Decisions of The Comptroller General of the United States

VOLUME 62 Pages 605 to 640

AUGUST 1983

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300131000

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1983

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

COMPTROLLER GENERAL OF THE UNITED STATES

Charles A. Bowsher

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Vacant

ACTING GENERAL COUNSEL

Harry R. Van Cleve

DEPUTY GENERAL COUNSEL

Harry R. Van Cleve

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Rollee H. Efros

Seymour Efros

Richard R. Pierson

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Compensation—Panama Canal Employment System—Retroactive Increases—Authority to Implement

The Assistant Secretary of the Army (Civil Works) questions whether he is authorized by section 1225(b)(2) of the Panama Canal Act of 1979 to retroactively implement an increase in the wages of employees of Federal agencies participating in the Panama Canal Employment System. We hold that the wage increase may not be effected retroactively because section 1225(b)(2) of the Panama Canal Act, authorizing annual wage increases, does not specifically provide for the retroactive implementation of such increases. Absent specific statutory authority, pay increases resulting from the exercise of discretionary administrative authority may be implemented on only a prospective basis.

Matter of: Panama Canal Employment System—Retroactive Wage Increases, August 2, 1983:

William R. Gianelli, Assistant Secretary of the Army (Civil Works), has requested a decision, as to whether the Panama Canal Act of 1979, Public Law 96-70, authorizes him to grant a retroactive increase in wages for certain employees of Federal agencies participating in the Panama Canal Employment System. We hold that the Assistant Secretary is not authorized to grant a retroactive wage increase for the affected employees because section 1225(b)(2) of the Panama Canal Act, 22 U.S. Code 3665, authorizing annual wage increases, does not specifically provide for the retroactive implementation of such increases. Absent a specific statutory provision authorizing retroactive pay adjustments, an increase in compensation resulting from the exercise of discretionary administrative authority may be effected on only a prospective basis.

This decision has been handled as a labor-management relations matter under our procedures in 4 C.F.R. Part 22 (1983). Copies of the request were served upon seven labor organizations, but we received no comments from those groups.

DISCUSSION

Prior to implementation of the Panama Canal Treaty of 1977 (TIAS No. 10030), employees of Federal agencies conducting operations in the Republic of Panama were paid under the Canal Zone Merit System in accordance with rates of basic pay for the same or similar work in the United States. See Canal Zone Code, title 2, §§ 144, 149 (1962). The Panama Canal Act of 1979, Public Law 96-70, chapter 2, 96 Stat. 468, 22 U.S.C. §§ 3601-3871 (Supp. III 1979), implementing the Panama Canal Treaty, directed replacement of the Canal Zone Merit System by the Panama Canal Employment System, and established a new schedule of wages applicable to certain employees hired on or after the effective date of the Act. The new wage schedule, implemented on October 1, 1979, by the Panama Area Wage Base, is prescribed by section 1225(b) (22 U.S.C. § 3665(b)(2) (Supp. III (1979)) of the Act as follows:

(b)(1) Effective October 1, 1979, each individual employed by an Executive agency or the Smithsonian Institution, whose permanent duty station is located within an area or installation in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements, shall be paid basic pay at a rate of not less than $2.90 an hour.

(2) Effective on October 1 of each succeeding calendar year, the rate of basic pay for each individual referred to in paragraph (1) of this subsection whose basic pay is not fixed in relation to rates of basic pay for the same or similar work performed in the United States shall be increased by an amount equal to not less than 2 percent of the rate of basic pay for that individual in effect immediately before that date.

Under the "grandfather" provisions of section 1219 of the Panama Canal Act, individuals employed by Federal agencies operating in the Republic of Panama prior to the effective date of the Act are not subject to the wage schedule established in section 1225(b)(2), but, instead, continue to receive rates of basic pay comparable to United States wage rates. 22 U.S.C. § 3659 (Supp. III 1979).

Authority for administering the wage and employment provisions of the Panama Canal Act is vested in the President by Section 1223(a) of the Act. 22 U.S.C. § 3663 (Supp. III 1979). By Executive Order No. 12173, 44 Fed. Reg. 69271 (1979), as amended, the President delegated his authority under the Act to the Secretary of Defense. Implementing regulations promulgated by the Secretary of the Army, set forth in Parts 251 and 253 of Title 35, Code of Federal Regulations (C.F.R.) (1982), establish the Panama Canal Employment System and prescribe rules governing wage and employment practices within the System. The mechanism for adjusting rates of basic pay for employees of Federal agencies participating in the System is established in 35 C.F.R. § 251.13, which provides as follows:

Agencies that participate in the Panama Canal Employment System shall consult with each other concerning basic pay for employees and shall refer their recommendations for basic pay to the Panama Area Personnel Board. Upon approval by the Secretary of the Army or his designee of basic wage rates, the rates shall be adopted by the agencies.

The Assistant Secretary of the Army reports that the changes in wage rates effected by the Panama Canal Act have had an adverse impact on employee morale since employees hired on or after the effective date of the Act receive basic pay and annual cost-of-living allowances at a rate substantially lower than employees "grandfathered" at United States wage rates. Further, he states that the Government of the Republic of Panama and labor organizations representing employees stationed in Panama have charged that the wage system is discriminatory as it violates the "equal work-equal pay" principle.

In order to respond to the concerns expressed by the Government of the Republic of Panama and labor organizations, and to improve the competitive posture of Federal agencies operating in Panama, the Panama Area Personnel Board revised the Panama Area Wage Base in January 1982 to conform in principle to the General Schedule, with 10 steps. This revision provided for regular within-grade increases, permitted supervisors to recommend deserving employ-

ees for quality salary increases, and authorized agencies to use the highest previous rate rule, which benefits employees by placing them in a higher step of their grade. These changes were to be reviewed after 1 year to determine whether further adjustments in the wage structure were required.

On October 1, 1982, the Assistant Secretary of the Army approved the minimum 2 percent increase in wage rates authorized by section 1225(b)(2) of the Panama Canal Act. We have been informally advised by a member of the Assistant Secretary's staff that the 2 percent increase was granted on an "automatic" basis, without discussion or consideration of possible enlargement of the increase before October 1, 1983, the date prescribed for the next annual wage adjustment.

In January 1983, the Panama Area Personnel Board completed its review of the January 1982 changes in the Panama Area Wage Base. The Board determined that, among a variety of other measures, an additional 2 percent wage increase was necessary to aid recruitment and retention of qualified personnel in Panama and to improve employee morale. Responding to these findings, the Assistant Secretary decided to grant an additional 2 percent wage increase retroactively effective on October 1, 1982. This determination, as part of a "package" of changes designed to reduce the disparity between the wages of pre-Treaty and post-Treaty employees, was separate from the Assistant Secretary's earlier determination on October 1, 1982, to grant the minimum 2 percent increase required by section 1225(b)(2) of the Panama Canal Act.

The Assistant Secretary now questions whether the additional 2 percent wage increase approved in January 1983 may be implemented retroactively in view of our decisions disallowing retroactive adjustments in pay absent specific statutory authority. It is the Assistant Secretary's position that section 1225(b)(2) of the Panama Canal Act allows retroactive implementation of the wage increases authorized therein. He has advised that, pending the issuance of a decision by our Office, the additional 2 percent increase will be paid prospectively but not retroactively.

As indicated by the Assistant Secretary, we have held as a general rule that retroactive pay increases may be granted only by express authority of Congress. 31 Comp. Gen. 191 (1951); 25 id. 601 (1946). Applying this requirement to the terms of section 1225(b)(2) of the Panama Canal Act, we are unable to find specific authority enabling the Assistant Secretary to retroactively implement on October 1, 1982, an additional 2 percent wage increase approved in January 1983. Section 1225(b)(2) states that wage increases of not less than 2 percent of basic pay will be effective on October 1 of each calendar year following the effective date of the Act, and makes no provision for the retroactive implementation of annual wage increases approved subsequent to the specified date.

Absent statutory authority specifically providing for retroactive increases in compensation, we have allowed retroactive pay increases only where such increases do not depend upon the exercise of discretionary administrative authority. Thus, we have allowed retroactive compensation increases where the statute authorizing the increase is mandatory, directing the payment of additional compensation on a certain date without vesting discretionary authority in an administrative official to determine the amount of compensation payable. See 44 Comp. Gen. 153 (1964). In such circumstances, an employee's right to additional compensation arises by operation of law, and cannot be defeated by erroneous administrative action. See generally 24 Comp. Gen. 676 (1945). In contrast, an increase in compensation resulting from the exercise of discretionary administrative authority is effective on the date the proper administrative official approves the increase or on such later date as he may specify, even though the conditions justifying the increase existed prior to the date of the administrative action. B-170113, July 13, 1970; 31 Comp. Gen 462 (1952); and 24 *id.* 676, cited above.

While section 1225(b)(2) of the Panama Canal Act is mandatory in that it requires the effected employees' rates of basic pay to be increased by a mimimum of 2 percent effective October 1 of each calendar year succeeding October 1, 1979, it vests discretion in the administrator of the Act to approve wage increases exceeding 2 percent. Thus, the Assistant Secretary's action in January 1983 approving a 2 percent increase in addition to the minimum 2 percent increase granted previously constituted an exercise of administrative discretion. Under these circumstances, the additional 2 percent increase may be implemented on only a prospective basis, even though the conditions justifying the increase may have existed prior to January 1983.

For the foregoing reasons, we hold that the 2 percent wage increase approved by the Assistant Secretary of the Army in January 1983 may not be retroactively implemented on October 1, 1982.

[B-210532]

Debt Collections—Waiver—Civilian Employees—Compensation Overpayments—Failure to Deduct Insurance Premiums—Optional Life

Employee elected regular and optional life insurance coverage under the Federal Employees' Group Life Insurance Program (FEGLI), but when he transferred in 1969 the new agency stopped deducting his optional insurance premiums due to an administrative error. Since the employee received Leave and Earnings Statements throughout the period in question, which reflected optional premium deductions before his transfer, but not afterward, his failure to examine the statements and to note the error makes him at least partially at fault, thereby precluding waiver under 5 U.S.C. 5584.

Matter of: Frederick D. Crawford—Waiver—Nondeduction of Optional Life Insurance Premiums, August 3, 1983:

Mr. Fredrick D. Crawford, a civilian employee of the United States Army, appeals our Claims Group's September 26, 1980 denial of his request for waiver of a claim against him by the United States for overpayment of compensation in the amount of $674.60. The overpayment resulted from his agency's failure to make proper deductions from his salary for his optional life insurance coverage under the Federal Employees' Group Life Insurance Program (FEGLI). For the reasons stated below, we conclude that waiver should not be granted under the circumstances of this case.

Mr. Crawford, a Procurement Analyst employed by the U.S. Army Tank Automotive Command at Warren, Michigan, elected both regular and optional life insurance coverage under FEGLI on February 20, 1968. Thereafter, he was transferred to the White Sands Missile Station, effective March 23, 1969. At the time of the transfer, the agency failed to note that Mr. Crawford had previously elected coverage under both the regular and optional life insurance plans. As a result, from March 23, 1969, through early February 1978, when the error was discovered, the agency deducted only regular insurance premiums from Mr. Crawford's salary, resulting in a total overpayment of $674.60.

Mr. Crawford initially applied to the Department of the Army for waiver of his indebtedness and, under the provisions of 5 U.S.C. § 5584, the request was forwarded to our Office with the recommendation that waiver be approved in part, and denied in part. In a submission dated March 2, 1979, the Army Finance and Accounting Center recommended that waiver of $639.80 be approved since, in its view, a reasonable person might not have recognized that an error had been made, since several pay changes had occurred during the period in question. In addition, the agency postulated that Mr. Crawford's Leave and Earnings Statements might have confused him since they reflected only one deduction for both regular and optional life insurance prior to September 17, 1977. The agency recommended that waiver of the remaining $34.80 be denied since overpayment of this amount occurred after September 17, 1977, when the Leave and Earnings Statements began to show separate entries for regular and optional insurance deductions.

Despite this recommendation, our Claims Group denied waiver of the erroneous overpayment in its entirety in a settlement letter dated September 26, 1980. Since Mr. Crawford had been provided with Leave and Earnings Statements throughout the period of the overpayment, an examination of which would have apprised the employee of the agency's failure to deduct the optional FEGLI premiums, the Claims Group found Mr. Crawford to be at least partially at fault for the undetected overpayment.

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In an appeal dated September 30, 1982, Mr. Crawford asserts that he did not know, and could not reasonably have known, that optional premium payments were not being deducted from his salary since, "deductions for life insurance did show increases over the years and were taken to be the proper accounting for the total insurance coverages (regular and optional)." Moreover, Mr. Crawford claims that the premium deductions of $674.60 are charges for a benefit that he never received, since neither Mr. Crawford nor any other covered family member died or suffered injury while the policy was in effect. Furthermore, he expresses doubt that his family would have been able to receive the optional life benefit if he had died during the term of the policy.

The Comptroller General is authorized by 5 U.S.C. § 5584 to waive claims for overpayment of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States. Such authority may not be exercised if there is an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim. Since there is no indication of fraud, misrepresentation, or lack of good faith on the part of the employee in this case, waiver hinges on whether Mr. Crawford is found to be at fault.

We consider "fault" to exist if, in light of all the circumstances, it is determined that the individual concerned should have known that an error existed, but failed to take action to have it corrected. See *Charles J. Zeman,* B-199802, November 28, 1980, and 4 C.F.R. § 91.5 (1983). In making this determination, we ask whether a reasonable person in the employee's position should have been aware that he was receiving payment in excess of his proper entitlements. See *George R. Beecherl,* B-192485, November 17, 1978, and *Charles J. Zeman,* above.

If an employee has records which, if reviewed, would indicate an overpayment, and the employee fails to review such documents for accuracy or otherwise fails to take corrective action, he is not without fault, and waiver will be denied. See *Bernard J. Killeen, Jr.,* B-198207, August 22, 1980; *John J. Doyle,* B-191295, July 7, 1978. This rule is particularly relevant in the case of Leave and Earnings Statements. As we stated in *Arthur Weiner,* B-184480, May 20, 1976, we cannot stress too highly the importance of a careful review by each employee of the pay data provided by the employing agency. Such review, and reporting of discrepancies for remedial action, is an essential function in the Government's attempt to reduce payroll errors. Thus, if an employee is given a Standard Form (SF) 50 showing that he has life insurance coverage but his Leave and Earnings Statements show that premiums were not withheld, the employee has notice of an error and is ordinarily considered to be at least partially at fault if he fails to take corrective action. *John J. Doyle,* above.

In this case, Mr. Crawford's transfer to the White Sands facility was initially documented by an SF-50, dated March 24, 1969, which erroneously indicated that he had elected only regular life insurance coverage. This error was later corrected, however, by a second SF-50, dated April 23, 1969, which properly indicated that Mr. Crawford had elected both regular and optional insurance coverage. The record futher indicates that Mr. Crawford received biweekly Earnings Statements both before and after his transfer to the White Sands facility. We believe that an examination of those statements should have revealed the underdeduction to Mr. Crawford, for the amount deducted for his insurance coverage was considerably less than the amount which should have been deducted on a biweekly basis for both regular and optional coverage. This underdeduction should have been particularly evident to Mr. Crawford during the first year after his transfer, since his total biweekly insurance deductions during that period (at $3.58 initially, and, later, at $3.85), were less than the amount which should have been deducted for optional insurance alone, which was then $6.00 each pay period.

Furthermore, in completing Mr. Crawford's application for waiver, dated September 20, 1978, the agency stated as follows:

> Mr. Crawford stated, he had not verified the pay computation shown on his earnings and leave statement in detail necessary to determine optional life insurance was not being deducted from his earnings and that he did not have insurance tables to determine the exact amount of insurance premiums that should have been deducted.

Since Mr. Crawford was aware that he had elected optional life insurance coverage, and since the agency's failure to deduct the optional premiums should have been apparent from an examination of the Leave and Earnings Statements provided, we must conclude that Mr. Crawford was on notice of the overpayment, and thereby deny waiver.

Mr. Crawford also asserts that he may have received no benefit from the optional insurance coverage since it is not clear to him that his beneficiary would have received payment had he died. Contrary to Mr. Crawford's belief, his beneficiary would have received the life insurance if he had died during the period after he elected coverage even though no premium payments were deducted from his wages. Under 5 C.F.R. §§ 871.203 and 871.204, optional insurance can be cancelled only by the employee's ineligibility for coverage or the employee's written cancellation. See *Thomas O. Marshall, Jr.,* B-190564, April 20, 1978. For this reason, we have held that it is not against equity and good conscience to require an employee in Mr. Crawford's situation to pay for the life insurance protection provided.

For the reasons set forth above, we sustain the determination by our Claims Group denying Mr. Crawford's request for waiver.

[B-210963]

Pay—Additional—Diving Duty—Requirements

To qualify for special pay for diving duty, under 37 U.S.C. 304(a), an individual must be assigned to, maintain a proficiency in, and actually perform diving duty. Each requirement must be met before special pay begins to accrue. Therefore, where a member was assigned to duty as a student at Officer Candidate School during which he did not actually perform diving duty, although he may have met the other requirements, he may not receive special pay. 37 Comp. Gen. 546 is distinguished.

Matter of: Petty Officer Rodney L. Kruse, USN, August 3, 1983:

This action is in response to a request for an advance decision to determine the legality of paying Petty Officer Rodney L. Kruse, USN, special pay for diving duty to which he was assigned while attending Officer Candidate School. We find that he is not entitled to the special pay because he did not actually perform diving duty during that period.

The question was submitted by the Disbursing Officer, Naval Personnel Support Detachment, Newport, Rhode Island, and has been assigned submission number DO-N-1413 by the Department of Defense Military Pay and Allowance Committee.

Petty Officer Kruse was transferred from duty at San Diego, California, to temporary duty for instruction at the Officer Candidate School, Naval Education and Training Center, Newport, Rhode Island, beginning July 31, 1982, and, thereafter for further assignment. While the duration of the temporary assignment is not apparent from the record furnished us, we presume that it exceeded one month, as is usually the case. Petty Officer Kruse's original orders were modified to indicate that "primary duty involving diving" was an essential part of his military duty. However, as a student at the school he did not actually perform any diving duty.

Under 37 U.S.C. § 304(a), as amended by Public Law 97-60, § 115, October 14, 1981, a member of the armed services is entitled to special pay for diving duty when the individual:

(1) Is assigned by orders to the duty of diving;
(2) Is required to maintain proficiency as a diver by frequent and regular dives; and
(3) Actually performs diving duty.

Implementing regulations found in paragraph 11101a (interim change No. 375, effective July 1, 1982) of the Department of Defense Military Pay and Allowances Entitlements Manual follow the language of the statute almost verbatim as to the prerequisities for the special pay. The legislative history of the 1981 version of 37 U.S.C. § 304 indicates that Congress, in accepting the Senate's version of the bill, clearly intended that all three requirements of the statute had to be met before an individual became entitled to the

special pay. In rewritting the section,* the Senate noted that under then current law, special pay for diving duty accrued when an individual was assigned to, maintained a proficiency in, and actually performed diving duty. Its goal was to maintain that policy but also to raise the amount of special pay. S. Rep. No. 97-146, 97th Cong., 1st Sess. 10 (1981); *See also* Conf. Rep. No. 97-265, 97th Cong., 1st Sess. 7, 23 (1981).

In rewriting subsection (a), and dividing it into three parts, Congress attemped to make its intentions clear. However, the use of the conjunction "and" between clauses (a)(2) and (a)(3) may have led to the confusion in this case as to when special pay begins to accrue. A number of courts have considered similar statutory construction problems and have held that where a number of items or requirements are listed in a statute and connected by conjunction (e.g. "and") only before the last of the series, "the same connective is understood between the previous members." *Wilcox* v. *Warren Construction Co.,* 95 Or. 125, 186 Pac. 13 (1919); *Lithium Corporation of America* v. *Town of Bessemer City,* 261 N.C. 532; 135 S.E. 2d 574, 577 (1964); *People* v. *Donner,* 435 N.Y.S. 2d 225, 227 (1980). *See generally* Sutherland Stat. Const. 21.14 (4th Ed.).

With "and" being the similar connective in the present case, it is clear that Congress intended that all three requirements of the statute be met for an individual to qualify for special pay.

We note that the Naval Military Personnel Manual, which prescribes requirements for qualifying as a Navy diver and maintaining such qualification, provides that Naval personnel may receive special pay for diving when the following criteria are met:

(a) Member is a designated diver or under training for a specific diver designation.
(b) Member's diving qualifications are current.
(c) Member is under competent orders to diving duty * * *.

Naval Military Personnel Manual, art. 2620200. The regulation further provides that entitlement to special pay for diving duty shall not be interrupted during periods of authorized leave or temporary additional duty.

In some circumstances, the dives performed by a member to maintain his diving qualifications will suffice to meet the actual performance requirement of the statute. We held, for example, that helium-oxygen divers, who qualified for incentive pay for a fixed period by performing the requisite dives at the beginning of that period, were entitled to such pay for the remainder of that period, provided their duty assignments aboard helium-oxygen equipped vessels were not terminated. 37 Comp. Gen. 546, 550 (1958).

Unlike those divers, who were required by normal ship operations to perform helium-oxygen diving, Petty Officer Kruse was assigned to duty as a student at the Officer Candidate School,

* Prior to 1981, Section 304(a) reads as follows:

Under regulations prescribed by the Secretary concerned, a member of a uniformed service who is entitled to basic pay and who is assigned by orders to the duty of diving is also entitled to special pay at a rate not more than $110 a month for periods during which diving duty is actually performed. A member may not be paid special pay under this subsection in addition to incentive pay authorized under section 301 of this title. 37 U.S.C. § 304(a) (1976).

where notwithstanding the statement in his amended orders, he was not actually performing diving duty. His assignment to the unit in which diving duty was required was terminated and he was assigned on temporary duty to a course of instruction leading to commissioning as an officer. Following that course of instruction he was to be given another permanent assignment.

As stated earlier, article 2620200 of the Personnel Manual provises that entitlement to diving duty pay shall not be interrupted during periods of temporary additional duty. However, since Petty Officer Kruse's assignment to a unit in which diving duty was required was terminated, this paragraph is not authority for continuing his diving pay.

Although his orders were amended to indicate that he was assigned to diving duty while at Officer Candidate School, that was not the case. Such an amendment to orders cannot supply the requirement imposed by statute if that amendment is not in keeping with the facts. Further, since Petty Officer Kruse did not actually perform diving duty, as required by 37 U.S.C. § 304(a)(3), he is not entitled to the special pay for the period of his duty as a student at the Officer Candidate School.

[B-210834]

Disbursing Officer—Altered Check Cashed—Full Restitution Made—Account in Balance—Relief Not Necessary

When dishonest payee who altered Government check for final pay makes full restitution of all amounts over and above his entitlement which were fraudulently obtained from military disbursing officer, account may be considered in balance. 27 Comp. Gen. 674 is explained and distinguished.

To Brigadier General Robert B. Adams, Department of the Army, August 5, 1983:

This decision is in response to your request of February 14, 1983, to relieve Army Captain D.F. Mills, Finance Officer, 3rd Armored Division, from liability for a $58 shortage of funds in accounts entrusted to him. For the reasons explained below, we do not think that Captain Mills' account is short by $58 and therefore there is no need to seek relief for him or for his class A agent, Second Lieutenant Stanley M. Jackson. The account should be adjusted accordingly.

On December 31, 1980, former Specialist 4th Class Ronald G. Uher II was issued a $58 check representing his end-of-month December 1980 pay. He then altered the check so that it appeared to have been issued for $258. When presented with this check, Lieutenant Jackson cashed it for $258, without detecting the fraudulent alteration.

When the fraud was discovered, Mr. Uher was apprehended. He confessed to the alteration and returned $200. The Government's

account was thus placed in the same position it would have been in if the fraudulent alteration had not taken place.

Your assumption that there is still a $58 shortage in Captain Mills' account is apparently based on a 1948 Comptroller General's decision, 27 Comp. Gen. 674, according to the documents submitted with your request. We stated in that case:

> It is well established that a fraudulent and material alteration of a check destroys its validity insofar as the person who made the alteration is concerned and extinguishes as to him the maker's obligation it was intended to satisfy.

You then concluded that the Government did not owe Mr. Uher his final pay of $58 as a result of his actions and since he did not return that sum, the account was short.

That interpretation of our decision is quite understandable but is not for application in this case. If read in context, it becomes evident that 27 Comp. Gen. 674 was concerned with the negotiability of the altered instrument, both as to the original payee and as to a bank which failed to detect an obvious alteration. Under such circumstances, we said, we are not required to honor the check. Our case did not discuss the validity of the underlying debt where the Government has already paid out the amount owed. Mr. Uher was entitled to his $58 final pay. The Government would have had no basis to retain his pay even if it had successfully recovered that amount from him since he made full restitution for all the sums to which he was not entitled. Therefore, the $58 should be recorded as a valid disbursement and the account adjusted accordingly.

[B-211514]

Bonds—Bid—Surety—More Than One—Pledging Same Assets—Propriety

Agency's rejection of low bid as nonresponsive, because individual sureties submitted on a bid bond pledged the same assets, was improper where affidavit submitted disclosed a net worth which was more than adequate to cover the requirement that each surety have a net worth at least equal to the penal amount of the bond and where bid bond was legally sufficient to establish the joint and several liability of the sureties. Furthermore, Defense Acquisition Regulation 10.201.2 does not require that the two sureties have two separate pools of assets.

Matter of: Fitts Construction Co., Inc., August 9, 1983:

Fitts Construction Co., Inc. (Fitts), protests the rejection of its bids by the Naval Facilities and Engineering Command under invitations for bids (IFB) Nos. N62477-82-B-8012 and N62477-82-B-0027. Fitts' bids were rejected as nonresponsive because the individual sureties submitted by Fitts as bid security pledged the same assets. The Navy takes the position that the failure to have separate pools of assets for each surety detracts from the joint and several liability of the sureties and, therefore, relates to bid responsiveness rather than responsibility. Further, the Navy argues that Defense Acquisition Regulation (DAR) § 10.201.2 (1976 ed.) antici-

pates that the two sureties submitted as bid security have two separate pools of assets.

We sustain the protest.

The two contracts were for miscellaneous repairs and improvements to two Navy buildings. Fitts was the low bidder in response to both IFB's. Each IFB required that a bid guarantee, in the amount of 20 percent of the largest amount for which award can be made under the bid, be submitted with each IFB. Fitts complied with this requirement, submitting a bid bond for each IFB listing two individual sureties. The penal amount of the bond for IFB No. N62477-82-B-8012 was $8,567 and for IFB No. N62477-82-0027 was $18,000, 20 percent of the bid amounts. The individual sureties listed by Fitts are husband and wife. They completed and submitted separate affidavits of net worth (Standard Form 28), but each affidavit listed identical assets and indicated an identical net worth of $802,775.

We disagree with the Navy's view that the issue raised in the present case relates to bid responsiveness. The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the invitation's material terms and conditions. 49 Comp. Gen. 553, 556 (1970). This determination of responsiveness must be made from the bid documents at the time of bid opening. *Peter Gordon Company, Inc.*, B-196370, July 18, 1980, 80-2 CPD 45. We have held that a solicitation provision calling for a bid guarantee is a material requirement which cannot be waived. 38 Comp. Gen. 532 (1959). We have also recognized that a bid is nonresponsive where either the required bond is not submitted, *de Weaver and Associates*, B-200541, January 6, 1981. 81-1 CPD 6, or the submitted bond contains a deficiency which detracts from the joint and several liability of the sureties on the bond. See *Structural Finishing, Inc.*, B-201614, April 21, 1981, 81-1 CPD 303, and *Southland Construction Co.*, B-196297, March 14, 1980, 80-1 CPD 199 (bid nonresponsive where bond was altered without any evidence of approval by the surety); *Cassidy Cleaning, Inc.*, B-191279, April 27, 1978, 78-1 CPD 331 (blank bid bond submitted).

The bid bond furnished by Fitts was duly executed by two individual sureties whose affidavits indicated that they both had net worths at least equal to the penal amount of the bond and was not otherwise defective on its face. Neither surety in this case was in a position to disavow the obligation under the bond since both expressly agreed to indemnify the Government in a specified amount. The bond thus met the solicitation's bonding requirement and was legally sufficient to establish the joint and several liability of the sureties in the event of default on the bid by Fitts. Accordingly, we find that the Navy's determination that the bid submitted by Fitts

was nonresponsive was improper since the question of the acceptability of individual sureties is one of bidder responsibility. *Dan's Janitorial Service, Inc.*, 61 Comp. Gen. 592 (1982).

Furthermore, we find no support for the argument asserted by the Navy that the DAR requires that there by two separate pools of assets for each surety. In B-172750, September 27, 1971, we considered a situation in which a husband and wife served as individual sureties and where only one Affidavit of Individual Surety was submitted. We found that since the affidavit contained the signatures of both the husband and the wife, an intent was manifested that the affidavit be an affidavit from two sureties. Also, we found that the applicable procurement regulations concerning the net worth of each surety were satisfied since the affidavit disclosed a net worth more than adequate to cover the requirement that each surety have a net worth at least equal to the penal amount of the bond.

In the present case, the penal amount of the bonds for the two IFB's totaled $26,657. The net worth disclosed by the affidavits was $802,775, which is clearly adequate to cover each surety's obligation to have a net worth at least equal to the penal amount of the bond. Accordingly, there was no basis for concluding that the sureties were not acceptable. *Dan's Janitorial Service, Inc., supra.*

However, since performance is approximately 50 per cent complete on both projects, we are not recommending that either contract be terminated. In these circumstances, corrective action would not be in the Government's best interests.

[A-67190]

Prisons and Prisoners—Federal Prison Industries—Products—Requirement of Federal Agencies to Purchase—Exceptions

Forest Service, Department of Agriculture, is not required to request clearance from Federal Prison Industries Incorporated (FPI) when making purchases from private sources using funds appropriated by Public Law 98-8. 18 U.S.C. 4124 generally requires Federal agencies to buy all FPI products which meet their requirements from FPI rather than from private sources. Public Law 98-8 (98th Cong., 1st sess., 97 Stat. 13 (March 24, 1983)) is an emergency measure which appropriates funds for projects designed to combat the economic recession occurring at the time of its passage. Specific legislation prevails over general. Since private purchases further the Act's purposes the requirement to purchase from FPI does not apply.

Matter of: Forest Service—Requirement to procure from Federal Prison Industries Inc., August 12, 1983:

The Director of Administrative Services, Forest Service, Department of Agriculture, requested our decision on whether the Statutory requirement to make purchases from Federal Prison Industries, Inc. (FPI) applies when the Service is conducting activities funded by appropriations made in Public Law 98-8.

We hold that the Forest Service is not required to make purchases from Federal Prison Industries, Inc. when carrying out its

responsibilities under Public Law 98-8. Requiring such purchases from FPI is inconsistent with the law's purposes as explained below. Accordingly, the Service may procure goods from private sources without requesting FPI clearances when spending funds appropriated by Public Law 98-8.

Public Law 98-8 (98th Cong., 1st Sess., 97 Stat. 13 (March 24, 1983)) is an emergency appropriations measure which Congress enacted in response to the economic recession occurring at the time of its passage. Generally, the law makes appropriations to Government agencies which are designed to ease unemployment and stay the rise of business failures. A corollary purpose is to "hasten or initiate Federal projects and construction of lasting value to the Nation and its citizens." The Act is prefaced with the following statement of Congressional findings:

> It is the sense of the Congress that the continued economic recession has resulted in nearly fourteen million unemployed Americans, including those no longer searching for work, rivaling the actual numbers of unemployed during the Great Depression. Other millions work only part-time due to the lack of full-time gainful employment. The annual cost of unemployment compensation has reached the staggering total of $32,000,000,000. The hardships occasioned by the recession have been much more severe in terms of duration of unemployment and reduced percentage of unemployed receiving jobless benefits than in previous recessions.
>
> Actual filings of business related bankruptcies for the year ending June 30, 1982, reached a total of seventy-seven thousand as compared with a prior year figure of sixty-six thousand. Business failures are up 49 per centum compared to one year ago. Delinquencies are many times greater. The American farmers are more than $215,000,000,000 in debt. Hundreds of thousands of farmers are faced with bankruptcy.
>
> * * * * * * *
>
> Under these circumstances, the Congress finds that a program to provide for neglected needs of the Nation which results in productive jobs, and to provide humanitarian assistance to the indigent and homeless, to be very strongly in the national interest.

Consistent with these findings, the Act provides appropriations to the Forest Service as follows:

> PRESERVING THE NATIONAL FOREST SYSTEM
>
> To restore, repair, and provide forest roads, trails, and other existing facilities which are part of the real wealth of this country, there is appropriated an additional amount of $25,000,000 to remain available for obligation until September 30, 1984, for the "National Forest System."
>
> In order to provide jobs, to improve the growth rate of existing forested land inventories, and to decrease the number of deforested acres of Forest Service lands, there is appropriated an additional $35,000,000 for "National Forest System," Forest Service.
>
> In order to provide jobs which will result in the construction of real assets for this country, an additional amount of $25,000,000 is appropriated, to remain available until expended, for "Construction," Forest Service.

Federal Prison Industries, a government corporation of the District of Columbia, conducts a program of industrial training and employment for inmates of Federal penal and correctional institutions under the provision of 18 U.S.C. §§ 4121-4128 (1976). The program is designed to give inmates the opportunity to acquire knowl-

edge and skill in trades and occupations which will provide them with a means of earning a livelihood upon release. 18 U.S.C. § 4123 (1976). In the process, the inmates produced various goods for sale by FPI.

Federal agencies are required to buy all FPI products which meet their requirements from FPI rather than from private sources. 18 U.S.C. § 4124 (1976). Generally, an agency must obtain a clearance from FPI in order to purchase an item which is available through FPI from another source. 41 C.F.R. § 1-5.408 (1982).

The Forest Service indicates that it needs to buy items which are available from FPI to carry out its responsibilities under Public Law 98-8 but it questions whether requiring it to purchase these items from FPI is consistent with the Act's purposes. For example, the Service acquires roadsigns in providing forest roads and trails and it needs paint brushes and tarpaulins to restore forest facilities. These items may be obtained from FPI or from local private sources. Purchasing needed items from private sources furthers the Act's purposes of counteracting the continued economic recession by providing emergency expenditures to create productive jobs and aid business. Employment is created because labor is used to produce and ship the goods and business is aided because the vendor sells items he otherwise would not have and thereby adds to his profit. However, such private procurements (without FPI clearances) would appear to be in conflict with the requirements of 18 U.S.C. § 4124 (1976).

Because of the Act's specific nature, furthering its purposes may take precedence over the more generally applicable restrictions of 18 U.S.C. § 4124 (1976). It is a well-established principle of statutory construction that when construing two seemingly conflicting pieces of legislation the more specific provision governs over the general. B-152722, August 16, 1965. Public Law 98-8 is the more specific Congressional statement. It is emergency legislation directed at alleviating an immediate economic problem while 18 U.S.C. § 4124 is applicable to agencies of the Government generally and indefinitely. It appears that at this time Congress is more concerned that the funds which Public Law 98-8 appropriates be used to provide expeditious aid to private industry and labor rather than that they be used to provide support for the ongoing inmate training program. Accordingly, when the Forest Service intends to expend funds appropriated by Public Law 98-8, it need not seek FPI clearance.

We have held previously that agencies may make purchases without requesting FPI clearance under similar statutes, as the Service notes. In 15 Comp. Gen. 415 (1935) we considered whether the Army was required to obtain a certificate of clearance before purchasing a brush from a private source with funds made available by the Emergency Relief Appropriations Act of 1935. That Act made appropriations, "to provide relief, work relief, and to increase employment by providing for useful projects." We concluded that

"[t]he making of such purchases from the Federal prisons would appear to be out of line with the purpose for which the appropriation was made" and therefore a certificate of clearance was unnecessary. 15 Comp. Gen. 415. (See also A-67191, November 9, 1935, *re* purchase by the Army of tarpaulins for use as truck covers in Civilian Conservation Corps Camp with funds appropriated by Emergency Relief Appropriation Act of 1935.)

In A-67190, A-67191, March 27, 1936, we were asked to decide whether the Federal Emergency Administration of Public Works was required to seek FPI clearance when purchasing articles with funds appropriated to carry out the purposes of the National Industrial Recovery Act of 1933. 48 Stat. 195 (June 16, 1933). That Act's declaration of policy read:

> * * * It is hereby declared to be the policy of Congress * * * to promote the fullest possible utilization of the present productive capacity of industries, * * * to reduce and relieve unemployment, to improve standards of labor, and otherwise rehabilitate industry * * *.

Section 206 specified that no convict labor was to be used on any project the Act authorized. However, the implementing regulation provided that no materials produced by convict labor were to be directly incorporated into projects, "except in those cases in which the use of such materials is required by applicable statutes." We held that since no clearance request was required in view of the Act's provisions and implementing Executive orders, the GAO would not object to a change in the implementing regulations to permit procurement from the private sector without first securing clearance from the FPI. Such a change was subsequently made.

The rationale of the cases discussed above is generally applicable here because the purposes of the earlier acts are essentially the same as Public Law 98-8. Accordingly, the Forest Service need not request certificates of clearance from FPI when making purchases using funds which Public Law 98-8 appropriates.

[B-210645]

Officers and Employees—Resignation—Separation Date Changes

Widow of former employee seeks to cancel employee's resignation on January 9, 1982, and substitute sick and annual leave until employee's death on July 3, 1982. A separation date may not be changed absent administrative error, violation of policy or regulation, or evidence that resignation was not the intent of the parties. There is no evidence of administrative error, violation of policy or regulation, or contrary intent which would warrant a change in the employee's separation date.

Matter of: Kenneth A. Gordon—Change of Separation Date in Order to Use Accumulated Leave, August 12, 1983:

The issue here concerns whether a former employee's resignation date may be moved forward 6 months to the date of his death which would permit payment for accumulated sick leave, life insur-

ance benefits, and a survivor's retirement annuity. We hold that the separation date may not be changed in the absence of administrative error, the failure to follow agency regulations, or the failure to conform to the intent of the parties, none of which is evident in this case.

This decision is in response to a request from the Honorable Mark S. Fowler, Chairman, Federal Communications Commission (FCC). The request is in response to a claim from the widow of a former FCC employee, Kenneth A. Gordon.

Mr. Gordon was employed by the FCC from September 1971, until January 9, 1982, when he "very unexpectedly" resigned stating as his reasons, "[p]ay cap limits objectives." It appears that in April 1982 Mr. Gordon showed signs of illness, and he subsequently died of cancer on July 3, 1982. Mrs. Gordon seeks to change Mr. Gordon's resignation date from January 9 to July 3, 1982, which would permit payment for unused sick leave (735 hours) and would result in her entitlement to life insurance benefits and a survivor's annuity.

Mrs. Gordon claims that her late husband was unaware of his terminal illness until shortly before his death, but that according to the doctors, his illness had been developing for some time, as much as 2 years earlier. Mrs. Gordon argues that his illness reduced his ability to function normally during the period prior to his resignation and reduced his capacity to make a responsible decision regarding his resignation.

The agency report states that had they known of Mr. Gordon's medical condition, they would have counseled him concerning disability retirement and encouraged him to remain on the rolls pending a medical review for retirement purposes. The agency notes, however, that Mr. Gordon did not state ill health as a reason for his resignation, although his sudden resignation was considered, "uncharacteristic from our perspective."

Our decisions have held that generally the date of separation by resignation is the date tendered by the employee, and such date may not be challenged once it becomes an accomplished fact. *Ralph R. Sturges*, B-189895, November 2, 1977, citing 32 Comp. Gen. 111 (1952). An employee may not be restored to a pay status for any period subsequent to the date of separation for the purpose or granting leave unless there was an administrative error or a violation of a regulation or policy in effecting the separation. B-164232, May 28, 1968. See also Federal Personnel Manual, Chapter 715, S1-2a. Thus, we have permitted corrective action when the circumstances of a particular case show that the resignation was not accepted in the terms submitted or that the resignation as executed did not conform to the intentions of the parties. 21 Comp. Gen. 517 (1941).

There does not appear to be any violation of policy or regulation in this case since there is no indication that the agency knew or

should have known of his illness. As the agency points out, the Federal Personnel Manual, Chapter 715, S2-5, suggests counseling employees who propose to resign for reasons of ill health in order to review the advisability of disability or optional retirement. Our prior decisions permitting changes in the separation date have involved situations where the agency was aware of the employee's illness and should have permitted the use of sick leave prior to the employee's retirement. See B-175201, June 2, 1972, and B-174708, February 4, 1972. However, in the present case Mrs. Gordon admits that no one knew of Mr. Gordon's illness until very shortly before his death. Therefore, there is no evidence of any violation of policy or regulation in failing to counsel Mr. Gordon prior to his resignation.

As to the intent of the parties, there is no indication that Mr. Gordon requested anything other than resignation. See, for example, our decision in *Sturges,* cited above, where we had to resolve doubt as to whether the employee wished to resign or take a leave of absence. We concluded in *Sturges* that the employee intended to resign based on the evidence before us. In the present case, we have no evidence to the contrary of Mr. Gordon's intent to resign except the statement from Mrs. Gordon that had he known of his illness he would not have intended to resign. This does not establish contrary intent sufficient to change his separation date.

Finally, Mrs. Gordon suggests that the illness reduced Mr. Gordon's capacity to make a responsible decision regarding his resignation. There is no evidence in the record before us of mental problems or diminished mental capacity. As we held in *Sturges,* cited above, a judicial adjudication of incapacity would be required in order to limit the legal rights and powers of an adult. See Texas Civil Statutes, Probate Code, Chapter IX, and Texas Civil Statutes, Article 5547-83. In the absence of such a determination, we must presume that Mr. Gordon had the legal mental capacity to discharge his rights and obligations.

Accordingly, we find no basis to allow a change in Mr. Gordon's separation date in order to grant him accumulated sick and annual leave to the date of his death. Therefore, Mrs. Gordon's claim may not be allowed.

[B-210493]

Compensation—Holidays—Leave Without Pay Status—Before and After Holiday—Gradual Retirement Plan Participation

A regularly scheduled full-time employee participated in one of his agency's Gradual Retirement Plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 and B-206655, May 25, 1982, are distinguished.

Matter of: Richard A. Wiseman—Gradual Retirement Plan—Pay for Nonworked Holidays, August 15, 1983:

This decision is issued at the request of the Finance and Accounting Officer, National Security Agency, on the question of whether an employee may be paid for a holiday where he was in a leave without pay (LWOP) status on the workday before and the workday following the holiday. The question is answered yes for the following reasons.

Mr. Richard A. Wiseman, was as regularly scheduled full-time employee of the National Security Agency. On August 28, 1982, he requested to participate in the agency's Gradual Retirement Plan, choosing Option 2, which permitted him to reduce his number of days at work, with such other days to be covered by being in an LWOP status.

Mr. Wiseman chose to work regular hours on Monday, Tuesday and Thursday, with Wednesdays and Fridays covered by LWOP. That arrangement was agency approved. In November 1982, two holidays occurred on Thursdays, Veterans Day (November 11) and Thanksgiving (November 25). Mr. Wiseman did not work on either of those 2 days nor was he paid for them.

The submission, quoting a portion of the agency's regulations governing entitlement to pay for nonworked holidays, expresses the view that the intent of the applicable provisions appears to be to deny pay for a nonworked holiday when it is presumed that there was no intention of the individual to work on the holiday. It goes on to point out that even though Mr. Wiseman's status on Wednesdays and Fridays was LWOP, since LWOP on these 2 days was a part of his regular weekly schedule, there is every reason to believe that he would have reported to work on his regularly scheduled Thursday workday, but for the fact that it was a holiday.

The Gradual Retirement Plans for the National Security Agency devised under authority of Department of Defense Instruction 1412.3, Retirement Planning Programs, is contained in Section 18, of chapter 379.18, NSA/CSSPMM 30-2. Those provisions generally authorize an employee to gradually enter retirement through a reduction of work activities for a short period immediately preceding full retirement and in contemplation of such retirement.

Paragraph 18-6 of those regulations provide five optional plans. Plans 1 and 2 permit an employee to work reduced but scheduled worktime (not less than 24 hours), and combine that reduced schedule with either annual leave or LWOP, respectively, to make up the remaining hours to total a 40-hour workweek. Plan 3 permits an employee to change from being a full-time employee to a part-time employee. Plan 4 permits a full-time employee to become an intermittent employee and perform duty on an unscheduled agency operational activity basis. Plan 5 permits the employee to actually

retire and be immediately reemployed on a less than full-time basis.

In 18 Comp. Gen. 206 (1938), we ruled that in the absence of other unusual facts or circumstances, the presumption that a regularly scheduled employee was relieved or prevented from working on a holiday required a showing that he was on duty at the close of the workday before and at the beginning of the workday following the holiday. In 45 Comp. Gen. 291 (1965) we authorized a modification of that presumption to permit payment for such nonworked holidays even though the employee was in an authorized leave of absence on one of those workdays so long as he was in a pay status on the other workday.

Because these two decisions and several others seemed to permit differing holiday pay administration among various agencies, we were requested to clarify the matter. In *Matter of Pay for Holiday not Worked,* 56 Comp. Gen. 393 (1977), we ruled that so long as an employee is in a pay status on either the workday preceding a holiday or on the workday succeeding a holiday, he is entitled to straight-time pay for the holiday even though he is in an authorized LWOP status or, for that matter, in an absent without leave status on the other workday.

In decision *Matter of Employees of the Government Printing Office,* B-206655, May 25, 1982, we considered the question of entitlement of employees to be paid for the half-day they were excused from duty on December 24, 1981, on the recommendation of the President. Citing to 56 Comp. Gen. 393, *supra,* we permitted employees who were in a pay status during the earlier part of that day or at the beginning of the first workday following to be paid for that absence. However, we ruled that employees who were in a LWOP status on December 24th and also on the first workday following, would not be entitled to pay for the excused period.

The ruling in that case, of course, was predicated on the fact that the employees who were in an LWOP status, before and following the Presidentially excused period, were apparently in an indefinite LWOP status, which would have included all days in between. As a result, the presumption that such an employee would be prevented from working a day designated as a holiday within such a period would not arise.

We believe the present case is distinguishable from those two cases. Mr. Wiseman, as a full-time employee, had a regular but reduced weekly schedule of work which included 2 days of LWOP, specifically scheduled for Wednesdays and Fridays. In view of the fact that Plan 2 of the Gradual Retirement Program required the specific scheduling of worktime not less than 24 hours in any 1 week, then each of the 3 days he was scheduled to work would have to be covered by a pay status in order for him to retain eligibility under the Program. Thus, in cases like Mr. Wiseman's where days of work are specifically scheduled during a workweek and one

of those days is designated as a holiday even though it is bounded by scheduled LWOP days, it may be presumed that but for the holiday occurrence on that day, the employee would have worked.

It is our view, therefore, that Mr. Wiseman may be paid for the two Thursday holidays which occurred in November 1982, if otherwise correct.

[B-208679]

Compensation—Severance Pay—Eligibility—Involuntary Separation—Religious Reasons

A National Guard member was denied reenlistment as a result of his refusal to attend training drills on Saturdays which required his removal as a civilian National Guard technician. He was denied severance pay on the ground of delinquency in refusing to work on Saturdays. We hold that he is entitled to severance pay under 5 U.S.C. 5595 because his refusal to attend Saturday drills based on his religious beliefs was not delinquency within the meaning of the statute. See *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

Matter of: Terrill J. Kawcak—National Guard Technician—Severance Pay, August 23, 1983:

The issue presented involves the eligibility of a National Guard technician for severance pay under 5 U.S.C. § 5595 (1976). He was separated from his civilian position as a result of losing his military membership when he was denied reenlistment in the New Mexico Air National Guard due to his religious beliefs which prevented him from attending drills on Saturdays. For the reasons stated below, we hold that the claimant is entitled to severance pay.

BACKGROUND

This decision is in response to a request from the National Federation of Federal Employees (union) concerning the eligibility of Mr. Terrill J. Kawcak, a former member of the New Mexico Air National Guard (NMANG), for severance pay. This decision has been handled as a labor-relations matter under our procedures contained in 4 C.F.R. Part 22 (1982), and in this regard we have received comments on this matter from the union and the NMANG.

Mr. Kawcak was an excepted service technician subject to the dual status requirements of 32 U.S.C. § 709(b)(1976). A person employed under this section is a civilian technician, and his employment thereunder is dependent upon his continued National Guard membership. As a National Guard member, Mr. Kawcak was required to participate in one 2-day drill each month, normally on a Saturday and Sunday, plus 15 days of annual training. This requirement conflicted with one of the tenets of his church, the Worldwide Church of God, which calls for strict observance of the Sabbath from sundown Friday to sundown Saturday. On certain occasions Mr. Kawcak was was able to avoid the requirement that he

attend drill on Saturday by virtue of the "appropriate duty" procedure, whereby he was excused from monthly drill and made up the missed time on another designated occasion. On three occasions however, permission to be absent was denied and Mr. Kawcak refused to attend the drills. Subsequently, Mr. Kawcak's request for reenlistment was denied and his employment as a civilian technician was terminated. Based on the circumstances underlying Mr. Kawcak's termination, NMANG determined that he was not entitled to severance pay.

Mr. Kawcak brought an action in the United States District Court for the District of New Mexico seeking a permanent injunction ordering the NMANG to rescind his discharge and approve his reenlistment. In its decision *Kawcak* v. *New Mexico Air National Guard,* Civil Action No. 81-745-JB (May 7, 1982), the district court framed the fundamental issue as whether or not the NMANG could demand as a condition of Mr. Kawcak's reenlistment that he participate in Saturday exercises.

The court stated that it "is sympathetic with Plaintiff's position and is convinced of the sincerity of the Plaintiff's beliefs and his desire to observe his religion." Nevertheless, the court found that his right to exercise his religion must bend to accommodate military needs and that the NMANG had met the burden of demonstrating a compelling state need. Accordingly, the court upheld the discharge and granted summary judgment for the defendants. However, "[d]ue to the gravity of the constitutional rights involved and the relative strength of Plaintiff's challenge * * *," the court found that each party should bear its own costs.

Mr. Kawcak's claim before this Office involves his entitlement to severance pay under 5 U.S.C. § 5595 (1976). That section provides that an employee who has been employed for a continuous period of at least 42 months and is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency, is entitled to be paid severance pay in regular pay periods by the agency from which separated.

The New Mexico Air National Guard's Technician Personnel Officer (TPO) reports that Mr. Kawcak's separation was due to his loss of military membership which in turn directly resulted from his voluntary actions altering his military status. The TPO points to National Guard Bureau Technician Personnel Publication regulation 302.7 (March 17, 1981) which provides as follows:

> *Voluntary Military Disqualification* When a technician takes a voluntary action that alters his military status (i.e., applies for a commission, acknowledges his intention to resign from the Guard or not to reenlist, accepts certain promotions, etc.), immediate steps should be taken by the TPO to notify the individual regarding loss of technician employment. The notification should address loss of benefits, ineligibility for severance pay and discontinued service retirement, etc.

The NMANG determined that Mr. Kawcak was delinquent in electing not to attend training assemblies on Saturdays, and this delinquency was the basis for his loss of military membership and his

resulting removal from his civilian technician position. Accordingly, severance pay was precluded in such circumstances.

ANALYSIS AND CONCLUSION

The decisions of this Office have consistently followed the statutory requirement that the tenure of a technician in his civilian position is contingent upon the continuation of his military status, and that when such military status ends the technician's civilian employment is terminated automatically in accordance with the law and implementing regulations. Under such conditions the termination of civilian employment, contrary to the wishes and desires of the technician, is an involuntary separation. Thus, in the case cited by Mr. Kawcak, B-172682, June 14, 1971, concerning the eligibility of National Guard technicians for severance pay if they are separated from their civilian positions as a result of losing their military status because of nonselection for promotion, we noted that the National Guard regulation on Selective Retention required the selection board in its decisionmaking process to consider qualification factors not entirely related to performance. We recognized then that the "selection-out" process may cause involuntary separation of an efficient and satisfactory employee through no fault of his own. We concluded that an employee so separated, if otherwise qualified, is entitled to severance pay.

Again in our decision 53 Comp. Gen. 493, 495 (1974) (B-172682, January 24, 1974), we stated that, when an application for reenlistment is rejected, the resulting termination of civilian employment is an involuntary separation. We, therefore, concluded as follows:

> Consequently, except when it is reasonably established that the reason for failure to accept an application for reenlistment is for cause based on charges of misconduct, delinquency or inefficiency, on the part of the enlisted member, it is our view that the automatic separation from the civilian position would entitle the technician to severance pay.

In response to that decision, paragraph 7-4f of the National Guard Bureau's Technician Personnel Supplement to the Federal Personnel Manual, Chapter 550-7 (November 1, 1975), was promulgated, stating:

> *Failure to accept reenlistment.* The failure to accept an enlisted technician's reenlistment application is an involuntary separation for severance pay purposes except when it can be reasonably established that failure to accept an application is for reason of misconduct, delinquency or inefficiency.

In Mr. Kawcak's case, the New Mexico Air National Guard determined to deny reenlistment, which carried with it subsequent removal as a technician, on the basis of an affirmative finding of delinquency. The New Mexico Air National Guard, however, does not dispute the sincerity of Mr. Kawcak's religious beliefs respecting the Sabbath. In fact, the district court was "convinced of the sincerity of Plaintiff's beliefs and his desire to observe his religion." That being the case, we cannot agree with the NMANG's determi-

nation that Mr. Kawcak was delinquent in refusing to attend Saturday drills for religious reasons.

In 12 Comp. Gen. 472, 474 (1932), we stated that the terms "delinquency" and "misconduct" were used synonymously in a provision of the civil service retirement act dealing with involuntary separations (now 5 U.S.C. § 8336(d)). In our opinion, Mr. Kawcak, in exercising his First Amendment rights to freely exercise his religion, cannot be found to have been guilty of misconduct or delinquency under the severance pay statute, 5 U.S.C. § 5595(b)(2) (1976). The free exercise of one's religious beliefs is a fundamental right guaranteed by the United States Constitution and the freedom to practice those beliefs has traditionally been one of the highest values of our society. See *Marsh* v. *Alabama,* 326 U.S. 501, 509 (1946); and *Murdock* v. *Pennsylvania,* 319 U.S. 105, 115 (1943).

In the closely analogous area of unemployment compensation benefits, the Supreme Court has followed these precepts. In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), the State of South Carolina had denied unemployment compensation to a member of the Seventh Day Adventist Church who was fired for refusing to work on Saturday. The State statute provided for disqualification for benefits upon a finding of discharge for misconduct, and the State Supreme Court held that appellant's ineligibility for benefits did not infringe her constitutional liberties.

The United States Supreme Court reversed the State court, stating as follows, at page 404:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

The Court's holding was that "South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." 374 U.S. at 410. See also *Thomas* v. *Review Board of the Indiana Employment Security Division,* 450 U.S. 707 (1981).

We fail to see any significant difference between unemployment compensation and severance pay for the purposes of protecting the constitutional right of religious freedom. The eligibility standards, while not identical, are similar in nature and both are designed to cushion the impact of losing a job. As a remedial statute, 5 U.S.C. § 5595 is to be given a liberal construction to carry out its purposes. *Spring* v. *United States,* 492 F.2d 1053, 1054-55 (4th Cir. 1974). We also note that the State of New Mexico found Mr. Kawcak to be entitled to unemployment compensation under the New Mexico statutory provision disqualifying persons who leave their employment voluntarily without good cause. N.M. Stat. Ann. § 51-1-7A.

Accordingly, we hold that Mr. Kawcak's separation from his civilian technician position was involuntary and was not for misconduct, delinquency or inefficiency. Therefore, he is entitled to be paid severance pay under 5 U.S.C. § 5595 (1976).

[B-210305]

Officers and Employees—Transfers—Temporary Quarters—Subsistence Expenses—Entitlement—Delays en Route to New Station

Employee who performed travel incident to transfer of duty station was delayed by breakdown of mobile home in which he and his family were traveling. On basis of such delay, he claimed temporary quarters expenses for a 6-day period during which the mobile home was being repaired. Temporary quarters expenses may not be paid since, for the period of actual travel en route to the new station, the employee's rights are limited by 5 U.S.C. 5724a to an appropriate per diem allowance rather than temporary quarters expenses.

Subsistence—Per Diem—Transferred Employees—Delays

Employee's entitlement to travel expenses en route to new station is generally limited to per diem for number of days authorized for travel. However, when employee is delayed en route for reasons acceptable to agency, per diem may be allowed for period of delay. Since employee here was delayed by breakdown of his mobile home residence, he would have had to occupy temporary quarters, pending completion of repairs, even if he had proceeded directly to his new station. Under these circumstances, employee's per diem expenses may be allowed.

Matter of: Robert T. Bolton—Subsistence expenses incident to transfer, August 24, 1983:

The question presented is whether an employee who was delayed en route to his new duty station by the breakdown of his mobile home is entitled to temporary quarters expenses for the period of the delay. We hold that the employee may not be reimbursed for temporary quarters expenses since, for actual travel en route to a new duty station, an employee's rights are limited to an appropriate per diem allowance rather than temporary quarters expenses. However, where the agency determines that an employee was delayed en route for reasons beyond his control or otherwise acceptable to the agency, the employee may be reimbursed for per diem expenses for the period of the delay en route. Since the employee in this case was delayed by the breakdown of the mobile home in which he and his family reside, they would have had to occupy temporary quarters, pending completion of repairs on the mobile home, even if they had proceeded directly to the new duty station. Under these circumstances, we believe that per diem expenses may be paid for the period of the delay en route.

This decision is in response to a request from Mr. Ronald L. Carter, an authorized certifying officer with the Department of the Interior in Billings, Montana, concerning the claim of Mr. Robert T. Bolton for temporary quarters expenses incident to his transfer.

Mr. Bolton, an employee of the Bureau of Reclamation, Department of the Interior, was transferred in October 1982 from Pierre, South Dakota, to Hill City, South Dakota, a distance of approximately 194 miles. In connection with this transfer, Mr. Bolton was authorized to move his family, household goods, and mobile home from Pierre to Hill City. The official transfer date was set for October 10, 1982.

Mr. Bolton initially had planned to move his mobile home from Pierre to Hill City in just 1 day, and to have it ready for occupancy in Hill City on the same night. As a result, Mr. Bolton did not request temporary quarters expenses in connection with his transfer, and such expenses therefore were not authorized prior to the date set for his move. Despite the fact that subsistence expenses were neither requested nor authorized in this case, the certifying officer states that such expenses would have been authorized had they been requested.

Mr. Bolton was authorized certain travel expenses in connection with his transfer, including:

> * * * allowances for per diem * * *, certain expenses incurred in connection with real estate transactions and unexpired leases, or transportation of a house trailer for use as a residence and certain miscellaneous expenses.

The time set for the employee's travel, which governs the accompanying per diem allowance for expenses en route, was presumably not to exceed 1 day, given the relative proximity of the old and new duty stations.

The Boltons left Pierre on October 7, 1982. During the journey from Pierre to Hill City, however, the mobile home broke down, in or near Rapid City, South Dakota. Because the mobile home apparently could not be fixed promptly, the family found temporary lodging in Rapid City, and remained there for a period of 6 days. When the repairs on the mobile home were completed, the Boltons left Rapid City for their planned destination, arriving at Hill City on October 14, 1982, at approximately 10:30 a.m.

Mr. Bolton now claims temporary quarters expenses for the period from October 7, 1982, to October 14, 1982, in connection with his transfer. The agency questions the propriety of paying this claim since Mr. Bolton did not request, and was not authorized, temporary quarters expenses prior to the date of his transfer. The agency specifically has asked our Office whether authorization of temporary quarters expenses may be made retroactively, where the agency's initial nonauthorization of temporary quarters expenses did not result from an error or inadvertent omission in the preparation of the employee's travel orders.

The payment of travel, transportation, and relocation expenses of transferred Government employees is authorized under 5 U.S.C. §§ 5724 and 5724a (1976) as implemented by the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR). Section 5724 and section 5724a of Title 5, United States Code, authorize the reim-

bursement of all or part of certain expenses incurred by an employee who is transferred in the interest of the Government. Among the expenses authorized to be paid are per diem while en route and temporary quarters subsistence expenses of the employee and his immediate family for a period of 30 days.

In connection with 5 U.S.C. § 5724a, section 2-2.2b of the FTR provides in part:

Per diem allowance when en route between employee's old and new official stations. When an employee is transferred, an allowance shall be paid for per diem instead of subsistence expenses incurred by the employee's immediate family while traveling between the old and new official stations regardless of where the old and new stations are located. If the actual travel involves departure and/or destination points other than the old or new official station, the per diem allowance shall not exceed the amount to which members of the immediate family would have been entitled if they had traveled by usually traveled route between the old and new official stations. * * *

Thus, under FTR section 2-2.2b, above, for the period of actual travel en route to the new duty station, an employee's right to reimbursement of expenses is specifically limited to an authorized per diem allowance rather than temporary quarters expenses. In this regard, en route travel is generally defined as the period beginning when the employee leaves the old station and ending when he arrives at the new station. Whatever temporary quarters and subsistence expenses are incurred while the employee is en route are covered by an appropriate per diem allowance and not by temporary quarters subsistence expenses.

In this regard, section 2-2.3d(2) of the FTR, as amended in 1977, provides as follows for the maximum per diem allowance when the employee uses a privately owned vehicle:

(2) *Maximum allowance based on total distance.* Per diem allowances should be paid on the basis of actual time used to complete the trip, but the allowances may not exceed an amount computed on the basis of a minimum driving distance per day which is prescribed as reasonable by the authorizing official and is not less than an average of 300 miles per calendar day. *An exception to the daily minimum driving distance may be made by the agency concerned when travel between the old and new official stations is delayed for reasons clearly beyond the control of the travelers such as acts of God, restrictions by Governmental authorities, or other reasons acceptable to the agency;* e.g., a physically handicapped employee. In such cases, per diem may be allowed for the period of the delay or for a shorter period as determined by the agency. The traveler must provide a statement on his/her reimbursement voucher fully explaining the circumstances which necessitated the en route travel delay. The exception to the daily minimum driving distance requires the approval of the agency's authorizing official. [Italic supplied.]

The above provision prior to 1977 did not specifically provide that agencies could make an exception to the daily minimum driving distance requirement when an employee was delayed en route for reasons beyond his control or acceptable to the agency. Our Office has not yet interpreted the current provision in light of the language which was added in the 1977 amendment allowing agencies to make exceptions. Prior to that amendment, we interpreted the provision as requiring the employee to travel a specified distance each day, that is, an average of 300 miles (or a higher daily mileage rate prescribed by the authorizing official) per calendar

day. Since the regulation at that time did not contemplate exceptions to the daily minimum distance requirement, we held in *Leroy A. Ellerbrock*, B-190149, December 23, 1977, that the regulation did not permit the payment of an increased per diem allowance due to extenuating personal circumstances such as the breakdown of an employee's rental truck en route to the new station. As amended, however, section 2-2.3d(2) of the FTR clearly provides that agencies may make exceptions to the daily minimum driving distance and, therefore, allow additional per diem, when an employee is delayed en route to his new station for reasons beyond his control or otherwise acceptable to the agency. Accordingly, *Ellerbrock* will no longer be followed where the effective date of the transfer is on or after June 1, 1977.

In this case, Mr. Bolton is not entitled to temporary quarters expenses in connection with his 6-day delay and stopover in Rapid City, since he incurred the stated expenses en route to his new duty station of Hill City. There is no evidence in the record that Mr. Bolton occupied temporary quarters before he began his travel or following arrival at his destination. He occupied temporary quarters only during the period he was en route to Hill City, because of the delay resulting from the breakdown of his mobile home. Even if the agency had authorized temporary quarters expenses for Mr. Bolton prior to his transfer, Mr. Bolton would not have been able to use such expenses to cover his en route travel, since his entitlement to reimbursement for such travel would have been limited under 5 U.S.C. 5724a to an appropriate per diem allowance. The certifying officer's question concerning authorization of temporary quarters is answered accordingly.

Although Mr. Bolton is not entitled to temporary quarters expenses, the agency may provide him with a per diem allowance for the period of his delay en route to the new station, pursuant to section 2-2.3d(2) of the FTR. If the agency determines that Mr. Bolton was delayed for reasons which were beyond his control, or are otherwise acceptable to the agency, additional per diem may be allowed to cover the period of delay. There is no evidence in the record to show that Mr. Bolton was responsible for, or had any control over, the breakdown of his mobile home, which resulted in the 6-day delay. Furthermore, since the vehicle which broke down was the actual residence in which Mr. Bolton and his family were living, the family would have been required to occupy temporary quarters while the mobile home was being repaired, whether they had remained in Rapid City or proceeded directly to Mr. Bolton's new station. Under these circumstances, we believe that per diem expenses may be paid for the period of the delay en route.

Accordingly, while there is no legal basis upon which Mr. Bolton may be reimbursed for temporary quarters expenses in connection with his stay in Rapid City, he may be paid per diem expenses for the period of his delay en route to his new duty station.

[B-212221]

Contracts—Privity—Subcontractors—Default of Prime Contractor—Government Liability

Subcontractors and suppliers, claiming amounts due for labor and materials furnished to defaulted prime contractor, may not bring a claim directly against the Government when, under any common law theory, they lack privity of contract with the Government.

Contracts—Contract Disputes Act of 1978—Inapplicability—Subcontractor Claims

Under the Contract Disputes Act of 1978, contracting officer does not have authority to settle claims of subcontractors who were not parties to prime contract, even when such firms agree to accept *pro rata* settlement from remaining contract funds. Rather, such funds should not be paid until a trustee in bankruptcy and/or court of competent jurisdiction settles accounts among all potential claimants and prime contractor.

Matter of: General Services Administration—Request for Advance Decision, August 24, 1983:

The General Services Administration (GSA) requests an advance decision regarding the authority of a contracting officer to settle claims of two subcontractors from contract funds remaining after termination for default of a prime contract. We conclude that the subcontractors have no legal basis for recovery from the Government, and the contracting officer has no authority to settle at this time.

On August 24, 1981, GSA awarded a $24,975 contract for handicap alterations to the Federal Building and U.S. Post Office, Tupelo, Mississippi, to C.G. Construction Company. A $500 change order brought the total contract price to $25,475. Since the amount of the original award had been less than $25,000, GSA did not require payment and performance bonds. The agency paid C.G. Construction a total of $9,171 in progress payments before the firm abandoned the project and apparently went out of business. Consequently, the contracting officer terminated the contract for default on April 5, 1982.

On May 14, 1982, GSA awarded a completion contract in the amount of $5,000 to Creative Glass Company, a subcontractor on the project. After all the work had been completed, a balance of $11,304 still remained in the account.

Because C.G. Construction did not submit payrolls as required by the contract, GSA has no record of claims for labor or materials furnished by subcontractors or suppliers, except for those on which it seeks our opinion: a claim by Creative Glass, which on March 23, 1983, advised the contracting officer that it was owed $14,856.80 for labor and materials, and a claim by Senter Transit Mix for $716.10. Both firms have agreed to accept *pro rata* settlements of their claims from the funds remaining in the contract account and to hold the Government harmless for any additional amounts due.

Before settling a claim, a contracting officer must determine whether there is a sufficient legal basis for recovery from the Government. It is well settled that since privity of contract generally

does not exist between the Government and subcontractors, such firms have no legally permissible way to bring claims directly against the Government. See *Curtis Jepson, trading as Curt's Plumbing and Heating,* B-194773, May 24, 1979, 79-1 CPD 376; 23 Comp. Gen. 655 (1944). Privity may be found in certain situations, however, under recognized common law theories of agency, third party beneficiary, or implied contract. See *Universal Aircraft Parts, Inc.,* B-187806, January 11, 1979, 79-1 CPD 14.

In this case, none of the above theories applies. We find no suggestion of a contractual relationship, express or implied, between the subcontractors/suppliers and the Government during the period before the prime contractor's default. Nor do we find that C.G. Construction's was acting "by and for" GSA, or that the claimants are third party beneficiaries of C.G. Construction's contract with GSA, since there is no evidence that the contracting parties, *i.e.,* C.G. Construction and GSA, had the interest of the claimants in mind when they entered into the contract. See *Universal Aircraft Parts, Inc., supra.* Therefore, we find no legal basis for a direct claim against GSA.

GSA asks whether, under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601(4), 605 (Supp. IV 1980), the contracting officer has authority to decide the claims. Although the Act does not categorically exclude all subcontractors and third parties from proceeding under it. See *A&B Foundry, Inc.,* EBCA No. 118-4-80, May 29, 1981, 81-1 BCA ¶ 15,161, the boards of contract appeals repeatedly have held that absent privity, or specific contractual provisions or agency regulations providing for direct appeal, subcontractors and suppliers have no right to recover for unpaid labor and materials furnished to the prime contractor. Enactment of the Contract Disputes Act did not alter this requirement. *Id.; J.M.C. Mechanical, Inc.,* ASBCA No. 26750, June 17, 1982, 82-2 BCA ¶ 15,878, and cases cited therein.

The subcontractors and suppliers in this case thus have no legal claim against GSA. While in certain circumstances, a prime contractor itself can pursue retained funds or authorize subcontractors to do so in its name, see *Divide Constructors, Inc., Subcontractors to Granite Construction Company,* IBCA No. 1134-12-76, March 29, 1977, 77-1 BCA ¶ 12,430, it appears from the record that the principals of this prime contractor cannot be located. Also, GSA's submission to our Office suggests that the prime's failure to submit required payrolls has precluded the Government from determining whether there are other suppliers, or workers, who might be due payment. Consequently, we think it would be premature for the Government to dispose of the funds in issue until a trustee in bankruptcy and/or a court of competent jurisdiction settles accounts among these two firms and other potential claimants. *Cf. Merritt* v. *United States,* 267 U.S. 338 (1925) (subcontractor may not recover fill contract price from the Government); B-147131, March 2, 1962 (subcontractor's claim denied pending final determination by proper judicial authority).

[B-211243]

Subsistence—Per Diem—Temporary Duty—Lodging in Rental Property Owned

An employee who uses his mobile home for lodging while on temporary duty may not include $600 rental payment allegedly made to himself in computing the lodgings portion of his per diem allowance even though he claims that the mobile home is held for rental purposes. If the employee submits documentation to establish that the property is held and used as a rental unit and would otherwise have been rented out during period of his claim, allocable interest and taxes incurred, if any, may be included in determining lodging costs.

Subsistence—Per Diem—Rates—Lodging Costs—Leased Television With Option to Purchase

Absent evidence that the claimant terminated a television lease agreement with option to purchase at end of temporary duty assignment he may not include cost of renting the television in the computation of the lodgings portion of his per diem allowance. Payments on personal property for the purpose of eventual ownership are not within the purview of lodging costs recognized as reimbursable.

Matter of: Lucius Grant, Jr., August 25, 1983:

Mr. Lucius Grant, Jr. requests reconsideration for our Claims Group's February 28, 1983 denial of his claim for additional per diem. We find that his claim must be disallowed on the basis of the record presented.

Mr. Grant's permanent duty station is Robins Air Force Base, Georgia. He reported for temporary duty at Charleston Air Force Base, South Carolina, on August 10, 1981. He obtained lodging in a local motel during the period August 10 through September 10, when he moved his mobile home from land he owns in Georgetown, South Carolina, to rented space at a North Charleston address. Mr. Grant occupied these quarters until his temporary duty was completed on December 18, 1981. He was paid per diem at the rate of $33 a day for the period of his temporary duty assignment. The lodgings portion of his per diem allowance was computed on the basis of his motel costs and costs associated with the occupancy of his mobile home, including water, electricity, cable television, telephone and rental space for the mobile home. The $1,890 amount he claimed as paid to himself for use of the mobile home was excluded from the computation of lodgings costs, as was $168.88 in rental payments made on a combination television/stereo set under a lease/purchase agreement. Mr. Grant appeals from our Claims Group's determination that the Air Force correctly excluded these items of expense in determining the lodgings portions of his per diem allowance.

It is Mr. Grant's contention that the excluded items of expense should be considered lodging costs under the following language of paragraph C4552-2j of Volume 2 of the Joint Travel Regulations (2 JTR):

j. *Allowable Expenses When an Apartment, House, Mobile Home, Travel Trailer, or Recreational Vehicle is Rented or Used for Quarters While on TDY.* When an em-

ployee on temporary duty rents a furnished or unfurnished apartment, house, mobile home, travel trailer, or camping vehicle for use as quarters, or uses a privately owned mobile home, travel trailer, or recreational vehicle for quarters, per diem will be computed in accordance with the provisions of subpar. a. Allowable expenses which may be considered as a part of the lodging cost for averaging purposes are as follows (50 Comp. Gen. 647 and 52 Comp. Gen. 730);

1. rent of the apartment, house, mobile home, travel trailer, or camping vehicle;
2. rental charge for parking space for a mobile home, travel trailer, or camping vehicle * * *.

That regulation is not authority to pay an employee a per diem allowance to recover his expenses of ownership by means of a payment in the nature of rent when he occupies his privately owned motor home or travel trailer while on temporary duty. In *Matter of Witherspoon,* B-189392, August 23, 1977, we specifically held that an employee who lodges in a private recreational vehicle at a temporary duty station may not be reimbursed for expenses of the vehicle's upkeep and maintenance, including depreciation. However, he may be reimbursed for expenses incurred including propane for heating, rental of the site on which trailer was placed, and the cost of utilities. Similarly, we held in *Matter of Stertz,* B-196968, July 1, 1980, that a military member who uses a personal recreation vehicle for lodging while on temporary duty may not be reimbursed the portion of the monthly purchase payment on his recreational vehicle for the time in temporary duty status. Reimbursement of lodging expenses is to compensate a member for additional expenses he incurs while away from the permanent station. In contrast, rental expenses actually incurred for the use of a mobile home or travel trailer may be included as a cost of lodging. *Matter of McDonald,* B-199462, August 12, 1981.

In support of his claim, Mr. Grant has submitted receipts for payments of $600 per month made to himself for rent of the mobile home to which he holds title. He states that he does not ordinarily reside in the mobile home but holds it as a rental property. In *Matter of Gardner,* B-210755, May 16, 1983, we considered a per diem claim submitted by an employee who, while on temporary duty, lodged in a camp which he owned and claimed to hold as a rental property. In denying his claim for lodging costs based on the rental price of the property, we held that an employee who claims expenses on account of having lodged in property which he owns must provide clear and convincing evidence that but for his lodging there while on temporary duty, the property would have been rented out at all times covered by the claim. Noting that the per diem allowance was not intended to reimburse an employee for allegedly lost income, we stated:

* * * If, however, he provides the Corps of Engineers with records showing that the property is held and used as a rental property and would have been rented during the entire period, his claim for lodging expenses occasioned by his temporary assignment may be considered for payment. However, the basis for computing these costs is not the rental price of the property, but rather a proration of his monthly interest, taxes, and utilities * * * for the rental property in question.

The principles set forth in *Matter of Gardner* would appear to apply equally to the situation in which an employee, while on tem-

porary duty, lodges in a mobile home he holds as a rental property. Thus, a rental cost of $600 per month may not be included for purposes of determining the lodgings portion of Mr. Grant's per diem allowance.

The lodgings portion of the per diem allowance already paid to Mr. Grant covers the utility costs he incurred while occupying the mobile home. He is entitled to these costs regardless of its status as a rental property. However, additional amounts for interest and taxes incurred, if any, may not be included in the lodgings costs computation since Mr. Grant has not furnished any documentation to substantiate his contention that the mobile home was in fact rental property or to establish that it would otherwise have been rented out during the period covered by his claim.

In 52 Comp. Gen. 730 (1973) we recognized that the cost of renting a television may be considered a lodging cost incident to the rental of an apartment. In this case, Mr. Grant rented the television/stereo unit under an 18-month lease with an option to purchase. In the absence of evidence to establish that the lease/purchase agreement was terminated at the end of this temporary duty assignment, the rental payments may not be included as a lodging cost since there is no authority to include payments made on items of personal property for the purpose of eventual ownership.

Accordingly, the Claims Group's settlement is sustained.

[B-206127.3]

Contracts—Awards—Abeyance—Resolution of Protest

There is no requirement that an agency make an award while a protest is pending before General Accounting Office even though delay in awarding the contract results in an urgent situation requiring that the solicitation be canceled and a portion of the requirement resolicited.

Contracts—Small Business Concerns—Awards—Size Status—Time to Question

The contracting officer has the right to question a bidder's status as a small business at any time during the award process.

Matter of: Charles Beseler Company, August 29, 1983:

Charles Beseler Company protests the cancellation of invitation for bids (IFB) DAAB07-82-B-E033 by the U.S. Army Communications-Electronics Command (CECOM), Ft. Monmouth, New Jersey. It also claims reimbursement of its bid preparation costs.

The protester essentially contends that award should have been made to it well before the decision to cancel was made, and that the contracting officer was arbitrary and capricious in not so awarding the contract. We find no legal basis for the protester's position and therefore we deny the protest and the claim.

The solicitation, which was set aside for small business, called for 1,522 driver's viewers, which were to be provided as Government Furnished Material to manufacturers of tanks for the Army and U.S. Marine Corps. The solicitation sought prices with and without

first article testing and provided for delivery to begin 300 days after award. It also provided the Government the option to increase the quantity up to 100 percent of the base quantity. Seven bids were opened on March 24, 1982. The lowest five bidders were as follows: Numax Electronics Incorporated at $2,614,620, Baird Corporation at $2,646,036, Beseler at $2,844,618, ICSD Corporation at $2,917,529, and Opto Mechanik, Inc. at $3,361,208. These prices all include first article testing. Baird was the only bidder eligible for waiver of first article testing and it bid the same price with or without such testing.

Subsequently, four of the five low bidders filed at least one protest regarding the award of this contract with either the contracting agency or our Office. First, Baird and Beseler, by letters of March 26 and 29, respectively, protested to CECOM that the bid submitted by Numax was nonresponsive because Numax failed to price the option quantities in accordance with the solicitation instructions. By another letter of March 29 to CECOM, Beseler also protested Baird's eligibility for award, contending that the firm was other than a small business. On April 13, CECOM sustained the protests against award to Numax and rejected Numax' bid. Numax subsequently filed a protest with our Office against the rejection of its bid. In October, we denied the protest. See *Numax Electronics Incorporated,* B-206127.2, October 8, 1982, 82-2 CPD 317. On April 29, the Small Business Administration (SBA) advised CECOM that Baird was not a small business and therefore ineligible for award. This determination, coupled with CECOM's rejection of Numax' bid, made Beseler potentially the low bidder and the contracting officer consequently in early May requested that a preaward survey of Beseler be conducted. The completed survey did not reach the contracting office until July 9.

Baird protested to the agency by letter of May 11 that Beseler was not responsible and not small. SBA, by letter of June 7, determined Beseler to be small. On July 2 Opto Mechanik protested Beseler's responsibility to CECOM and on July 14 Opto Mechanik challenged Beseler's status as a small business.[1] After we issued our decision denying the Numax protest, the contracting officer, in response to the Opto Mechanik protest, again referred the question of Beseler's size status to SBA. By letter of November 5, the SBA affirmed its prior determination that Beseler was small.

Meanwhile, CECOM learned that the delay in award was jeopardizing the tank delivery schedules. On June 8, the Marine Corps advised CECOM that it required its first delivery of viewers by August 1983, and that in light of the solicitation's 300-day delivery schedule, delivery probably would not occur in time to be coordinated with its tank production schedule. On July 29, the Army Tank-Automotive Command (TACOM) advised CECOM that it re-

[1] ICSD by letter dated July 7, 1982 to our Office complained that no award should be made to Beseler. Since, however, ICSD's letter was sent in response to CECOM's report in connection with Numax' protest filed with our Office we do not consider it a separate protest.

quired its first delivery of viewers in January 1983, and it later informed CECOM that delivery to it after that date would require shutting down tank production lines at a daily cost of $50,000. In view of the urgency, CECOM decided that the Army's initial requirements could only be met by a firm for which first article testing could be waived. Since none of the bidders considered by the SBA to be small under the solicitation qualified for waiver of first article testing, CECOM in late September requested permission to cancel the solicitation, resolicit the most urgent portion of the requirement from the only two firms, both large, for which first article testing could be waived, and later resolicit the remainder under a solicitation set aside for small business. The SBA concurred, permission was obtained, and the solicitation was canceled on October 26.

Beseler does not challenge the urgency of the situation that led to the cancellation. Rather, Beseler asserts that because of the urgency the contracting officer should have awarded a contract while the protests were pending. Beseler points out that the contracting officer's failure to make the award and the subsequent cancellation resulted in the termination of "a significant portion of a small business set-aside."

The Army reports that the contracting officer did not appreciate the urgent need for the viewers until late July. At that time, the record indicates, efforts were made to satisfy the most urgent requirements through other contract sources. This effort was successful for the Marine Corps requirement, but not for the Army's own requirement. The contracting officer reports that she requested permission to cancel the solicitation when it became apparent that the Army's urgent requirements could no longer be met under the outstanding IFB.

We do not believe the protester has established that the contracting officer's actions were arbitrary or capricious or otherwise improper. Although it is not clear to us why the contracting officer did not appreciate the urgency of the procurement—the IFB itself, in a provision captioned "URGENCY OF DELIVERY," warned bidders that the delivery schedules "are firm" and that no extensions would be considered—there is absolutely no requirement that an award *must* be made while a protest is pending. The regulation relied on by the protester, Defense Acquisition Regulation (DAR) § 2-407.8(b), authorizes award of a contract prior to resolution of a protest filed with this Office if, among other reasons, the items being procured are urgently required and approval is received from the appropriate level above the contracting officer. It does not, however, mandate the use of such authority, and it is clear from reading the regulatory provision in its entirety that award prior to protest resolution should be made only in exceptional cases. In other words, the decision to seek approval for award while a protest is pending is within the discretion of the contracting officer, and no bidder has the right to insist that an award be made pursuant to the authority in DAR § 2-407.8.

Moreover, even if the contracting officer wanted to make an immediate award, the record indicates that in light of the various protests it was not clear to her which bidder in fact should have been viewed as in line for award. While Beseler insists it was in line for award after the SBA first ruled that it was a small business and after the preaward survey was completed in July, the Numax protest was still pending (had it been sustained, Numax would have been in line for the award), and Beseler's size status had again been called into question. Although Beseler points out that Opto Mechanik's July 14 protest challenging Beseler's size status was untimely under DAR § 1-703(b)(1), the contracting officer had the authority to question Beseler's size status on her own in light of the information supplied by Opto Mechanik. *See* DAR § 1-703(b)(2). In this regard, the contracting officer points out that the original size determination on Beseler did not encompass consideration of all the firms alleged by Opto Mechanik to be affiliates of Beseler; she further states that she wanted to be certain that Beseler indeed was a small business so that the purposes of the Small Business Act would be furthered.

The contracting officer does not explicitly indicate why, in light of this concern, she did not again refer the question of Beseler's size status to SBA until October. We note, however, that it was about this time when she became concerned about the urgency aspects of the procurement and became involved in the effort to have the most urgent requirements satisfied through other sources. Also, as the contracting officer further points out, once the urgency became apparent to her and the corollary efforts were to no avail, she realized that the Army's needs could not be met by an award under this IFB and she initiated action to have the IFB canceled. Thus, although the referral to SBA was eventually made, presumably to provide for the possibility that authority to cancel the IFB would not be forthcoming, it is clear from this record that the contracting officer was not prepared to make an award to Beseler in July or August because 1) the contracting officer had some doubt as to Beseler's small business status, and 2) she believed that award under the IFB would not meet the Army's needs unless other arrangements could be made to meet certain urgent requirements.

These circumstances suggest no arbitrary or capricious action, but rather action that is within the permissible bounds of contracting officer discretion. While another contracting officer might have handled the procurement differently, that does not render this contracting officer's actions improper. In short, the protest falls short of establishing the existence of action to which we can interpose legal objection.

The protest and claim are denied.

U. S. GOVERNMENT PRINTING OFFICE :1984 O - 427-246