of funds for the purpose of making hypothermia and solar grants.

Moreover, at the time the grants were made, CSA's fiscal year 1979 appropriation was still available for that purpose, having been validly obligated before the close of the fiscal year. Although grant awards were not made until fiscal year 1980, CSA asserts that it obligated the funds in fiscal year 1979 "relying on the provisions of Title 31 U.S.C. § 200." Section 200(a)(6) provides:

(a) * * * no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—

* * * * * * *

(6) a liability which may result from pending litigation brought under authority of law * * *.

We agree that CSA complied with the requirements of 31 U.S.C. § 200. While in this instance the Stipulation signed by both parties was used as the obligating document, CSA could, with equal validity, have filed the complaint or any other document providing evidence that litigation was in progress which could result in future liability.

We have had only one other occasion to consider the application of 31 U.S.C. § 200(a)(6) in litigation involving a proposed impoundment. In 54 Comp. Gen. 962 (1975), a preliminary court order, which was issued before an appropriation for the Food Stamp Program lapsed, required the agency to obligate its funds to preserve them, pending final decision on the merits of a controversy over the Department of Agriculture's refusal to expend funds for an outreach program. We held that the court order was effective to obligate the impounded appropriation balance under 31 U.S.C. § 200(a)(6).

Although the obligating document in the 1975 case was a court order, there is nothing in section 200(a)(6) to suggest that a court order is the only acceptable evidence of potential legal liability.

We conclude, therefore, that CSA's September 26, 1979, agreement by Stipulation to obligate the funds which were the subject of the suit served as the required evidence of a valid obligation of the appropriation balance and prevented its expiration.

Accordingly, at the time the grants were made in 1980 pursuant to the court order, the 1979 CIP funds were still available to liquidate the obligation. It follows that the payments CSA made to grantees were proper and need not be recovered.

With respect to grantees which CSA had not paid before the court vacated its Order, the Government is obligated to pay them only to the extent that they incurred obligations or expended funds in reliance on the promise to reimburse them which CSA made in the grant agreement. If, prior to the court's vacating Order, a grantee did not expand funds, or incur a legal obligation to do so, in reliance on CSA's agreement to reimburse it, the Government is free to terminate the grant in accordance with its standard regulatory provisions.

[B-207187]

General Accounting Office—Jurisdiction—Labor-Management Relations—Requests for Decisions—Comments From Other Party—Timeliness

General Accounting Office (GAO) will not take jurisdiction of an agency request filed under 4 C.F.R. Part 22, even though the union's objection to GAO consideration of the claim, because it was the subject of a pending grievance, was submitted more than 20 days after the union was served with agency request. The 20-day period for submission of written comments guarantees consideration of comments received within that period but does not nullify GAO's discretion to consider comments received after that time period has expired. To consider a claim subject to a negotiated grievance procedure after one of the parties objects would conflict with jurisdictional limits set forth in 4 C.F.R. Part 22, which are intended to ensure smooth functioning of the procedures of the Federal Service Labor Management Relations statute.

Matter of: Lawrence L. Longsdorf—GAO Jurisdiction—Party objects to GAO review under 4 C.F.R. Part 22, July 7, 1982:

By letter dated March 26, 1982, Mr. Robert B. Wassall, Director of the National Weather Service's Central Region, requested our decision concerning Mr. Lawrence L. Longsdorf's claim for 28 hours of compensatory time for travel and work he performed outside of normal working hours.

This claim is also the subject of a pending grievance filed under a negotiated grievance procedure on behalf of Mr. Longsdorf by his union, the National Weather Service Employees Organization. Since Mr. Longsdorf's union has objected to the submission of this matter to the General Accounting Office, we will not take jurisdiction. See 4 C.F.R. § 22.7 (1981).

Because a grievance has been filed, we have decided to treat this request under 4 C.F.R. Part 22, which outlines our procedures for decisions on appropriated fund expenditures which are of mutual concern to agencies and labor organizations. Therefore, on May 6, 1982, we wrote to the Director of the Central Region advising him that in accordance with 4 C.F.R. § 22.4, he was required to serve the appropriate union official with a copy of his request and submit a statement of service to this Office. Although he did not submit a certificate of service with his March 26 request, the Director advised us by a letter dated May 19 that he had sent the Union a copy of his request on April 12, which had been received on April 15. By a letter also dated May 19, the Union objected to the submission of this claim to GAO because it is subject to a negotiated grievance procedure.

Section 22.4(c) of our regulations concerning procedures for labor-management cases provides that responses to a request for a decision "should be submitted within 20 calendar days after the date of service of the request in order to ensure that it will be considered." Section 22.4(a) provides that when a party is served by mail, the date of service is the date the document served is deposited in the United States mail. Thus, the Union's response to us was not submitted within 20 calendar days after the date of service of the request. Even so, we will consider the Union's objections, and we will not assert our jurisdiction here.

We do not view the 20-day time period for submission of responses as a rigid limitation. When our rules concerning labor-management decisions were first published in the Federal Register we made the following comments concerning the time period for filing written comments:

> Some suggested that the time in § 21.5(b) for filing written comments be extended, or the regulations provide for extensions of time in certain circumstances. In response to these comments, the 15 day period has been extended to 20 days, but it was not considered necessary to provide formally for extensions of time. The final rule insures consideration of comments received within 20 days, but does not preclude consideration of comments received at a later date. 43 Fed. Reg. 32395 (1978).

The purpose of the establishment of the 20-day period was to assure the parties to the dispute that we would not decide the issue for 20 days and would definitely consider any comments submitted to us within that time period. However, we have retained our discretion to consider comments received after the 20-day period.

We have decided to exercise that discretion in this case and consider the Union's comments even though they were not submitted within the 20-day period. We do so because the circumstances of this case fall within the restrictions we have placed on our jurisdiction. Section 22.7(a) of our regulations provides that the Comptroller General will not review or comment on the merits of an arbitration award which is final and binding pursuant to 5 U.S.C. § 7122 (a) or (b). Since the negotiated grievance procedure is an integral part of the arbitration process, we determined that it would be inappropriate for GAO to respond to requests from either management or labor to review any matter subject to a negotiated grievance procedure if the other party objects. See section 22.7(b).

Therefore, since Mr. Longsdorf's union has objected to our review of his claim on the basis that it is subject to a negotiated grievance procedure, we will not assert our jurisdiction.

[B-196506]

Appropriations—Availability—Attorney Fees—Administrative Proceedings—Merit Systems Protection Board Complaints—Against Supervisors

Chairman, International Trade Commission, requests decision on whether Commission may use appropriated funds to furnish legal representation to employees brought before Merit Systems Protection Board on complaint of the Board's Special Counsel. Commission funds are available to provide counsel in cases in which supervisor performed the conduct which is the subject of the Special Counsel's complaint within the scope of employment and the agency determines that it is in it's interest to provide representation. Conduct is within the scope of a supervisor's employment if it is in furtherance of, or incident to, the carrying out of official duties. Because such conduct is in furtherance of an agency function, the cost of counsel may be considered a necessary expense incurred in performing that function.

Matter of: International Trade Commission—Legal representation, July 8, 1982:

The Chairman of the International Trade Commission has requested our opinion on whether the Commission may use appropriated funds to provide legal representation for employees brought before the Merit Systems Protection Board by the Special Counsel. We hold that it may.

The Merit Systems Protection Board, created by the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1111 (1978), 5 U.S. Code 1101 note) is charged with insuring adherence to the merit systems principles enunciated by the act. Among its duties, the Board (or an administrative law judge designated by the Board) conducts hearings to determine whether Federal employees have committed so-called prohibited personnel practices. The practices include discriminating for or against an employee on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation; granting any unauthorized preference or advantage to any employee for the purpose of improving or injuring the prospect of any particular person for employment; taking or failing to take a personnel action with respect to any employee as a reprisal for "whistleblowing" disclosures, and taking or failing to take such actions which violate any law, rule or regulation implementing, or directly concerning the merit systems principles of the act. 5 U.S.C. § 2302(b) (Supp. III, 1979).

The Board prepares a written decision at the conclusion of a hearing and may issue a final order imposing disciplinary action. 5 U.S.C. § 1207(a)(5), (b) (Supp. III, 1979). The Board may order an employee's removal, reduction-in-grade, debarment from Federal employment for up to 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000. 5 U.S.C. § 1207(b) (Supp. III, 1979).

The statute expressly allows any employee against whom a complaint has been presented to the Board to have a reasonable amount of time to answer the charges, to have a transcript kept of his hearing, and to have an attorney represent him. 5 U.S.C. § 1207(a) (1), (2), (4) (Supp. III, 1979).

Generally, the hiring of an attorney is a private matter between the attorney and the client, and absent express statutory authority, reimbursement of attorney's fees may not be allowed. 55 Comp. Gen. 1418 (1976). However, appropriated funds are available to provide legal counsel when representation of the employee is in the Government's interest. B-130441, April 12, 1978. The Department of Justice provides representation in actions brought against an employee under the authority of 28 U.S.C. §§ 516, 517, 518, and 547(b) (1976), when it believes that the outcome of the litigation could ultimately affect the rights and duties of the United States. These sections charge the Department with the responsibility for representing the United States in all litigation in which it has an interest.

The Department provides representation in accordance with its Statement of Policy set forth at 28 C.F.R. §§ 50.15, 50.16 (1980). The Statement provides for Department representation in state criminal proceedings and in civil and Congressional proceedings. The Department does not provide representation in administrative hearings under the policy.

However, an agency's appropriated funds are available to provide a supervisor with representation in an administrative hearing if he performed the conduct in issue within the scope of his employment. Conduct is within the scope of a supervisor's employment if it is in furtherance of, or incident to his carrying out his official duties. In such cases, because the performance of the conduct was in furtherance of an agency function, the cost of counsel may be considered a necessary expense incurred in performing that function. 53 Comp. Gen. 301, 306 (1973).

For example, we held that Nuclear Regulatory Commission appropriated funds were available to reimburse Commission employees who retained counsel to represent them in a disciplinary action before a special board designated by the Chairman of the Atomic Safety and Licensing Board. The employees were charged by a private attorney who represented intervenors with misconduct in connection with their actions during a licensing proceeding. The Commission Executive Legal Director had determined that the employees were acting within the scope of their employment, and we concluded that agency funds were available to provide legal counsel. B-127945, April 5, 1979.

Moreover, an agency can also have an administrative interest in providing legal representation to its employees. It serves the agency to supply counsel to an employee who is forced to defend himself against charges arising out of conduct which was within the scope of his Federal employment. If agency employees know that they would have to bear their own representation expenses in actions against them resulting from performance of their jobs, they might discharge their duties and exercise their discretionary functions less rigorously.

Accordingly, the Commission may provide representation to supervisors brought before the Merit Systems Protection Board if it believes that the conduct which is the subject of the Special Counsel's complaint was performed within the scope of the supervisor's employment. For example, if the Special Counsel brings a complaint before the Board because he thinks a supervisor has discriminated against an employee in a hiring or promotion, but the Commission believes that the supervisor has acted properly, the Commission may provide counsel.

[B-202453]

Commerce Department—Economic Development Administration—Loan Guarantees—Public Works and Economic Development Act—Private Lender Requirement—Scope of Applicability

Economic Development Administration (EDA) does not have authority to implement proposal whereby public lenders would be permitted to purchase guaranteed portion of loans made by private lending institutions to private borrowers under 42 U.S.C. 3142. Whether purchase of the guaranteed note by the public lender is necessarily contemplated when loan guarantee is initially approved or occurs in the ordinary course of unrestricted secondary market trading, such purchase would violate statutory requirement that EDA can only guarantee loans made by private lending institutions.

Matter of: Private Borrower—Private Lender Requirement in Public Works and Economic Development Act of 1965, July 13, 1982:

This decision is in response to a request from Mr. Alfred Meisner—the former Acting General Counsel of the United States Department of Commerce—on behalf of the Economic Development Administration (EDA), for our legal opinion concerning the scope of the "private borrower-private lender" requirement set forth in section 202 of the Public Works and Economic Development Act of 1965, as amended, 42 U.S.C. § 3142.

As explained in EDA's letter, EDA has authority under 42 U.S.C. § 3142(a) to guarantee up to 90 percent of guaranteed loans "made to private borrowers by private lending institutions" for the purpose of fostering economic development in economically depressed areas. EDA is presently considering a proposal to allow the sale of the guaranteed portion of these loans in the "secondary money market." As stated in EDA's letter, once the guaranteed note is sold in the secondary market, the purchaser becomes "the actual if not the direct source of funds for the underlying loan transaction," in effect, the lender. If secondary market sales are not restricted, it is possible, if not likely, that the purchasers of the guaranteed note would not always be a "private lending institution" that could have qualified for a guarantee initially. The specific question presented to us is whether the private lender requirement of the statute "extends to subsequent parties to the loan transaction, such as secondary market purchasers." For the reasons set forth hereafter, we believe that question must be answered affirmatively.

As recognized by EDA, this is not the first time we have considered a question involving the interpretation of the private lender requirement in 42 U.S.C. § 3142. In our opinion B-194153, September 6, 1979, which was written in response to a request from Senator Percy, we considered the legality of a proposed pilot program that was designed to bring new industrial development to several depressed areas in the City of Chicago. In that case, EDA had proposed to implement a program whereby it would guarantee loans made to private borrowers by commercial banks with the guaranteed portion of those loans to be subsequently assigned to the City of Chicago or a trustee designated by the City. Under this proposal, each loan would be represented by two notes—with one note representing a percent of the loan to be fully guaranteed and the other note representing the remaining 10 percent of the loan to be wholly nonguaranteed. The City would finance the purchase of the guaranteed notes with funds raised by the sale of bonds in the "public credit markets." While we upheld the legality of the two-note arrangement, we concluded that the proposed financing arrangement exceeded EDA's existing statutory authority and could therefore not be implemented on the following grounds:

> * * * The question is not the validity of the guarantee to the private lending institution that originated the loan, but whether, as contemplated in this proposal, the guarantee can be assigned to an entity that is not private, is not a lending institution and could not have qualified for a guarantee initially. This proposal appears to us to be an attempt to accomplish indirectly that which clearly could not be accomplished directly. Since the legislation does not allow EDA to guarantee loans made by a lender other than a "private lending institution," the proposed financing arrangement which necessarily contemplates from its inception that the sole source of the funds to be covered by EDA's guarantee would be a non-private "lender," albeit using money it had raised from the private sector, is not in accordance with EDA's statutory authority.

A portion of our September 6, 1979 opinion concerning one aspect of the two-note arrangement not relevant to this discussion was subsequently modified in 60 Comp. Gen. 464 (1981).

In arguing that the present proposal is within its statutory authority, EDA maintains that both factually and legally it is "clearly distinguishable" from the situation we considered in the earlier case. First, EDA maintains that our decision disapproving the so-called "Chicago" proposal was based largely on the fact that in that case it was contemplated from the inception of the program and the initial approval of a guarantee that a public lender would purchase the guaranteed note. The involvement of the public lender—the City of Chicago—was "an integral and inevitable part of the proposal." Here, EDA argues that the participation of a non-private lender in a secondary market sale is a "potential event" that is not the "motivating factor" underlying the entire transaction. Therefore, EDA contends that as long as it is unaware of any specific proposal to involve nonprivate lenders when it guarantees the loan, unrestricted secondary market trading in such guarantees that might result in purchase by a public lender should not be objectionable.

EDA further argues that the legislative basis for the establishment of the private borrower-private lender requirement provides another reason for distinguishing between the current proposal and the Chicago plan. EDA maintains that the intended purpose of this statutory requirement was to prevent EDA from participating in the guarantee of tax-exempt bonds which can ordinarily only be issued by some type of public borrower. *See* H. Rep. No. 89-539, 89th Cong. 1st Sess. (1965). Since the use of tax-exempt bonds to finance Chicago's participation was a crucial aspect of the earlier proposal, EDA now states that implementation of that proposal would have been in "direct contravention" of the intent of Congress in imposing the private borrower-private lender requirement. However, EDA contends that the present proposal would not necessarily involve EDA's participation with tax exempt obligations since such participation, if not predicated at the time the underlying loan and guarantee transaction is established, "is highly unlikely to occur as part of normal secondary market trading."

With respect to EDA's primary argument, we do not believe that the legality of this type of arrangement should hinge on whether or not the public lender's participation in the program as a secondary market purchaser of the guaranteed note is contemplated from the inception of a loan or merely occurs in the normal course of secondary market operations. As recognized by EDA in its submission, the purchaser of a guaranteed note in the secondary market becomes in effect "the lender of the guaranteed loan." Therefore, whether or not the sale of a guaranteed note to the public lender is necessarily contemplated from the beginning of a transaction, once the public lender purchases the guaranteed note the end result is the same, *i.e.*, the public lender becomes the source of the funds covered by EDA's guarantee. While our decision of September 6, 1979, does refer to the fact that the then proposed program necessarily contemplated from its inception the involvement of a nonprivate lender, the primary basis for our refusal to approve the proposal was our view that the arrangement would allow "EDA indirectly to do something that it could not do directly—guarantee a loan by a non-private lender." We believe that the same deficiency exists with respect to EDA's current proposal.

Concerning EDA's argument that the two proposals are distinguishable because the current plan, unlike the earlier one, would not contravene the intent of Congress in imposing the private borrower-private lender requirement that guarantees of loans financed with tax-exempt bond issues should be precluded, neither the statu-

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tory language nor its legislative history indicates that loans by public lenders could be guaranteed by EDA as long as they were not tax-exempt. Moreover, when we requested EDA to provide us with its comments in connection with our consideration of the Chicago proposal, EDA stated with respect to the tax-exempt issue that it "does not consider the nature of the bond issuance to be a material consideration." Accordingly, our decision was not based on, nor did we consider, the possibility that the bonds sold by the City would be tax-exempt. In our view then, as now, the legality of this type of arrangement does not turn on whether or not tax-exempt obligations are involved. Also, we note that EDA was not able to assure us, assuming we approved the current proposal, that it would never be in a position of guaranteeing tax-exempt obligations.

Finally, we believe that this proposal would be extremely difficult if not impossible for EDA to implement. If we approved this proposal, without reversing our opinion regarding the Chicago plan, EDA would be in a position of having to determine whenever a guaranteed note was to be sold, or perhaps even before the initial guarantee was approved, whether or not it was contemplated at the inception of the loan that a public lender would purchase the guaranteed note. Thus, the question of whether a particular transaction involving the sale of a guaranteed note was legal or illegal would necessarily depend not on an objective determination—was the purchaser a "private lending institution" as that term is used in the statute—but on the subjective determination as to the intent of the parties when they entered into and implemented the transaction. In our view, this would impose an administrative burden on EDA that would be virtually impossible for it to fulfill.

In accordance with the foregoing it is our view that public lenders are not eligible to participate as secondary market purchasers of EDA guaranteed loans under any circumstances.

[B-204078]

Panama Canal Commission—Administrator—Residence Maintenance Expenses—Regulations Governing Official Residences in Foreign Areas—For Application

Expenditures for operation and maintenance of residence of Administrator of Panama Canal Commission are subject to regulations issued under 5 U.S.C. 5913, applicable to official residences in foreign areas. Under Panama Canal Act, Pub. L. No. 96-70, areas and installations in Republic of Panama made available to United States pursuant to Panama Canal Treaty and related agreements, formerly in Canal Zone, are foreign. Report ID-81-57, Aug. 5, 1981, is modified to the extent that it is inconsistent with this decision.

Appropriations—Panama Canal Commission—Restrictions—Administration's Residence Maintenance—Expense Limitation—Residence Staffing Salaries Excluded

Pub. L. 96–400, Oct. 9, 1980, limited Panama Canal Commission appropriations for operating expenses to not more than $60,000 for the maintenance of the Administrator's residence. This limit did not apply to additional $41,000 for residence employees' salaries which is past were charged to Administrator's Office, absent indication of intention to cut total cost estimate of $108,000 (including an additional amount of $7,000 for repairs) to $60,000. Finding in report, ID–81–57, Aug. 4, 1981, is affirmed.

Matter of: Administrator of Panama Canal Commission—Maintenance of Residence, July 13, 1982:

The Chairman, House Committee on Merchant Marine and Fisheries, by letter of September 8, 1981, requests that this Office reconsider certain conclusions appearing in a report to him entitled, "Panama Canal Commission Expenditures for Entertainment, Official Residence, and Supervisory Board" (ID–81–57), August 5, 1981, B-204078.

The Chairman first refers to expenditures of the Administrator of the Panama Canal Commission for maintenance of his official residence which, the report stated, do not fall under regulations issued pursuant to 5 U.S.C. § 5913, because this section deals with foreign areas, which does not include the former Canal Zone area. The Chairman suggests that the case relied on in the report (B-199251, November 18, 1980, 60 Comp. Gen. 71), is inapposite because it involved a claim for temporary quarters subsistence expenses, governed by a definition of "foreign areas" which is not applicable to official residence expenses. The Chairman believes that the former Canal Zone area is a foreign country for the purposes of section 5913.

Upon review, for the reasons stated below, it is our opinion that official residence expenses of the Administrator are within the scope of section 5913 and regulations issued pursuant thereto.

The Chairman also refers to a statement in our report that staffing costs are not considered in determining compliance with the $60,000 limitation of Pub. L. No. 96–400, 94 Stat. 1681, for maintenance of the Administrator's residence. He believes that the legislative history of this limitation shows that it was to apply to staffing as well as other expenditures for the residence.

Our review leads us to confirm the view expressed in the report that the $60,000 limitation for maintenance of the residence of the Administrator does not include residence staffing expenses.

First Question

Legislative Background

We first consider the question relating to the applicability of section 5913 to official residence expenses of the Administrator of the Panama Canal Commission.

The Overseas Differentials and Allowances Act (Act), Pub. L. No. 86-707, September 6, 1960, 74 Stat. 792, in part codified as 5 U.S.C. § 5913, had the purpose of "establishing a uniform system for compensating all Government employees in oversea[s] posts irrespective of the agency by which they are employed." (S. Rep. No. 1647, 86th Cong., 2nd Sess. 1 (1960).) The Act extended to "non-foreign affairs agencies authority to pay the costs of unusual housekeeping expenses for principal representatives at a post." (S. Rep., page 25.)

Section 5913, Title 5, United States Code (1976) (Subchapter II—Quarters) provides that:

(a) for purpose of this section, "agency" has the meaning given it by section 5721 of this title.

(b) Under such regulations as the President may prescribe, funds available to any agency for administrative expenses may be allotted to posts in *foreign countries* to defray the unusal expenses incident to the operation and maintenance of official residences suitable for—

(1) The chief representatives of the United States at the posts; and

(2) Such other senior officials of the Government of the United States as the President may designate. [Italic supplied.]

We first need to determine if the Admiministrator of the Panama Canal Commission is subject to section 5913. Section 5721 defines "agency" to mean: "(A) an Executive agency," and under section 1101 of the Panama Canal Act of 1979, Pub. L. No. 96-70, September 27, 1979, 93 Stat. 456 (22 U.S.C. § 3611 (Supp. III, 1979)), the Panama Canal Commission is established as an agency in the executive branch of the United States Government. Thus, if the former Canal Zone is a "foreign country," expenses of maintaining the Administrator's official residence are subject to the statute and its implementing regulations. The Act itself contains no definition of "foreign country" and there is no regulatory impedient to application of the provisions of section 5913 to the former Canal Zone area.

Section 3(b) of the Panama Canal Act, *supra,* provides that:

Subject to the provisions of subsection (c) of this section, for purposes of applying the Canal Zone Code or other laws of the United States and regulations issued pursuant to such Code or other laws with respect to transactions, occurrences, or status on or after the effective date of this Act—

(1) "Canal Zone" shall be deemed to refer to the areas and installations in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements;

Subsection (c) states that:

Any reference set forth in subsection (b) of this section shall apply except as otherwise provided in this Act or unless (1) such reference is inconsistent with the provisions of this Act, (2) in the context in which a term is used such reference is clearly not intended, or (3) a term refers to a time before the effective date of this Act.

Discussion

Recent appropriation Acts have allocated specific amounts for official residence purposes. The residence of the Administrator is located in the former Canal Zone area of the Republic of Panama. The issue raised by your inquiry is whether the status of this area was changed as a result of the Panama Canal Treaty of 1977 and related agreements.

In forwarding proposed implementing legislation to the Congress, the President, in his letter of January 23, 1979, stated that:

> * * * the treaties will enter into effect on October 1, 1979. Under their terms, on that date the Canal Zone will cease to exist, * * * and general jurisdiction over the area as well as the performance of a number of important support functions will pass to Panama. * * *.

This change of status was described in H.R. Rep. No. 96-98, 96th Cong. 1st Sess., Part I, on H.R. 111 which was enacted as the Panama Canal Act of 1979, as follows:

> Under the Panama Canal Treaty the United States will continue to operate the Panama Canal until December 31, 1999, subject to the provisions of the treaty and applicable laws of the United States. However, the conditions and circumstances under which such operation will continue are substantially modified by the treaty in comparison with those prevailing up to this time. These changes result from termination of territorial jurisdiction in the Canal Zone; the elimination of the Canal Zone Government and transfer of all governmental functions to Panama except the protection of the canal, to be shared by the two countries * * *. (Page 35.)

With the dissolution of the Canal Zone Government, the former Canal Zone is now under general Panamanian jurisdiction. Thus, it is clear that residences in that area which would otherwise qualify should now be considered to be located in a "foreign country" and be governed by the same rules and regulations as apply to residences of senior officials in other foreign countries.

This holding is consistent with our decision in 59 Comp. Gen. 671 (1980) that travel by a foreign service employee serving overseas to the Canal Zone for home leave could not be authorized, since home leave may only be granted in the continental United States or its territories and possessions and the Panama Canal Treaty provides the Republic of Panama with full sovereignty over this area.

We agree with the Chairman that our 1980 decision, 60 Comp. Gen. 71, is not applicable to official residence expenses under section 5913. That decision dealt with the authority for a new employee to receive temporary quarters allowances for himself and his family upon reporting to a post in the former Canal Zone. The primary holding of the decision was that:

> New appointees to positions outside the conterminous United States are entitled only to the travel and transportation expenses listed at paragraph 2-1.5g(2)(b) of the FTR [Federal Travel Regulations]. As specifically noted at FTR para. 2-1.5g(2)(c), new appointees to positions overseas are not entitled to certain allowances payable to transferred employees under 5 U.S.C. §§ 5724 and 5724a, including temporary quarters subsistence expenses * * *.

The decision also noted, as an additional ground for disallowance, that the former Canal Zone area "continues to be outside the defi-

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nition of 'foreign area' for purposes of overseas differentials and allowances." We note that the temporary lodging allowance covered by 5 U.S.C. § 5923 is the overseas corollary to the stateside allowance payable under 5 U.S.C. § 5724a(a)(3). Section 1231(d) of the Panama Canal Act expressly amended 5 U.S.C. § 5724a(a)(3) to retain that stateside allowance for employees in the former Canal Zone. We cannot believe that the Congress intended this particular group of employees to receive duplicate benefits under both 5724a(a)(3) and under section 5923.

Conclusion

As the former Canal Zone is now under general Panamanian jurisdiction, we hold that it is a "foreign country" for purposes of 5 U.S.C. § 5913. To the extent that our report (ID-81-57) is inconsistent with this holding, it is hereby modified.

Second Question

Legislative Background

We next consider the question of whether the monetary limitation on the maintenance expenses of the Administrator's residence includes the cost of the staff. For the reasons that follow, we do not think they do.

Public Law 96-400, October 9, 1980, 94 Stat. 1681, 1693, included appropriations for the Panama Canal Commission for the fiscal year ending September 30, 1981. The appropriation for operating expenses stated that, "* * * not to exceed $60,000 shall be available for maintenance of a residence for the Administrator * * *."

The limitation was added to the appropriation bill as an amendment made on the House floor by Chairman Hubbard of the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries. He explained that the amendment—

> * * * simply place[s] the same restrictions on the expenditure of these funds which are contained in the Panama Canal Treaties bill for 1981. The authorization bill, H.R. 6515, has been reported favorably by the Committee on Merchant Marine and Fisheries and favorably by the Panama Canal Subcommittee * * *. 126 Cong. Rec. H6891 (daily ed. July 31, 1980).

The report referred to was H.R. Rep. No. 96-882, 96th Cong., 2d Sess. (1980) on H.R. 6515, the proposed Panama Canal Appropriations Authorization Act, Fiscal Year 1981 (which was not enacted). The report stated that—

> * * * The bill also authorizes appropriations, subject to prescribed maximum limits, for certain purposes regulated by general law applicable to all Government agencies such as * * * expenses incident to the operation and maintenance of official residences for senior officials of the United States in foreign countries (5 U.S.C. 5913).
>
> The limitations on the authorization for these specific objects are in all cases, except three, the amounts the Commission advised the Committee has been included in the budget for those objects.* * * (Page 5.)

Official residence expenses were not included among the three exceptions. The report further stated as follows:

Expenditures to be made for the residence for the Administrator included in the appropriation language are not shown in the Justifications,. The answers to questions submitted by the Commission showed [an] estimate[s] of * * * $60,000 for 1981. Supplementary data furnished by the Commission show additional estimated expenditures of * * * $48,000 in 1981, not included in the line item for the residence of the Administrator, bringing the total estimate to * * * $108,000 in 1981. (Page 9.)

In Hearings on H.R. 6515 and H.R. 6516 before the Subcommittee on the Panama Canal, 96th Cong., 1st and 2d Sess. (1979, 1980), the Administrator submitted an estimate of $60,000 for his residence which included: Maintenance of structure and equipment, $34,000; Power and telephone service, $13,000; Supplies and minor equipment, $6,000; and Custodial and other services, $7,000 (page 113). The Administrator was asked for additional information regarding the staffing of the residence. Supplemental information supplied to the Subcommittee indicated that—

* * * Although a staff of four employees is retained at the residence, for budget purposes the payroll expenses of these employees have historically been included in the costs of the Administrator's Office and Staff * * *. The FY 81 costs of their salaries * * * are as follows: 1 Housekeeper ($9,800); 1 Cook ($14,500) and 2 Maids ($16,700). (Page 165.)

Additionally, the $7,000 cost for structural repairs to the residence, funded elsewhere, was shown.

Analysis

The Fiscal Year 1981 appropriation for the Panama Canal Commission's operating expenses includes a $60,000 limitation for maintenance of the Administrator's residence. According to the Chairman of the Subcommittee on the Panama Canal, this provision had the same restrictions as the almost identically worded provision in H.R. 6515 which was to authorize Panama Canal appropriations. The Committee on Merchant Marine and Fisheries report on H.R. 6515, in explaining the imposition of the limitation, indicated that the Commission's budget request had been accepted. At the same time, the report referred to information supplied by the Commission as part of the hearings on the proposed bill—that there were additional estimated expenditures "not included in the line item for the residence of the Administrator" ($60,000), bringing the total estimate to $108,000 for Fiscal Year 1981. This additional information shows that the total estimate consisted of the following:

Maintenance of structure and equipment, power and telephone, supplies, minor equipment and commercial services, and custodial and other services	$60,000
Salaries of a housekeeper, a cook, and two maids	41,000
Structural repairs due the termites	7,000
Total	108,000

From the foregoing, it appears that the Committee on Merchant Marine and Fisheries accepted not only the $60,000 budget estimate for the items specified by the Commission but also the additional $41,000 for residence employees' salaries which, in accordance with past practice, it included with the Administrator's Office staffing expenses. Further, to subject the total cost estimate of $108,000 to the $60,000 limit would have resulted in an almost 45 percent reduction in total requests relating to the Administrator's residence. This would be inconsistent with the Committee's stated acceptance in full of the $60,000 request if the other requests totaling $48,000 would have had to come from the same $60,000. We note that reductions in requests in other categories were specifically stated and were established at 20 percent below budget estimates (Report, page 5). However, there was no reference to any reductions for costs associated with the Administrator's residence.

Conclusion

In the absence of any indication that the Congress in adopting the $60,000 limitation on maintenance intended to include the salaries of residence employees within this amount, it is our opinion, as stated in our report, "Panama Canal Commission Expenditures for Entertainment, Official Residence, and Supervisory Board," that the residential salary expenses are not subject to the limitation in question.

[B-204434]

Transportation—Household Effects—What Constitutes—Household Effects and Public Property Items

Where Department of Defense Volume Movement Announcement invites rate offers for transportation of household goods and DOD regulations describe such service as a method of moving member's personal property, the term "household goods" does not include public property and carrier's tenders submitted in response to announcement therefore does not encompass such public property.

Transportation—Overcharges—Set-Off—Merger of Debtor Corporation—*De Facto* Merger—Assets *v.* Capital Stock Transfer

Parent or affiliate corporation is not liable for overcharges collected by debtor corporation on theory of de facto merger where there is no evidence that corporations merged.

Transportation—Overcharges—Set-Off—Mutuality of Parties, etc.—Agency Relationship—Absence on Date of Overcharge Collection

Where capital stock of debtor corporation was purchased by holding company and agency relationship with debtor's affiliate was established subsequent to collection of overcharges by debtor, latter's corporate identity cannot be disregarded to hold parent or affiliate liable for overcharges on basis of agency in absence of evidence that control was exercised over debtor at the time the act complained of took place.

Matter of: Mayflower Corporation; Aero Mayflower Transit Co., Inc.; American Transfer & Storage Company, July 13, 1982:

The Mayflower Corporation requests our review of the action taken by the General Services Administration (GSA) relating to two of its subsidiaries—American Transfer & Storage Company (American), a Texas corporation, and Aero Mayflower Transit Company, Inc. (Aero, Inc.).

American transported 10 intrastate Texas shipments on Government bills of lading (GBL) in 1977. Subsequently, GSA determined that the carrier collected overcharges on the shipments in the amount of $13,482.79, and when American declined to pay, GSA deducted the overcharges from monies otherwise due Aero, Inc., apparently because there were no monies due American available for that purpose.

Mayflower disputes the validity of the overcharges and of GSA's action in deducting the overcharges from Aero, Inc. We conclude that the determination of overcharges is correct, but the deduction from monies due Aero was improper.

Determination of Overcharges

All of the shipments were tendered to the carrier at Webb Air Force Base, Texas. Most consisted of public property; generally, they consisted of furniture that was tendered to American from various offices and other buildings on the installation, although apparently some shipments involved the private property of Air Force members.

Mayflower contends that the rates charged were applicable because they covered the transportation of household goods and that all the articles transported were included within that term. GSA contends that the term "household goods" includes only the personal property of members. From a reading of the carrier's tenders, we find that the interpretation urged by GSA is correct. The carrier's tenders indicate that American offered rates only on personal property. Item 13 thereof states: "Basis for submission is per MTMC–PPC Volume Movement announcement dated June 1977." The announcement relates to Department of Defense-sponsored personal property. The tenders, in Item 1, refer to the commodity of service as:

Household Goods—Domestic Door to Door Motor Van (Code 1).

Based on the above, as well as on the Defense Department's Personal Property Traffic Management Regulation which defines household goods as excluding property not for the military member and his immediate family, we conclude that the tenders were applicable on shipments of personal property but not applicable to shipments of furniture and related articles shipped from offices and other buildings on a military installation. Therefore, we agree with GSA that different rates apply to these public property shipments.

With respect to the shipments of household goods belonging to members, GSA states that the tenders were applied where the resulting charges were the lowest available. Where they were not the lowest available, GSA applied different rates. In so doing, it relied on part J of the announcement and the alternation clause in the tenders, which make them inapplicable where the charges accruing thereunder exceed charges otherwise applicable for the same service. We agree with GSA's action. See, *e.g.*, *Hilldrup Transfer & Storage Co.*, 58 Comp. Gen. 375.

Validity of Deduction Action

The right to make deductions, as a means of recovering overcharges, is expressly reserved to the United States. The statute, 31 U.S.C. § 244(a) (Supp. III 1979), authorizes deductions of:

* * * The amount of any overcharge by any carrier or forwarder from any amount subsequently found to be due *such carrier or forwarder*. [Italic supplied.]

Under the literal reading of this provision, the deduction can only be applied to money due the overcharging carrier. The courts, however, have allowed various exceptions. See *Ship-Rite Transporters, Inc.*, B-193966, April 12, 1979, for a discussion of these exceptions. One of these exceptions involves a de facto merger.

GSA reports that Mayflower purchased 100 percent of American's stock, that the three corporations share key management personnel, and that American's letterhead, captioned "American Mayflower," states "Agent for Aero Mayflower Transit Co., Inc." Citing *Ship-Rite Transporters, Inc., supra,* GSA concludes that there has been a de facto merger among Mayflower, Aero, and American.

However, *Ship-Rite* is inapposite to the facts of this case. *Ship-Rite* dealt with one company's acquisition of the assets, including operating rights, of another. Here, there is no evidence that American's assets were purchased by Aero or Mayflower. Although Mayflower purchased the capital stock of American, American continues to exist as a body corporate, and there has been no transfer of its operating authority. We fail to see how there has been a de facto merger under these circumstances.

Also, we point out that the courts will not disregard the separate corporate entities to hold shareholders liable on obligations of an agent corporation unless it appears that the corporate entity is being used as a sham to perpetuate fraud or to avoid liability. See *Bell Oil & Gas Co.* v. *Allied Chemical Corp.*, 431 S.W.2d 336 (Tex. 1968); *Maule Industries* v. *Gerstel*, 232 F.2d 294 (5th Cir. 1956); *Whayne* v. *Transportation Management Service, Inc.*, 252 F. Supp. 573 (E.D. Pa. 1966), *affirmed* 397 F.2d 287 (3rd Cir. 1967), *cert. denied* 393 U.S. 978 (1968).

Aside from de facto merger, GSA seems to suggest the existence of an agency relationship among the parties. Even assuming that elements of an agency relationship do exist, we note that Mayflower did not purchase American's stock until 1979, or nearly 2 years after American performed the services and collected the overcharges. For control (of an agent) to be the basis for liability to be imputed to the principal, it must have been exercised at the time the acts complained of took place. *Huski-Belt, Inc.* v. *First Citizens Bank & Trust Co.*, 157 S.E.2d 352 (N.C. 1967); 1 Fletcher Cyc. Corp. § 43. The record obviously indicates that American was not controlled by Mayflower at the time the services were performed and the overcharges were collected; therefore, Aero or Mayflower may not be held liable for the overcharges on the doctrine of agency.

Settlement should be made by GSA consistent with this decision.

[B-205459]

Compensation—Severance Pay—Rate Payable—Temporary Promotions—Termination—One Day Prior to Separation

Under 5 U.S.C. 5595(c), severance pay is computed on the basis of the rate of pay received immediately before an employee's separation. Thus, an employee whose temporary promotion to a higher position was termined 1 day prior to the day of his separation from Government service is entitled to have his severance pay computed on the basis of the rate of pay received in his permanent position, not on the basis of the rate of pay received in his temporary promotion.

Officers and Employees—Promotions—Temporary—Termination—Agency Discretion

In accordance with 5 C.F.R. 335.102(f)(1) an agency may terminate an employee's temporary promotion in its discretion at any time prior to the scheduled expiration date. Also, there is no requirement that the employee should receive express notice of the termination.

Matter of: John L. Gibson, July 13, 1982:

This is in response to a letter from the Assistant Secretary for Administration, Department of Commerce, requesting a decision whether Mr. John L. Gibson, a former employee of the Economic Development Administration, is entitled to receive severance pay computed on the basis of a temporary promotion to a higher position or on the basis of his permanent position. For the reasons set forth below, we conclude that the employee's severance pay should be computed on the basis of the lower rate of pay of his permanent position.

The record indicates that Mr. Gibson was separated from Government service on September 29, 1981, as a result of a reduction in force (RIF). It is undisputed that he is eligible to receive severance pay although the amount of severance pay due is at issue. Mr. Gibson contends that his severance pay should be computed on the basis of the pay of the GS-14 position to which he had been temporarily promoted. Mr. Gibson indicates that he had received that temporary promotion on March 23, 1980, which was subsequently extended for a period not to exceed September 29, 1981. However, the Assistant Secretary argues that the employee's temporary promotion was terminated prior to his separation; that he was returned to his permanent position, GS-13; and that his severance pay should be computed on the basis of his permanent position and not on the basis of his temporary promotion. In this connection the Assistant Secretary states:

> In accordance with 5 U.S.C. 5595(a)(2)(ii) and 5 CFR 550.701(b), severance pay is limited to employees serving under appointments without time limitations. It appears to be inconsistent to base that benefit on a temporary (i.e., time-limited) salary. * * * Further, an employee serving on a temporary promotion is on notice that he/she can and will be returned to his/her permanent grade and the step/salary he/she would have been receiving absent the temporary promotion (5 CFR 335.102(f). Lastly, under RIF regulations (5 CFR 351.404(a)(2)) an individual must compete from his/her permanent position.

As the Assistant Secretary points out, severance pay is governed by 5 U.S.C. § 5595 (1976) and the implementing regulations, 5 C.F.R. § 550.701 *et seq.*, promulgated by the Office of Personnel Management. Under the law and regulations, an employee who "is involuntarily separated from the service, not by removal for cause" and who "has been employed currently for a continous period of at least 12 months" may be eligible for severance pay so long as he was *serving under an appointment without a definite time limitation.*

The restriction against paying severance pay to employees who have been serving under an appointment with a definite time limitation applies to appointments only. Since appointments and promotions are not synonymous, the restriction evidently was not intended to include temporary promotions, i.e., promotions not to exceed a certain date. Furthermore, the "time limitation" restriction governs the eligibility of employees to receive severance pay and does not apply to the computation of severance pay amounts. Since it does not appear that Mr. Gibson was serving under an appointment with a definite time limitation, although his promotion was temporary, he is not ineligible for severance pay on that basis.

Once eligibility to receive severance pay has been found, as it has in this case, the amount of severance pay due must be computed in accordance with the formula prescribed at 5 U.S.C. § 5595(c):

Severance pay consists of—

(1) A basic severance allowance computed on the basis of 1 week's *basic pay at the rate received immediately before separation* for each year of civilian service up to and including 10 years * * * and 2 weeks basic pay at that rate for each year of civilian service beyond 10 years * * *. [Italic supplied.]

The applicable regulation, 5 C.F.R. § 550.703(b), states:

"Basic pay" means the rate of pay fixed by law or administrative action for the position held by an employee *at the time of separation* * * *. [Italic supplied.]

Thus, an employee whose temporary promotion ends at any time prior to his separation must have his severance pay computed on the basis of the rate of pay in his permanent position.

The Assistant Secretary does note that there is a difference between the language of the cited statute and the language of the cited regulation. In our view, however, for ascertaining the rate of basic pay to be used in computing the severance pay there is no difference between the term "immediately before separation," as stated in the statue and the term "at the time of separation," as phrased in the regulation. That is, under either phrase the rate to be used is the last rate of pay to which the employee was entitled.

According to the agency, Mr. Gibson's temporary promotion to GS-14, step 4, was terminated effective September 28, 1981, 1 day prior to his separation. If this termination was legally and properly effected, Mr. Gibson's basic rate of pay "immediately before his separation," on September 29, 1981, was that of a GS-13, step 7—$38,456 per year. However, if the termination of his temporary promotion was not legally or properly effected his basic rate of pay remained that of a GS-14, step 4—$41,657 per year.

Mr. Gibson contends that the termination of his temporary promotion was performed improperly for several reasons and, therefore, should have no effect in the computation of his severance pay. In this regard, he says:

The Agency contends now that my temporary promotion was terminated on September 28, 1981, the day before the effective date of the RIF. I received *no notice of such termination,* oral, written, or otherwise, and I continued, in the presence of the Regional Director and five of my subordinates, to function at the higher level on September 29, 1981, the date of my separation. * * * The rate of pay I received until the last day of my employment was $41,657 per year * * *. [Italic supplied.]

In our opinion, the agency terminated Mr. Gibson's temporary promotion, notwithstanding his assertions to the contrary. The record shows that on September 25, 1981, the agency executed a Personnel Action (SF-50) terminating Mr. Gibson's temporary promotion, effective September 28, 1981. This action was consistent with 5 C.F.R. § 335.102(f)(1) which states that temporary promotions may be ended and the employee returned to his permanent position at any time in the discretion of the agency. Moreover, we have held that express notice of a termination is not required. *Allan S. Danoff,* B-198142.2, February 24, 1982.

Although, as he asserts, Mr. Gibson may have continued to perform the same duties he performed as a GS-14 for the entire day following the termination of his temporary promotion and prior to his separation, this does not alter our view of the facts. The most the agency's action in terminating the temporary promotion, without changing his duties, would have done was to transform the temporary promotion into a detail to a higher grade position, effective September 28, 1981. That would not entitle Mr. Gibson to the higher salary for that day.

Finally, information we received from the agency has revealed that, contrary to Mr. Gibson's allegations, his pay was reduced to accurately reflect the termination of his temporary promotion. While there was some delay in this payroll action so that it did not occur in the first pay period following the termination, it did occur in due course. In any event, the facts that Mr. Gibson may have been erroneously overpaid, or that, unfortunately, he may not have received prompt notification of the termination of his promotion, do not change the fact that he was legally entitled to only the lower GS-13 salary.

Since it appears that the agency terminated the employee's temporary promotion, and since the employee was serving in his permanent position at the time of his separation, we hold that the employee's severance pay should be computed on the basis of the GS-13 rate of pay received in his permanent position.

[B-198221]

Bureau of Reclamation—Appropriation Limitations—San Luis Unit—Distribution Systems, etc.

Fiscal year 1978 appropriation act, Pub. L. 95-96, contained lump-sum amount, available until expended, for authorized reclamation projects "as authorized by law." Latter phrase limited use of funds so that for any project, funds may only be obligated in accord with authorization for that project. Pub. L. 95-46 authorized appropriations, to be obligated only in fiscal year 1978, to continue San Luis Unit, Central Valley Project, California, distribution systems and drains construction pending congressional reconsideration of permanent authorization increase. In accord with authorization limitation, appropriation—otherwise available until expended—was properly obligated only in fiscal year 1978 for distribution systems and drains construction.

Matter of: Obligation Availability of Funds Authorized for San Luis Unit, CVP, Distribution Systems and Drains, July 19, 1982:

We have received a congressional request for our opinion as to whether the legislative intent of Public Law 95-46 (91 Stat. 225) has been complied with in relation to the authorization of appropriations for the San Luis Unit, Central Valley Project, California, for fiscal year 1978. The request indicates that the act was intended to provide funds only during fiscal year 1978 to permit work to continue without interruption while the San Luis Task Force, which was created by the act, conducted its investigation. The request states as follows:

It now appears that funds have been appropriated and expended long after fiscal year 1978 which, * * * is contrary to the letter and the clear legislative intent of Pub. L. 95-46. The interim funding has, by virtue of continuing appropriations, become a longterm authorization, circumventing the reauthorization process during which, it was anticipated in 1977, the recommendations of the Task Force would be considered.

In our opinion, for the reasons stated below, the fiscal year 1978 appropriation applicable to the construction of the distribution systems and drains in the San Luis Unit was available for obligation only in fiscal year 1978. Obligations incurred in subsequent fiscal years, inconsistent with Public Law 95-46, were unauthorized.

Background

The San Luis unit was authorized by the San Luis Act (Public Law 86-488, 74 Stat. 156 (1960)). It authorized funding for (1) the major project features in the amount of $290,430,000, plus an additional amount, if any, as might be required because of increased construction costs as measured by engineering indexes and (2) the distribution systems and drains in the amount of $192,650,000. The latter authorization was not made subject to indexing changes.

In November 1976, the Department of the Interior's regional solicitor in Sacramento issued a legal opinion which concluded that the San Luis drain had been incorrectly classified as part of the major project features component when it should have been classified as an element of the distribution systems and drains component. Reclassifying the San Luis drain based on this opinion and shifting the applicable allotments resulted in the Bureau of Reclamation exceeding the original authorization ceiling for the distribution systems and drains by $12,476,311. The cognizant House and Senate committees were informed of this situation in February 1977. H.R. 4390, which was introduced in March 1977 to deal with this problem was enacted, as amended, as Public Law 95-46, on June 15, 1977. The applicable appropriation act, Public Law 95-96, 91 Stat. 7975 was enacted on August 7, 1977.

Analysis

Title III of the Public Works for Water and Power Development and Energy Research Appropriation Act, 1978, Public Law 95-96, 91 Stat. 797, 801 (1977), provided funding for the Bureau of Reclamation as follows:

For construction and rehabilitation of authorized reclamation projects or parts thereof * * * and for other related activities, *as authorized by law*, to remain available until expended, $362,835,000 * * *. [Italic supplied.]

Under the terms of this appropriation the entire lump-sum amount is to remain available until expended. However, the phrase "as authorized by law" limits the use of these funds to that which is permitted by authorizing statutes. In other words, for each authorized project, funds can only be obligated in accord with the authorization act for that project. See 45 Comp. Gen. 236 (1965). Therefore, to determine whether there is a limitation on the use of the lump-sum appropriation for the San Luis Unit, we must look to the authorization for the program.

As we have already indicated, the original project ceiling for the San Luis distribution systems and drains had already been exceeded prior to fiscal year 1978. Therefore, the only authority to obligate for the San Luis Unit any of the fiscal year 1978 lump-sum appropriation was contained in Public Law 95-46. Section 1 of that statute provided:

> * * * there is hereby authorized to be appropriated for fiscal year 1978, and to be committed for expenditure by the Secretary [of the Interior] notwithstanding any other provision of law or contract, the sum of $31,050,000 for continuation of construction of distribution systems and drains on the San Luis Unit, Central Valley Project, California. * * * 91 Stat. 225.

On its face, this provision does not specify any definite period of availability for the funds it authorizes to be appropriated. However, we note that it differs considerably from the usual authorization act for reclamation projects. Ordinarily, reclamation projects are authorized on a permanent basis subject to a funding ceiling. For example, the San Luis Act of 1960 which originally authorized the San Luis Unit construction provided an authorization ceiling without any fiscal year reference. However, Public Law 95-46 limits the authority to appropriate funds to a specific fiscal year. It is not clear from the language of the act ("authorized to be appropriated for fiscal year 1978") why the Congress treated this authorization differently from other reclamation project authorizations. Therefore, it is necessary to examine the pertinent legislative history.

As originally introduced in the House, H.R. 4390, which was to become Public Law 95-46, would have provided for inflation indexing of the $192,650,000 authorized ceiling established by the San Luis Act in 1960 for the construction of distribution systems and drains. It would also have included the San Luis Drain as a main project feature so that its cost would not be included in the distribution and drains ceiling. In lieu of this bill, the Secretary of the Interior proposed raising the ceiling to $240,450,000, which would have provided an amount sufficient to cover appropriations already made for fiscal year 1977 and those requested in the President's budget for fiscal year 1978. Under either the original bill or the Secretary's proposal, there would have been no fiscal year limit on the increased authorization.

In lieu of either of these proposals, the House Committee on Interior and Insular Affairs reported a substitute bill proposed by Representative George Miller. The substitute authorized $31,050,000 to be appropriated for fiscal year 1978, and also provided for the establishment of a task force to review the management, organization and operations of the San Luis Unit, and report to the Congress by January 1, 1978.

The amount authorized by the substitute was almost the same amount as requested in the President's fiscal year 1978 budget. The apparent purpose of the separate $31,050,000 authorization was to restrict appropriations to those necessary for continuation of the distribution systems and drains construction during the limited period in which the task force would investigate and report to the Congress. The Congress could then consider a further authorization measure. Our review of the legislative history of Public Law 95-46, which enacted the substitute, indicates that the substitute provision was understood to impose a fiscal year limit on the appropriation authorized by the amended bill.

For example, in discussing the proposed substitute Congressman Miller stated:

> * * * We intend to provide the authorization, the appropriations for 1 year as was recommended in the President's budget, to allow the continuation of the construction of the distribution and drainage systems in the project. *One year and 1 year only.* During that time or during the remainder of this calendar year I would ask that the Secretary establish a task force to look into the operations of the project * * *. (Hearings on H.R. 4390 before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess. 20 (1977).) [Italic supplied.]

Further, in supporting passage of H.R. 4390 on the House Floor, Chairman Meeds of the Subcommittee on Water and Power Resources said that "[t]he bill authorizes appropriations for 1 year only of $31,050,000 so that we can proceed this year." 123 Cong. Rec. 13138 (1977).

The Senate report on the amended bill (S. Rept. No. 95-144, 95th Cong., 1st Sess. 2 (1977)) stated:

> Inasmuch as the authorization is limited to fiscal year 1978, the Congress will have a further authorization measure before it during the 2d Session of the 95th Congress. The study will provide information for consideration at that time.

In his letter to the Chairman of the Senate Committee on Energy and Natural Resources, dated May 6, 1977, the Assistant Secretary of the Interior supported enactment of H.R. 4390, as amended. He explained:

> The bill is intended to provide an interim, short-term solution to the problem. It would prevent disruption of the construction program on the distribution systems and drains, but would extend that construction only to a limited extent, affording some reasonable period for the resolution of the several problems now outstanding in the structure and operation of the San Luis Unit and for the introduction of appropriate legislation to effect those resolutions. (S. Rept. No. 95-144, *supra* at 9.)

Finally, the President in signing H.R. 4390 stated:

> * * * This bill establishes the statutory framework for analyzing the problem and coming to a solution, while continuing construction on some of the project features during fiscal year 1978. * * *

This legislative history makes it clear that the Congress intended the additional $31,140,000 it was authorizing to be appropriated to be used only in fiscal year 1978. We conclude that by authorizing funds to be appropriated "for fiscal year 1978" Public Law 95-46 limits the availability of funds so appropriated to that fiscal year. As indicated above, the phrase "as authorized by law," which is included in the applicable lump-sum appropriation for authorized reclamation projects, requires that the funds be obligated only in accord with the applicable authorization act. It follows that, although the lump-sum reclamation appropriation for fiscal year 1978 is generally available until expended, that appropriation, up to a maximum of $31,140,000, was available for continued construction of distribution systems and drains on the San Luis Unit only during fiscal year 1978.

As is our usual practice, we requested comments on this matter from the Secretary of the Interior. In reply, the current Commissioner of Reclamation stated as follows:

> Public Law 95-46 merely limited the amount of funds that may be appropriated in FY 1978 for the San Luis Unit. * * *
>
> Public Law 95-96 appropriated as "no-year" money the $31,050,000 authorized by Public Law 95-46 for work on the San Luis Unit as a part of the total construction appropriation. Accordingly, the $31,050,000 did not have to be obligated in FY 1978 but was available for obligation as work on the San Luis Unit was programmed. * * * we have made obligations against the $31,050,000 subsequent to FY 1978.

The Commissioner, in his comments, fails to give effect to the words "as authorized by law" in the appropriation act. As discussed above, the legal effect of those words is to incorporate the fiscal year limitation in the authorization act into the appropriation itself. As indicated, our examination of the legislative history of the authorization act, Public Law 95-46, makes clear that all of the money was to be obligated in fiscal year 1978 to continue construction only during that year. If we were to interpret the authorization provision as does the Commissioner, as adding $31,050,000 in no-year funds, we would in effect merely be increasing the previously exceeded $192,650,000 no-year authorization ceiling for the project, an alternative considered but rejected by the Congress.

We are aware that there is some indication in later hearings on the San Luis project to the effect that funds were being obligated after fiscal year 1978. (Hearings Before a Subcomm. of the Senate Comm. on Appropriations: on H.R. 12928, 95th Cong., 2d Sess. 1146 (1978); on H.R. 4388, 96th Cong., 1st Sess. 1561 (1979); and on H.R. 7590, 96th Cong., 2d Sess. 327 (1980). Also, Hearings Before a Subcomm. of the House Comm. on Appropriations, 97th Cong., 1st Sess. 589 (1981).) We do not, however, consider the limited disclosure provided in the hearings to be sufficient to suggest that we may have misread the underlying legislative intention.

Our Community and Economic Development Division has determined that, of the $31,050,000 authorized and appropriated for the San Luis Unit, the Bureau of Reclamation obligated $11,029,642 in fiscal year 1978; $9,730,955 in fiscal year 1979; $1,522,405 in fiscal year 1980; $1,353,483 in fiscal year 1981. We understand that additional amounts have been obligated thus far in fiscal year 1982. Since these funds were available to be obligated for the San Luis

Unit only in fiscal year 1978, subsequent fiscal year obligations were not properly incurred. Further, any future obligation of those funds is unauthorized.

[B-205508]

Appropriations—Claims—Personal Property Loss/Damage—Third Party Liability—Insurance, etc. Collection—Refund of Agency Reimbursement

Department of Justice may deposit funds received from carriers or insurers for damage to or loss of employee's personal property while in transit, for which agency has paid claim pursuant to 31 U.S.C. 241, in appropriation from which payment was made, and not in miscellaneous receipts in the Treasury, since amount received from carrier or insurer constitutes refund of payment made to employee. B-170663, Jan. 21, 1971, is overruled in part.

Matter of: Department of Justice—Deposit of amounts received from third parties as payment for damage for which Government has already compensated claimant, July 19, 1982:

The Assistant Attorney General for Administration (U.S. Department of Justice) has requested our opinion on whether amounts received from third parties for damages to or loss of personal property for which payment was made under the Military Personnel and Civilian Employees Claims Act of 1964, as amended, 31 U.S.C. § 240-243 (1976), may be lawfully deposited to the appropriation from which the payment was made. For the following reasons, we hold that such receipts may be credited to the appropriation from which monies were expended.

The Military Personnel and Civilian Employees Claims Act of 1964, as amended, authorizes the head of an agency or his designee to settle and pay a claim against the United States for not more than $15,000 made by an employee of that agency "for damage to, or loss of, personal property incident to his service." 31 U.S.C. § 241(b)(1). The submission indicates that most of these payments arise from accidents resulting in loss of or damage to employee household goods while in transit in a permanent change of station move (PCS). It is known at the time that the payment is made that there will likely be a recovery from the carrier at a minimum rate per pound (set by law), and that, in general, recovery from an insurer may also be anticipated. However, since in many cases the employee is forced to wait several months for his claim to be acted on by the carrier or its insurer and/or the employee's insurer, the Department of Justice "makes an advance payment to the employee which is subsequently refunded upon settlement of the claim by the carrier or insurer." Frequently, the employee's recovery will not fully reimburse the loss incurred.

The submission explains that where funds are "advanced," the claimant subrogates to the Department of Justice any rights he has against the carrier or insurer for the damages or loss up to the amount paid by the Department and accepted by the claimant. The employee also furnishes the Department with the evidence needed to enforce the claim. If and when the employee receives payment from the carrier or insurer, the employee repays the Department up to the amount "advanced" to him.

The Assistant Attorney General indicates that the Department of Justice has, until now, credited such repayments to the appropriation from which the claim was paid, since "the payment to the employee in the first instance was in the nature of an advance or an accommodation," and any payment subsequently received by the employee from a third party, which is returned to the employing agency, "constitutes a refund of the advance." It is also noted that the payment made to an employee is recorded as a receivable when disbursed.

Before addressing the issue of the account to which amounts received from third parties after a settlement under 31 U.S.C. § 241 are to be credited, we must determine whether payments by an agency which turn out to exceed the amount of an employee's claim against the United States for loss are in fact authorized. In other words, we must decide whether 31 U.S.C. § 241 authorizes an agency to reimburse an employee for that portion of the employee's loss which it knows or strongly believes will be covered by the carrier or insurer. In the given circumstances, we think that it is acceptable, though not required, for an agency to pay an employee the full amount of the loss suffered, even where a recovery from the carrier and/or insurer is contemplated, since it may be difficult to predict the amount of that recovery and thus to ascertain the ultimate extent of the Government's liability for the loss. As long as the claimant is required to subrogate any rights he has against the carrier and/or insurer to the agency, the agency will eventually stand in virtually the same position as it would have had it waited to make its payment until the employee recovered any payments from other sources. The cost to the Government of an initial overpayment amounts to the interest costs incurred by the U.S. Treasury for the period the amounts ultimately refunded are outstanding. On the other hand, the employee suffers detriment—measured by the "time value" of the money owed him or her—while he or she remains without compensation for the destroyed or lost goods. We realize that the agency comes closer to making its employee whole by recognizing and assuming the cost to the individual of delay by the carrier and/or insurer. Viewed this way, we do not characterize Justice's payment as an advance.

Since this Act places the responsibility for settling claims on the head of each agency, we will not object to this practice if any particular agency wishes to adopt it. However, it is equally clear that no agency is required to do so.

Turning then to the question of whether amounts recovered from the carrier/insurer must be deposited in miscellaneous receipts, we rely upon our line of cases which permit the crediting of refunds to the appropriations charged. In 5 Comp. Gen. 734 (1926), for example, we were asked whether money refunded to the Postal Service when mail which was thought to be lost and for which an indemnity had therefore been paid was found and restored to the owner should be deposited in miscellaneous receipts. We held that:

> The moneys appropriated by the Congress for the payment of indemnities for loss of or damage to registered, insured, or C.O.D. mails must be construed as appropriations chargeable with such indemnities only when the damage or loss actually exists, and if upon an erroneous assumption, based upon facts justifying the same, money is paid as indemnity for articles which are subsequently found and restored to the owner, the original charging of the appropriation upon such erroneous assumption is for correction, and the money recovered as refund is properly for credit to the appropriation originally debited with the indemnity payment. Such crediting will not operate to augment the amount appropriated since upon the facts as subsequently developed no loss or damage actually existed, and hence the appropriation should not be charged with any indemnity on account thereof.

We recognize that the case now before us differs from the Postal Service case in that the agency is aware at the time that it settles the employee's claim that a recovery of at least a portion of the loss from a carrier or insurer may be anticipated. However, as previously stated, the agency cannot predict, without a degree of uncertainty, the extent of such a recovery. The appropriation charged with the loss will not be augmented if it is credited with amounts recovered from carrier and/or insurers, since upon the facts as subsequently developed, the extent of the employee's claim against the agency for loss is diminished. The payment received should be treated as a refund. See in this regard 7 GAO Policy and Procedures Manual § 13.2.

We think that our decision at 52 Comp. Gen. 125 (1972) is distinguishable from the given case. In 52 Comp. Gen. 125, we held that collections made under the Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. § 2651-2652, for hospital, medical, surgical, or dental care and treatment of persons injured under circumstances creating a tort liability upon a third person were for deposit in the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 484.

In the instant situation Justice is making a payment to its employee which it presumes may be too large because of potential recovery from a carrier, insurer or other third party precisely to achieve what it has determined to be the law's intent—namely, to make the employee as whole as possible. The instant situation differs from the situation in the FMCRA case in that Justice has the option of not making full payment by waiting until the employee recovers from the other sources. Thus, refund to the appropriation is proper in this case. In the FMCRA case, the agency furnishing the medical care must make the full expenditures therefor and then may or may not be involved in any proceedings against the alleged tort-feasors. The recovery action is independent of the expenditures for medical care in a way that it is not in the instant situation.

It is accordingly our conclusion that amounts received from third parties for damage to or loss of personal property for which payment was made under the Military Personnel and Civilian Employees' Claims Act of 1964 need not be deposited in the Treasury as miscellaneous receipts, but may be treated as authorized repayments; that is, the funds may be retained by the agency for credit to the appropriation from which payment was made in accordance with 7 GAO § 13.3. This applies regardless of whether the third-party recovery is paid directly to the Government or first to the employee (claimant) and then refunded to the Government by the employee. It also applies regardless of whether the form of recovery is direct payment or offset.

One prior decision of this Office, B-170663, January 21, 1971, suggests a contrary result. There, we concluded that funds withheld from a carrier representing an amount the Government had paid to an employee under 31 U.S.C. § 241 and for which the carrier was ultimately liable, should be deposited to miscellaneous receipts. Upon reconsidering this decision, we think it overlooked an essential point discussed above. In settling claims under 31 U.S.C. § 241, the agency has discretion either to allow the full amount of the claim up to the statutory limit and then pursue any third-party recoveries, or to require the employee to pursue third-party claims before presenting his claim to the agency. Naturally, the agency should express whichever policy it chooses in its regulations, and should apply that policy consistently. If the agency chooses the former policy, as Justice has done, it will be making payments in some cases that are, strictly speaking, higher than are required. In such cases, it is entirely legitimate to treat a third-party recovery as a reduction in the amount previously disbursed rather than as an augmentation of the agency's appropriation. Accordingly, to the extent it holds that third-party recoveries arising from the allowance of claims under 31 U.S.C. § 241 must be deposited as miscellaneous receipts, B-170663, January 21, 1971, is hereby overruled.

[B-207089]

Officers and Employees—Transfers—Temporary Quarters—Sharing Leased Quarters—*Pro Rata* Expense Reimbursement

An employee shared a private residence leased by another Government employee and the employee's daughter shared an apartment with a fellow college student during the period for which temporary quarters subsistance expenses are claimed. The shared apartment arrangement involves consideration different from the rules which pertain to lodging furnished by a friend or relative where it is difficult to place a value on the services furnished. An employee who shares responsibility for private quarters with another individual generally shares expenses on a pro rata basis at a fixed monthly amount. Therefore, he need not supply evidence that additional expense resulted from his lodging.

Matter of: Brian M. Bruh—Temporary Quarters Subsistence Expenses—Shared Lodging, July 19, 1982:

John M. Gregg, Chief, Financial Services Branch, General Services Administration (GSA), Washington, D.C., requests an advance decision concerning the propriety of certifying for payment a voucher submitted by Brian M. Bruh for temporary quarters subsistence expenses (TQSE) for himself and his daughter following his transfer and permanent change of station from the Internal Revenue Service in Boston, Massachusetts, to GSA in Washington, D.C., in July 1980.

The issue for determination is whether an employee who shares responsibility for private quarters with another individual, during the period for which TQSE is claimed, is required to submit evidence of additional cost which resulted from his lodging in accordance with the standard of proof applicable to cases in which a friend or relative furnishes the employee's lodging. For the reasons set forth below, we hold that the rules pertaining to an employee who utilizes the facilities of a friend or relative do not apply in the context of shared apartment arrangements.

Mr. Bruh reported for duty at his new official duty station on July 7, 1980, and shared an apartment with another Government employee during the period July 6 through October 25, 1980. Mr. Bruh's claim for $275, representing lodging expenses incurred during the period September 19 to October 19, 1980, is accompanied by a canceled check in the amount of $275 payable to the employee, and his signed statement that Mr. Bruh stayed at his residence and contributed to expenses at a monthly rate of $275.

Mr. Bruh's daughter also incurred lodging expenses of $120 during the period September 19 to October 19, 1980, and this amount represents half the monthly rent for an apartment which she shared with a fellow college student for 60 days prior to moving into her family's permanent residence at the new duty station. In support of this portion of the claim, Mr. Bruh has submitted a canceled check in the amount of $120 payable to Ms. Bruh's roommate.

As indicated by the agency, we have held that where an employee seeks reimbursement for temporary quarters occupied at the home of a friend or a relative, his claim may not be paid where the employee has not furnished information as to whether the friend or relative incurred additional expenses to furnish the employee lodgings. See *Richard Ennis*, B-190716, May 9, 1978. Therefore, we have stated that the burden is on the employee to prove the additional expense caused by the lodging. *Richard W. Metzler*, B-191673, December 5, 1978. The above rules are dictated by the language of paragraph 2-5.4 of the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR), which, in part, limits reimbursement for occupancy of temporary quarters to subsistence expenses actually incurred.

We do not believe that the standard applicable to reimbursement of lodging expenses of an employee utilizing the facilities of a friend or relative would be an appropriate standard to apply where, as here, the employee or his dependent shares responsibility for leased quarters with another individual. The problems of proof associated with a claim for the costs of lodging with a friend or relative are not present in the shared apartment arrangement since, in the latter situation, it is generally assumed that expenses will be shared on a pro rata basis. Thus, the actual basis for reimbursement can be readily determined since the expenses are usually in the form of monthly rent and are paid to a third party in a fixed amount. This is not so in the situation where one resides with a friend or relative, since it is difficult to place a value, if any, on the services furnished.

Neither Mr. Bruh nor his daughter occupied temporary quarters in the homes of a friend or relative, but instead entered into shared apartment arrangements during the period for which TQSE is claimed. Thus, the documentation submitted by Mr. Bruh evidencing the amounts paid to the individuals with whom the private quarters were shared provides a sufficient basis for reimbursement. Accordingly, the voucher may be certified for payment.

[B-205356]

Fees—Membership—Employee *v.* Agency

Use of appropriated funds to pay an agency's membership fees in a private organization is not prohibited by 5 U.S.C. 5946 where the membership is to be purchased in the agency's name rather than that of an individual. Prior to its use of appropriated funds for such a purpose, an agency must make an administrative determination that the payment of fees is necessary for the agency to carry out its authorized activities. In addition, the proposed membership must primarily benefit the agency involved, not its individual employees.

Matter of: Payment of Agency's Membership Fees in Private Organization, July 23, 1982:

The Associate Deputy Assistant for Pay, Travel and Disbursing Systems, Department of the Navy, requests our advance decision on the propriety of using appropriated funds to pay for membership dues in a local private organization. The Commander of the Naval Air Development Center in Warminster, Pennsylvania, seeks to use $100 of appropriated funds for membership fees in the Warminster Rotary Club. The Commander indicates that, based on our decision at 24 Comp. Gen. 814 (1945), he has been advised that payment of rotary membership dues by the Center would be improper. We disagree with this interpretation of our prior decision. In light of the Center's stated purpose for joining the Club, and the fact that the membership is to be taken out in the name of the

Center, not primarily for the use or benefit of any individual employee, we conclude that the payment is proper.

The Naval Air Development Center is located in the Township of Warminster, in the densely populated suburbs of Philadelphia. The Center is the Navy's primary laboratory facility for the research, development, testing and evaluation of Naval aircraft systems. Due to the nature of the facility's mission and its central location, the Commander of the Center states that its success can only be assured with the understanding and active support of Warminster's civic and business leaders. In recent years, however, tension has increased between the Township and the Center as residential and industrial development in the area has brought homes and businesses close to the borders of Naval property. This proximity has led to:

> * * * problems, and the potential for problems, which if unattended and unresolved could likely reduce the effectiveness of this Center * * * [and its] ability to accomplish its mission. * * *

To assure the continued success of the facility, the Commander seeks to improve contact and communication between the Center and the Warminster community. In many communities housing major military installations, civic and military officials have established joint advisory boards to deal with developing problems. This type of forum has not been established in Warminster, however. Instead, according to the Commander, the weekly meetings of the Warminster Rotary Club have "evolved to fill that vacuum and provide the only available common forum" for military officials to discuss and resolve problems with local business and civic leaders. Since the Rotary is the only existing forum for such discussion in Warminster, the Commander believes that the Center's participation in weekly Rotary meetings is necessary to assure its continued successful operation. Therefore, the Commander now seeks to use $100 in appropriated funds to purchase a Rotary Club membership in the name of the Naval Air Development Center.

A major issue in this case is whether the payment of Rotary membership fees in the name of the Center is proper under 5 U.S.C. § 5946 (1966). That section prohibits the use of appropriated funds to pay a Federal employee's membership fees in any organization unless the payment is authorized by a specific appropriation or express terms in a general appropriation, or the membership is part of an employee training program authorized by 5 U.S.C. §§ 4109 and 4110. Section 5946 specifically prohibits the payment of dues for *individual* Government employees, regardless of any benefit which might accrue to the agency as a result of the individual's membership. However, this section does not prohibit the payment of an *agency's* membership fee in a private organization. So long as the primary benefit of the membership accrues to the agency, rather than its employees, and the agency determines that its membership in a particular organization is necessary to carry out its statutory functions, the agency may use appropriated funds to pay membership fees. *See, e.g.* 53 Comp. Gen. 429, 431 (1973); 52 *id.* 495, 496 (1973); 31 *id.* 398 (1952).

This same rule was stated in 24 Comp. Gen. 814, *supra,* mentioned in the submission as precluding payment. Although in that case the agency involved indicated that "no officer or employee attends meetings thereof, or otherwise takes part in activities of the association or derives any benefit therefrom," that fact was not necessary to our conclusion. If the primary benefit of membership accrues to the agency, payment of the membership fee is proper even if individual employees participate and benefit incidentally from the activities of the association. *See* 24 Comp. Gen. at 816. We have consistently followed this rule in later cases, as discussed above.

The Naval Air Development Center's proposed membership in the Rotary Club will benefit only the Center, not any of its individual employees. According to the Commander, individual Center employees will participate in Rotary meetings solely as representatives of the Navy, neither expecting nor receiving any personal benefits from the Center's membership. Beyond this representative capacity "no individual will otherwise take part in activities of the organization."

Furthermore, the Commander of the Center believes that the payment of membership fees in the Rotary Club is necessary to ensure the overall success of the Center's mission. Since no joint military/civilian advisory board exists in the Township, the weekly meetings of the Rotary Club provide the only opportunity for Center personnel and local civic leaders to meet and discuss their mutual problems. The Commander believes that the Center's involvement in such discussions is crucial to the resolution and prevention of difficulties which, if left unresolved, might reduce the effectiveness of the Center.

> * * * It is for this reason, namely to obtain the benefits derived from the regular opportunity to meet and discuss mutual problems with civic and business leaders, that this Center has administratively determined it necessary to participate in weekly meetings of the Rotary.

Since the Commander has administratively determined that the payment of Rotary membership fees is necessary to carry out the Center's mission, and since the proposed membership will be of benefit primarily to the Center and not to its individual employees, payment of the Center's membership fees in the Warminster Rotary Club is not prohibited by 5 U.S.C. § 5946 or any other statute so far as we are aware. Such payment is proper as a necessary expense of the Center's operation.

Our conclusion in this case, however, does not mean that every military installation or regional Government office can use appropriated funds to join the Rotary, Kiwanis, Lions, and similar organizations. Under 5 U.S.C. § 5946, and our decisions cited above, appropriated funds can be used for agency membership in a private organization only when the agency can establish that the membership will contribute substantially to the fulfillment of its mission. In this case we have approved the expenditure only because we agree with the Center Commander's determination that participation in meetings of the Rotary is crucial to the Center effectively carrying out its mission.

[B-205521.3, B-205521.4]

Small Business Administration—Contracts—Contracting With Other Government Agencies—Procurement Under 8(a) Program—Contractor Eligibility—Adverse Size Determination by Appeals Board

Prior decision, which sustained a protest against award of a contract under the Small Business Administration's section 8(a) program to a firm determined by the SBA Size Appeals Board not to be small, is affirmed where it has not been established that the decision was based on an error of law or fact.

Matter of: Computer Data Systems, Inc.—Reconsideration, July 26, 1982:

The Small Business Administration (SBA) and Systems and Applied Sciences Corporation (SASC) request that we reconsider our decision in the matter of *Computer Data Systems, Inc.*, B-205521, June 16, 1982, 82-1 CPD 593. In that decision, we sustained a protest by Computer Data Systems, Inc. against the award of a contract to SASC for the development and maintenance of software systems for the Navy under the SBA's section 8(a) program. We recommended that the SBA no longer consider SASC for the Navy requirement or for any further contracts under the 8(a) program unless the SBA formally reverses the determination by the SBA Size Appeals Board that SASC is not a small business.

On June 30, 1982, SASC filed suit in the United States District Court for the District of Columbia for declaratory and injunctive relief. The case, *Systems and Applied Sciences Corporation* v. *Sanders,* Civil Action No. 82-0157, concerns material issues that are the subject of the requests for reconsideration. On July 1, 1982, the court issued a temporary restraining order and requested an expeditious decision by our Office.

The SBA and SASC contend that our initial decision was wrong because, among other things, it erroneously relied on *Cal Western Packaging Corp.* v. *Collins,* Civil Action No. 80-2548, D.D.C. April 30, 1982, and failed to recognize the advisory and inconclusive nature of size determinations concerning 8(a) firms. We have carefully considered each of the arguments proffered by the SBA, SASC, and a consortium of 8(a) firms that submitted an *amicus* brief, and we are not persuaded that our initial decision was incorrect. Therefore, we affirm our initial decision.

The facts in this case are simple and undisputed. SASC is a participant in the SBA's section 8(a) program, a program designed to foster the competitive viability of small business concerns that are owned and operated by socially and economically disadvantaged individuals. Under the 8(a) program, SASC has received approximately 250 contracts totaling more than $50 million.

On May 1, 1981, the SBA Administrator issued a memorandum directing regional administrators to initiate a size review of fifty participants in the 8(a) program, including SASC, whose receipts from 8(a) contracts indicated that they may have ceased to be small business concerns. The Philadelphia Regional Office immediately began a review of SASC's status and, on June 22, 1981, determined SASC to be other than a small business concern for computer programming services, SASC's principal activity.[1] To qualify as a small business with respect to computer programming services, a firm's average annual receipts in the previous three years may not exceed $4 million. 13 C.F.R. § 121.3-8(e)(9) (1982). Since SASC's average annual receipts exceeded this amount, the regional office ruled that SASC was not a small business for purposes of the 8(a) program. SASC appealed this determination to the SBA Size Appeals Board. The Board denied the appeal on September 28, 1981. SASC's subsequent petition for reconsideration was denied on July 7, 1982.

In question here is the authority of the SBA to award contracts under the 8(a) program in the face of the size determination. SASC was admitted to the 8(a) program in part on the basis that it met the $4 million size standard applicable to its principal business, the performance computer programming services. At no time since SASC's admission to the program has the SBA determined that SASC's principal business is other than computer programming. Although SASC now alleges its principal business is manufacturing, SASC's business plan clearly contemplates computer programming as SASC's principal business. Despite the apparent applicability of the $4 million standard, it appears that prior to the adverse size determination the SBA consistently provided 8(a) contracts to SASC of a magnitude far exceeding the $4 million annual receipts standard. This level of support appears to have increased rather than diminished since the June 22, 1981 adverse size determination. The record shows that SASC received 8(a) contracts worth more than $16 million in fiscal 1981 and more than $10.3 million in the first nine months of fiscal 1982. Thus, not only does the SBA continue to award contracts to SASC in the face of an adverse size determination, but it continues to award contracts at a level which is totally inconsistent with the size standard upon which SASC's 8(a) eligibility is based. It is against this background that the SBA

[1] To be eligible for the 8(a) program, a firm must meet the size standard that applies to its principal business activity. 13 C.F.R. § 124.1-1(c)(1).

has proposed to award SASC the Navy requirement for an estimated $1.9 million, prompting the protest by Computer Data Systems.

At the center of this controversy are two provisions of section 8(a) of the Small Business Act. 15 U.S.C. § 637(a) (Supp. III 1979). Section 8(a)(1)(C) authorizes the SBA to enter subcontracts with small disadvantaged business concerns. Section 8(a)(9) provides that no firm previously deemed eligible for the 8(a) program may be "denied total participation" in the program without first being afforded a hearing in accordance with the Administrative Procedure Act (APA). Relying upon the latter provision, the SBA asserts that notwithstanding the adverse size determination, it has the discretion to award new contracts to 8(a) firms until the firm is terminated from the 8(a) program after an APA hearing. Moreover, the SBA takes the view that it need not institute a termination hearing at all if, taking factors other than size into consideration, it judges termination to be inappropriate. This means that it may postpone indefinitely the application of size standards to 8(a) firms.

We have carefully reviewed the Act, and its legislative history, and we find no Congressional intent to expand, through the enactment of section 8(a)(9), the SBA's authority to permit the award of 8(a) contracts to concerns which the SBA knows are not small businesses. In *Cal Western*, the U.S. District Court for the District of Columbia considered the SBA's position concerning section 8(a)(9) and firmly rejected it. The court's language bears repeating:

> Despite the statutory provisions limiting the 8(a) program to small businesses, SBA contends that after a company initially qualifies to receive assistance under the 8(a) program, the agency may award a contract to the company even if the company is not small under the applicable regulations. The agency finds authority for this position in the statute's requirement that no firm "shall be denied total participation in [the 8(a)] program * * * without first being afforded a hearing on the record." 15 U.S.C. § 673(a)(9). It claims that refusing to award any new contracts to a company which is not small would be tantamount to excluding the company from the 8(a) program without a hearing and would therefore violate the statute.
>
> The agency's position is clearly incorrect. This provision is designed to insure that a company is not permanently excluded from the 8(a) program until a hearing is held. However, it does not require the agency to continue to award contracts to a company which has been found in violation of the size standards. If the company is ultimately exonerated, contract awards may resume, but until then a company which is not a small business may not receive awards on theory that it is. Thus, the company is not denied total participation in the 8(a) program; it is simly temporarily suspended until its eligibility can be finally determined. Any other result would violate both the letter and the spirit of the statute by allowing businesses which are not small to gain the benefits of the 8(a) program. *Cal Western*, pp. 2–3.

The SBA contends that *Cal Western* is not applicable because a conclusive size determination had been made concerning Carmatek, (the 8(a) firm found other than small) whereas the size determination concerning SASC is merely advisory. The SBA reaches this conclusion on the basis that the size standard applied to Carmatek, the "nonmanufacture rule," operates differently than the other size standards. This standard applies to a firm that offers to furnish a product it did not manufacture and requires such firms to meet two tests: the firm must have 500 or fewer employees, and the actual manufacturer of the product must be a small business. The SBA contends that this size standard actually can only apply to a particular contract (since a firm's supplier, and thus its size status, may vary from contract to contract). For that reason any size determination applying the standard can have no long term programmatic effect. The size standard applied to SASC, however, in the SBA's view has a programmatic effect.

The SBA's argument is unpersuasive. The "nonmanufacture rule" is one of the size standards set forth in 13 C.F.R. § 121.3–8. We can perceive no compelling basis for according size determinations either controlling weight or no weight with regard to the 8(a) program depending upon which size standard is being applied. Moreover, we find no textual support in *Cal Western* for the limitation of that decision to the particular size standard involved. In fact, the attempt to distinguish the nonmanufacture rule from other size standards appears to have been explicitly rejected by the court:

> SBA has undermined its own argument by conceding at oral argument that in some cases, such as where the company violates the nonmanufacture rule, it would be improper to award a contract pending the hearing. * * * If withholding contracts from one company does not exclude it from the 8(a) program in violation of section 637(a)(9), it cannot reasonably be held that the provision would be violated by withholding contracts from all businesses which are not small. *Cal Western*, p. 3.

SASC attempts to distinguish *Cal Western* on other grounds. It argues that Carmatek's contract constituted a violation of the Walsh-Healey Act's prohibitions against "brokering" Government supply contracts and that therefore the contract was illegal and void from the beginning, so that there was no need for an 8(a)(9) termination proceeding in order to make a determination concerning Carmatek's size status.

This argument is completely without merit. The Walsh-Healey Act clearly was not a factor in the court's decision, nor could it have been; the Walsh-Healey Act specifically exempts "contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or products thereof," 41 U.S.C. § 43 (1976). Carmatek's contract was to supply grain and soybean oil to the Department of Agriculture.

Next, the SBA and SASC argue that our initial decision fails to recognize that size determinations conducted under 13 C.F.R. part 121 are merely advisory with respect to the 8(a) program. The regulations provide that "size determinations under Part 121 on initial entry into the 8(a) program or on program completion or termination are advisory to the [Associate Administrator for Minority and Small and Capital Ownership Development]; and/or to the Administrative Law Judge in 8(a) proceedings under Part 124." 13 C.F.R. § 121.3–17(b).

We agree that the size determination is not conclusive and that the ultimate arbiters of SASC's size eligibility for the 8(a) program are the Associate Administrator and the Administrative Law Judge in termination proceedings. From this proposition, however, it does not follow that the Size Appeals Board size determination is utterly without effect. SBA officials with especial expertise in assessing compliance with size standards have determined, after affording SASC an opportunity to present facts and arguments, that SASC does not meet the size standard applicable to its principal business activity. To continue to award contracts under 8(a) in the face of such a determination raises serious questions concerning the SBA's compliance with the Act. The court in *Cal Western* recognized this and ruled that unless and until the final arbiters of the issue determine the firm to be small, further awards would violate the letter and spirit of the Small Business Act. Under the particular circumstances of this case, we believe that the logic of *Cal Western* is controlling.

SASC contends that our initial decision runs contrary to the congressional intent underlying the enactment of Public Law No. 96–481, 94 Stat. 2321 (1980). This amendment to the Small Business Act requires the SBA to establish for each 8(a) firm a fixed period for participation in the 8(a) program. Pursuant to this amendment, the SBA established for SASC a Fixed Program Participation Term which will expire automatically on October 21, 1983. Our decision, argues SASC, impermissibly interferes with the congressional mandate that firms exit the program in an orderly fashion as of a fixed date. In SASC's view, regardless of its size, it should be permitted to continue to receive awards consistent with its business plan until its graduation in October 1983.

We note initially that Congress did not enact the provisions solely to ensure that 8(a) firms' exits from the program would be smooth and orderly rather than abrupt as SASC seems to suggest; rather, Congress's concern was that "the continued participation of a few firms, in the absence of some compelling need, only injures those other small businessmen who could enter the marketplace through the 8(a) program." S. Rep. No. 974, 96th Cong., 2d Sess. p. 22 (1980). Moreover, there is no indication in the text of Public Law No. 96–481 or its legislative history that by enacting the graduation provisions Congress intended to alter in any way the SBA's enforcement, through size determinations or termination hearings, of the eligibility requirements. As the U.S. District Court for the District of Columbia recently observed:

> By enacting [Public Law No. 96–481], Congress demonstrated concern with he open-ended nature of the section 8(a) program, and accordingly thrust both the companies and the SBA to a determined goal by directing that the participants and the Administration negotiate over graduation dates. *But nowhere in the statute did the Congress prohibit or limit size determinations or decide that graduation would be the only ground for termination from the 8(a) program.* The Act leaves undisturbed the power of the Administrator to investigate and the power of the Administration to revoke the small business concern certificates. Congress did not construct a universal mechanism to facilitate a firm's departure from the 8(a) program. Rather, it established a method in addition to voluntary withdrawal or termination proceedings to ensure that only eligible participants were in the 8(a) program. [Italic supplied.] *Amex Systems, Inc.* v. *Cardenas,* 519 F. Supp. 537, 542 (D.D.C. 1981)

SASC contends that our decision, by recommending that contracts be withheld pending a final determination, incorrectly assumes a prompt hearing on the record. SASC contends that there are currently no ongoing hearings pursuant to section 8(a)(9) and that the SBA does not even have an administrative law judge to preside over a hearing. SASC claims it will suffer severe economic dislocation if contracts are withheld pending a termination hearing.

As the SBA pointed out at a conference concerning the requests for reconsideration, SASC's assertions concerning a long delay prior to a hearing are inaccurate: the SBA currently has numerous ongoing 8(a)(9) hearings and it does have available administrative law judges to preside. In fact, the SBA advises that it initiated a hearing on SASC's situation following the July 7 denial of SASC's petition for reconsideration.

It is urged, in an *amicus* brief filed by a consortium of 8(a) firms, that our recommendation that the SBA withhold contracts from SASC constitutes a *de facto* debarment or suspension in violation of the Due Process Clause of the Constitution. The consortium cites a long line of cases which require a minimum of notice and an opportunity to be heard prior to suspension debarment or termination. See *e.g. Old Dominion Dairy Products, Inc.* v. *Secretary of Defense*, 631 F. 2d 953 (D.C. Cir. 1980); *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D.C. Cir. 1964).

Our recommendation does not constitute a suspension or debarment as those terms are used in the decisions cited. Suspension or debarment in those decisions refers to a complete exclusion from contracting with the Government or with a Government agency. *See* Federal Procurement Regulations § 1-1.601-1 (1964 ed.); *Myers & Myers, Inc.* v. *United States Postal Service*, 527 F. 2d 1252, 1259 (2nd Cir. 1975). In this case, SASC's right to contract with the Government or with an agency is by no means abrogated. Rather, awards to SASC under the 8(a) program, which SASC has received with limited competition (that is, only against other 8(a) participants), or no competition at all, are being temporarily held in abeyance pending the section 8(a)(9) hearing. Moreover, we note that SASC, in accordance with the size determination procedures delineated in 13 C.F.R. § 121.3, has been given notice of the charges concerning its suspected size ineligibility and has been afforded three opportunities to present its version of the facts and its arguments. We believe it reasonable to presume that the size determination procedures promulgated by the SBA, which are routinely applied to deprive non-8(a) firms the benefit of bidding on procurements set aside for competition by small businesses, meet due process requirements.

Next, the parties contend that an adverse size determination, instead of leading to temporary suspension from the entire 8(a) program as we recommended in SASC's case, should only cause the firm to be ineligible for that class of 8(a) contracts to which a size standard of $4 million or less is involved. For example, even if SASC should not receive further 8(a) computer programming services contracts because of the $4 million gross receipts standard, the firm still could be considered for an 8(a) manufacturing contract, where size is based on the number of employees.

We must reject this position simply because it is inconsistent with the SBA's own regulations that implement the 8(a) program. SBA's regulations require that "to be eligible to participate" in the 8(a) program, a firm must qualify "as a small business concern as defined for purposes of Government procurement in [13 C.F.R. § 121.3-8]. The particular size standard to be applied shall be based on the principal activity of the applicant concern." 13 C.F.R. § 124.1-1(c)(1). The regulation at § 121.3-8 sets out the size standards, including the $4 million standard for computer programming services concerns. Further, § 121.3-17 explicitly states that "eligibility is determined with reference to the 8(a) program in general and not with reference to award of particular 8(a) procurements." Although the SBA may revise its regulations, we have no choice but to apply the regulations as they currently exist.

Last, SASC asks that we clarify our recommendation that SASC should not be considered for further 8(a) contracting unless the adverse size determination is formally reversed. SASC believes that read literally, this language might be interpreted as to foreclose the prospect of recertification provided in 13 C.F.R. § 121.3-4(d). We did not and do not intend to interfere in any way with SASC's unquestionable right to apply for recertification under this provision.

We conclude that the SBA and SASC have not established that our prior decision was based on an erroneous interpretation of either fact or law. Therefore, we affirm our decision. *Federal Sales Service, Inc.—Reconsideration,* B-198452, June 16, 1980, 80-1 CPD 418.