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[B-206236]

Payments—Voluntary—No Basis for Valid Claim—Exception—Public Necessity—Payment in Government's Interest

Government employee who uses personal funds to procure goods or services for official use may be reimbursed if underlying expenditure itself is authorized, failure to act would have resulted in disruption of relevant program or activity, and transaction satisfies criteria for either ratification or *quantum meruit,* applied as if contractor had not yet been paid. While General Accounting Office emphasizes that use of personal funds should be discouraged and retains general prohibition against reimbursing "voluntary creditors," these guidelines will be followed in future. Applying this approach, National Guard officer, who used personal funds to buy food for subordinates during weekend training exercise when requisite paperwork was not completed in time to follow normal purchasing procedures, may be reimbursed. 4 Comp. Dec. 409 and 2 Comp. Gen. 581 are modified. This decision was later distinguished by 62 Comp. Gen.——(B-209965, July 26, 1983).

Matter of: Grover L. Miller, June 1, 1983:

The Administrative Officer, Headquarters First Battalion, 152nd Infantry, Indiana Army National Guard, has requested our reconsideration of the claim of Captain Grover L. Miller for reimbursement of personal funds he expended to purchase food supplies. Captain Miller's claim was disallowed by our Claims Group on October 28, 1981 (Settlement Certificate Z-2828580). In disallowing the claim, the Claims Group cited the proposition, embodied in numerous decisions of this Office, that a Government employee cannot create a valid claim in his favor by paying an obligation of the United States from his own funds. *E.g.,* 33 Comp. Gen. 20 (1953). At the outset, we note that the request for reconsideration was not submitted either by the claimant or the appropriate agency head as required by 4 CFR § 32.1 (1983). Nevertheless, because we think there is adequate basis to allow the claim, we will exercise our discretionary authority to reconsider the settlement action on our own motion.

Facts

The facts of this case may be stated briefly. During the times pertinent to this claim, Captain Miller was the Commanding Officer of Company C, First Battalion, 152nd Infantry, Indiana National Guard. In July 1980, he used his own funds to purchase rations for use by his unit on a weekend training mission. The food was purchased from two separate markets ($241.37 to Kroger Company and $91.61 to Gruelich's Market) for a total of $332.98.

In his written explanation of why normal purchasing procedures were not followed in this instance, Captain Miller cited several contributing factors. The principal reason, however, appears to have been that during the period in question, a single Supply Technician, with limited experience in the position, was burdened by an extremely heavy workload. Routine paperwork which was required to obtain the necessary purchasing authority was not completed in

time. As a result, Captain Miller purchased the food supplies with his own funds.

The "Voluntary Creditor" Rule

As a general proposition, as noted above, one who uses personal funds to pay what he perceives to be an obligation of the Government does not thereby create a valid claim in his favor and may not be reimbursed. This has come to be known as the "voluntary creditor" rule—the individual has voluntarily (*i.e.*, without being authorized or required by law to do so) attempted to make himself a creditor of the Government. The rule has been around for a long time. To illustrate, the Comptroller of the Treasury, in 4 Comp. Dec. 409, 410 (1898), quoted the following passage from an 1855 Treasury Department decision:

> It has been so often decided by the accounting officers that no person could acquire a *legal* [italic in original] claim against the United States by such advances, that it must now be considered as the settled adjudication of the question, at least, by that branch of the Government.* * *

Ancient as the principle may be, it is nevertheless not an absolute. There are, and always have been, exceptions. In many cases, it is clear that the individual (the "voluntary creditor") exercised commendable initiative and acted in the Government's best interests. For example, we have permitted reimbursement for the purchase of food where the expenditure was incidental to the protection of life or Government property during an urgent and unforeseen emergency. 53 Comp. Gen. 71 (1973) (General Services Administration special police required to spend entire night in building which had been unlawfully occupied by demonstrators); B-189003, July 5, 1977 (FBI agents stranded in Government building during severe blizzard). Compare 42 Comp. Gen. 149 (1962); B-185159, December 10, 1975.

A 1980 decision broadened the exception somewhat to recognize that "urgent and unforeseen emergency" could, in appropriate circumstances, include mission completion short of life-threatening situations. We authorized reimbursement to an Air Force sergeant in Italy who had purchased communications equipment which could not have been obtained quickly enough to avoid mission impairment had normal procurement procedures been followed. We noted that "it would be shortsighted indeed not to recognize that this kind of initiative by the employee in an emergency is very valuable and, when it results in preserving a Government property interest, the employee should not be penalized through denial of reimbursement." B-195002, May 27, 1980.

Most recently, in B-204073, September 7, 1982, we authorized reimbursement to a military officer who used personal funds to purchase microcomputer software items for use in an ongoing research project at the Naval War College. While our decision attempted to distinguish the case on its facts from the general prohibition, the

essence of the decision was that, on the facts presented, denial of reimbursement would have produced an unduly harsh result without any compensating benefit to a legitimate Government interest.

In each case, we continually stress that payments from personal funds should be strongly discouraged. Nevertheless, the cases continue to arise. Therefore, we have chosen this case as an opportunity to re-examine the foundations of the voluntary creditor rule and to establish reasonable guidelines for the future.

The Early Decisions

The voluntary creditor rule, as we have indicated, is not new and was the subject of several early decisions. Perhaps the best discussion of the foundations of the rule is contained in 8 Comp. Dec. 582 (1902). There, the superintendent of an Indian school had contracted with a mechanic to oversee the installation of an electric plant at the school. After receiving the agreed-upon contract price of $400, the contractor claimed an additional $270 for an alleged breach by the Government, which the superintendent paid from personal funds. In denying the superintendent's claim for reimbursement, the Comptroller of the Treasury cited several factors reflecting considerations of both law and policy:

—The superintendent's voluntary payment was beyond the scope of his authority and could not operate to bind the Government.
—The superintendent was not entitled to reimbursement under a theory of subrogation nor, by virtue of the Assignment of Claims Act, could the claim be viewed as having been assigned or transferred to him.
—The claims settlement jurisdiction of "accounting officers" extends only to claims based on legal liability and not to claims based on equity or moral obligations.

In addition, the Comptroller noted that established systems exist for adjudicating claims and disbursing public funds, and an individual should not be permitted to pre-empt these procedures. To do so would "produce endless confusion and lead to double payment and serious embarrassments." 8 Comp. Dec., at 585.

While cases like 8 Comp. Dec. 582 and 4 *id.* 409 thus reflected a general prohibition, the rule was not applied blindly or arbitrarily. The early decisions recognized a significant exception for cases of "public necessity." Thus, in 8 Comp. Dec. 43 (1901), an Army medical office was reimbursed for hiring laundresses to wash bed and table linen in an Army hospital. Conceding that the question was not entirely free from doubt, the Comptroller of the Treasury stated the following proposition:

> Wherever an officer in the performance of his duty has found it necessary, in order to properly perform his duty, to advance his private funds, such an advance has been regarded by this Office, not as a voluntary and unauthorized advancement of funds creating no liability on the part of the Government, but as an advancement rendered necessary by the exigencies of a situation for the existence of which the

Government was responsible, and for which the officer was entitled to reimbursement of the amount advanced. 8 Comp. Dec., at 46.

One of the cases cited in 8 Comp. Dec. 43 was an unpublished decision of April 24, 1901, Appeal No. 5805, 17 MS Comp. Dec. 559. In that case, a soldier was reimbursed for food purchased for a group of recruits en route to their new duty station when Government-furnished rations were erroneously sent to the wrong place.[1] See also 2 Comp. Dec. 347 (1896).

This line of decisions was continued in 18 Comp. Dec. 297 (1911). A Justice Department employee had used personal funds to pay the fees of witnesses summoned to testify in a court action where there was insufficient time to follow normal authorization and payment procedures. The Comptroller allowed the claim for reimbursement, noting the voluntary creditor rule but stating:

> But this is a rule of accounting and should not be permitted to hinder the public business or prevent the payment of just and lawful claims against the Government. *Id.*, at 299.

Analysis and Conclusions

Based on our review of the body of case law on voluntary creditors, we are convinced, first, that there are sound reasons for retaining a general prohibition on reimbursement. There are well-established procedures for making purchases, submitting and adjudicating claims, and making disbursements. Keeping in mind that we are spending the taxpayers' money, the interests of the Government are best served when these procedures are followed. It is, we think, clearly undesirable for individual employees to presume to make these decisions on their own and beyond their authority based on what they believe should happen.

At the same time, however, we are equally convinced that some voluntary creditors *should* be reimbursed. The difficulty, of course, lies in drawing an appropriate line. The decisions of the Comptroller of the Treasury made considerable progress in this direction, and early GAO decisions reflected this. Thus, a 1927 decision stated the rule as follows:

> [N]o officer or employee of the Government can create a valid claim in his favor by paying obligations of the United States from his own funds *except when conditions or circumstances are shown to exist making such procedure necessary in the interest of the Government.* A-15833, March 10, 1927. [Italic supplied.]

In an apparent attempt to control potential abuse, that decision also stated that reimbursement should be permitted only in cases involving "urgent and unforeseen public necessity."

The test of "urgent and unforeseen public necessity" might have been adequate had it been properly defined in later decisions. Unfortunately, however, the phrase was used instead to tighten the rule. What had once been recognized as a "rule of accounting" (18

[1] Strictly speaking, it would be sufficient merely to cite this unpublished decision as precedent for allowing Captain Miller's claim. However, the frequency of these cases in recent years makes it desirable to address the issue more generally.

Comp. Dec. 297, *supra)* became treated, in effect, as a rule of law and acquired a rigidity it was never intended to have. Decisions of the past decade, previously discussed, evidence an attempt to escape this rigidity.

It becomes our task now, therefore, to establish reasonable guidelines for these cases in the future. The first step is to emphasize that there are certain categories of cases in which we will continue to apply the prohibition in essentially its traditional form. These are:

(1) Cases in which the underlying expenditure itself is improper, for example, where a given object is prohibited by statute or Comptroller General decision. If the agency would not be authorized to make a given expenditure directly, then the intervention of an employee as a voluntary creditor can have no effect. *E.g.,* 60 Comp. Gen. 379 (1981); 3 *id.* 681 (1924); 2 *id.* 581 (1923). The only exception will be expenditures necessary for the protection of life or Government property during an extreme emergency. *E.g.,* 53 Comp. Gen. 71, *supra.* While even this exception is not free from doubt, we will not disturb the decisions that recognize it.

(2) Cases in which an employee purchases an item primarily for his own personal use even though also in the performance of official duties, where the item is authorized, but not required, to be furnished at Government expense. Examples are 46 Comp. Gen. 170 (1966) (purchase of uniforms by Air Force hospital employees) and B-162606, November 22, 1967 (purchase of safety orthopedic shoes by automotive mechanic). If an item is required to be furnished but the Government fails to furnish it, we would not object to reimbursement of an amount administratively determined to be reasonable.

(3) Cases in which an employee uses personal funds to pay certain types of claims, not involving the procurement of goods or services, which have been filed or should have been filed against the Government. Examples are claims by Federal employees relating to compensation or tort claims. These areas are generally governed by specific statutory and/or regulatory requirements. For a variety of reasons, the normal adjudication and settlement process should be allowed to work its course. This decision does not deal with this category. For the most part, reimbursement will be prohibited. *E.g.,* 33 Comp. Gen. 20 (1953); 11 Comp. Dec. 486 (1905). Again, however, there may be rare exceptions based on unusual circumstances. See B-177331, December 14, 1972; B-186474, June 15, 1976.

The largest remaining category of cases—and the one we think warrants some redefinition—is illustrated by Captain Miller's claim: the unauthorized procurement of goods or services, where reimbursement is not prohibited under any of the three categories specified above. It is here that the most "meritorious" cases generally occur.

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As with voluntary creditor cases in general, payment from personal funds is undesirable and should be discouraged. Adequate procedures exist to ensure payment to the contractor in appropriate cases. The agency may be able to "ratify" the unauthorized procurement. See in this connection section 1-1.405 of the Federal Procurement Regulations (FPR) and sections 17-204.4 and 17-205.1(d) of the Defense Acquisition Regulation (DAR). If ratification is not appropriate, the contractor's claim may be considered under a *quantum meruit/quantum valebat* theory. In general, this is the approach we think should be followed.

Occasionally, however, as this case illustrates, an individual will make payment from personal funds. An absolute prohibition on reimbursement is not mandated by precedent nor is it necessary to protect the Government's interests. Of course, the ratification and *quantum meruit* theories are, strictly speaking, not applicable because the contractor has already been paid. The Government is now dealing directly with its employee who is not a contractor. Nevertheless, we believe these theories, by analogy, offer a rational basis on which to evaluate these cases.

First, however, an important threshold test must be met—the test of "public necessity" suggested in the early decisions. The measure is the extent to which the program or activity involved would have been disrupted had the voluntary creditor not taken prompt action. The purpose of this test is to limit reimbursement to cases where there is a real need to act without delay to protect a legitimate Government interest. Reimbursement should not be allowed where an individual purchases something mainly because he thinks it is desirable, and is then able somehow to induce or pressure his agency into "ratifying" the transaction. In this latter situation, there is no reason not to follow regular procedures.

Another factor to consider is the extent to which the voluntary creditor acted on his own or was induced or "directed" to act by a superior. To the extent the voluntary creditor acted by direction, a somewhat lesser standard of "public necessity" may be applied. Even though the superior official may have been wrong, the burden should not fall on the employee who may well have felt that he had little choice but to comply.

If the "public necessity" test is favorably satisfied, the agency should next ask whether it could have ratified the transaction under whatever authority it may have (*e.g.*, FPR § 1-1.405 where applicable) if the voluntary creditor had not made payment. If the agency could have ratified the transaction to pay the contractor, it may reimburse the voluntary creditor.

If ratification is not appropriate, the claim may be considered under a *quantum meruit* approach, again applied as if the contractor had not yet been paid. The elements are (1) benefit to the Government, (2) good faith, and (3) reasonable price. The "benefit to the Government" test will already have been satisfied by virtue of

the "public necessity" determination. In determining reasonable price, the Government should, to the extent feasible, compare the price it would have paid in a regular procurement, taking into consideration such factors as tax exemptions and the availability of Government discounts. Claims under this theory, as with direct *quantum meruit* claims, should be forwarded to GAO for settlement. Of course, as we have indicated, this theory is available only where the underlying expenditure itself is authorized.

Applying the approach outlined above to Captain Miller's claim, we find the following:

(1) The National Guard personnel under Captain Miller's command were entitled to be fed at Government expense during the weekend training exercise.

(2) Captain Miller acted in the Government's best interests. The alternatives would have been either for each individual to pay for his/her food and submit separate claims for reimbursement, or presumably, disrupt the training schedule. While there was certainly no "emergency," failure to act would have impaired the mission.

(3) Captain Miller's headquarters told him, in a July 23, 1980 letter, to advise the vendor "of your actions and plans for payment to the firm." The clear inference is that Captain Miller was to pay from personal funds rather than risk adverse public relations by subjecting the vendor to lengthy claims settlement procedures.

(4) The National Guard Bureau considered "formalization" under DAR § 17-205.1(d) and concluded that it could not formalize the commitment under the DAR.

(5) The Government clearly received a benefit from Captain Miller's actions. The training mission was able to proceed without interruption and, as far as we can tell, the troops ate the food.

(6) There is no indication of lack of good faith on anyone's part.

(7) We have no reason to question the reasonableness of the price. The total cost was small and the food consisted of standard supermarket items.

In view of the foregoing, we conclude that Captain Miller should be reimbursed in the amount of $332.98.

In sum, it must be emphasized that a voluntary creditor always acts at his own risk. As pointed out since the earliest days, the voluntary creditor does not acquire a "legal claim" against the Government. In other words, he is not entitled as a matter of law to be reimbursed. Reimbursement, where permitted, is essentially an equitable measure, as is the *quantum meruit* theory itself.

In the future, we will apply the guidelines set forth in this decision in the settlement of voluntary creditor claims. While we do not find it necessary to overrule any prior decisions, they should be viewed as modified to the extent they are inconsistent with what we have said here.

[B-206619]

Officers and Employees—Transfers—Real Estate Expenses—Former Residence Utilized as a Downpayment

Transferred employee traded a former residence as downpayment on purchase of residence at new official station. He seeks reimbursement of $163 premium paid for title insurance on property traded as a downpayment. Title insurance is generally reimbursable to a seller under the provisions of FTR para. 2-6.2c. However, since employee did not obtain the title insurance on his residence at his old duty station at time of transfer but on a former residence, he is not entitled to reimbursement of the fee paid for title insurance under "total financial package" concept enunciated in *Arthur J. Kerns*, 60 Comp. Gen. 650 (1981), and subsequent similar decisions.

Matter of: Roger L. Flint—Real Estate Expenses—Trade of Former Residence as Downpayment, June 1, 1983:

This decision is in response to a request by Mr. Ronald J. Boomer, an authorized certifying officer, United States General Services Administration (GSA), as to whether he may certify for payment a reclaim voucher submitted by Mr. Roger L. Flint, an employee of the agency. The voucher is for reimbursement of the premium of $163, paid by Mr. Flint for title insurance on real property traded as the downpayment on a residence he purchased at his new duty station. For the reasons hereafter stated, the cost of the title insurance in the sum of $163 may not be certified for payment.

The record discloses that by travel authorization dated October 8, 1980, Mr. Flint was officially transferred from Brunswick, Georgia, to Auburn, Washington. The employee reports that, while living in Georgia, he was renting a residence and consequently did not have a residence he could sell in order to obtain funds to pay the downpayment on the property located in Puyallup, Washington. After his transfer, Mr. Flint was renting the Puyallup property. Subsequently, the owner of the rental property decided to sell it. Since Mr. Flint needed a home for his wife and dependent father, he states that he offered the property he owned in Whitefish, Montana, as the downpayment on the Puyallup residence. The employee had occupied the Montana property as a residence in 1969 while working for the U.S. Forest Service and had subsequently leased it. In selling the Puyallup property, the owner accepted the Montana property, valued at $30,000, as the full downpayment. In conveying the Montana property, Mr. Flint purchased the title insurance at a cost of $163. Mr. Flint further reports that he lost his position with the Forest Service in a reduction in force and had been unable to sell the Montana property, which is located in a rural area. He was subsequently employed by GSA and moved to San Francisco, California. In 1977, he was transferred to Glynco, Georgia, in connection with a transfer of function. The GSA disallowed Mr. Flint's claim because no authority was found in the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR), for reimbursement of expenses associated with a transfer of property as a downpayment.

Generally, the cost of title insurance is reimbursable as a legal and related expense under the provisions of FTR para. 2-6.2c, to an employee incident to the sale of a residence. In this connection, GSA, the agency involved in this claim, has determined that the title insurance fee of $163 is reasonable in amount and would normally have been paid by Mr. Flint as a seller in the sales transaction under consideration. However, although the premium paid for title insurance is generally reimbursable, the specific question presented here is whether the trade-in of the Montana property, as the downpayment on the Puyallup residence, may be considered as part and parcel of the "total financial package" put together to enable Mr. Flint to purchase the Puyallup property. Our reply is in the negative.

The common thread, the common denominator, present in our recent decisions in this area, namely, *Arthur J. Kerns,* 60 Comp. Gen. 650 (1981); *Robert L. Hengstebeck,* B-200083, September 29, 1981; *Leland D. Pemberton,* 61 Comp. Gen. 607 (1982); and *James R. Allerton,* B-206618, March 8, 1983, is that the financial transactions involved in each of the cited decisions, i.e., a second mortgage, a release of liability, deeds of trust, and new mortgage, were secured by the employee's interest in his residence at his old duty station or his residence at his new duty station at the time of the transfer. See *Allerton,* cited above. Since the employee, in most instances, must sell his old residence or secure a second mortgage on the old or new residence in order to purchase a residence at his new official station, we viewed the financial transactions, each of which involved the employee's security interest in his residence at his old or new duty station as being, in reality, one total financial package.

The claim before us is distinguishable from the principle initially enunciated in the *Kerns* case. The cost incurred by Mr. Flint in the purchase of title insurance was incident to the trade-in of the Montana property as the downpayment on the purchase of the Puyallup residence. The utilization of property as a downpayment has been recognized by this Office, for purposes of reimbursement, as a valid financial transaction and tantamount to a cash payment. B-166419, April 22, 1969. We have also approved the trade-in of a house trailer as part of the downpayment on a residence purchased by an employee. B-168123, December 9, 1969. But here, the premium paid for the title insurance, while otherwise reimbursable, was incurred in connection with the trade-in of the Montana property, a former residence, but not the residence of Mr. Flint at the time of his official transfer to Auburn, Washington.

In this regard, FTR para. 2-1.4i, in describing a residence in connection with reimbursement of real estate expenses, defines official station or post of duty as the residence or other quarters from which the employee regularly commutes to and from work. *Robert C. Kelly,* B-189998, March 22, 1978. Mr. Flint's former residence

(the Montana property) was neither located at his old official station in Glynco, Georgia, or at his new official station in Auburn, Washington, nor did he commute on a daily basis from the Montana residence to his old official duty station in Glynco. Further, the Montana property was not Mr. Flint's residence at the time he was first definitely informed by competent authority that he was to be transferred to his new official station in Auburn, Washington. FTR para. 2-6.1d; B-177583, February 9, 1973.

Accordingly, and utilizing the "total financial package" concept enunciated in *Kerns* and our subsequent similar decisions, there is no authority to permit reimbursement to Mr. Flint of the cost of the title insurance incurred in connection with the trade-in of the Montana property as the downpayment on the Puyallup residence at his new official duty station. The reclaim voucher may not be certified for payment.

[B-207441]

General Accounting Office—Jurisdiction—Subcontracts

Protest against award of subcontract on behalf of Government by Department of Energy prime contractor is appropriate for General Accounting Office review under standards of *Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Nonunion protester, whose bid prime contractor did not open, is interested party, in particular circumstances, for purposes of protesting requirement for subcontractors to have union agreement notwithstanding that protester withdrew its bid. B-204037, Dec. 14, 1981, is amplified.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Significant Issue Exception—For Application

General Accounting Office will consider protest challenging requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions since significant issue is involved.

Bids—Rejection—Subcontractor's Bid—Failure To Comply With "Union-Only" Requirement

Requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions neither unduly restricts competition nor conflicts with Federal norm so long as prime contractor permits nonunion firms to compete for contracts and affords them opportunity to seek prehire agreements under the National Labor Relation Act.

Matter of: Anderson and Wood Construction Company, Inc., June 2, 1983:

Anderson and Wood Construction Company, Inc. (Anderson), protests a subcontract procurement conducted on behalf of the Department of Energy (DOE) by the Morrison-Knudsen Company, Inc. (MK), a DOE construction management contractor. All parties agree that this subcontract protest is appropriate for our review under our decision in *Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

We deny the protest.

MK initiated this procurement in February 1982 by issuing a "request for proposals" (RFP) for the upgrading of an electrical substation at DOE's Idaho National Engineering Laboratory (INEL). The RFP stated that proposals were due in March 18, 1982, "after which the public bid opening will promptly commence." (In view of this language, we will treat this as an advertised procurement.) MK solicited bids from 11 firms and also provided copies of the solicitation to several contractor associations.

MK is party to a collective-bargaining agreement with the unions in the INEL area. The agreement stipulates, in part, that MK will not subcontract any work at the INEL site to any contractor which is not also party to a union agreement. This agreement was not mentioned in the solicitation.

During the first week of March 1982, Anderson contacted MK to obtain a copy of the solicitation. This contact precipitated written advice to Anderson from an MK representative that Anderson "would not be accepted" unless MK received Anderson's "commitment to use union personnel." On March 17, Anderson representatives met with officials of the local union of the International Brotherhood of Electrical Workers (IBEW). As we understand the meeting, the local asked that Anderson accept a companywide bargaining agreement applicable anywhere within the local's jurisdiction, while Anderson sought an arrangement applicable only to the site. The meeting ended without agreement.

Anderson submitted its bid and a sealed letter on March 18. At the appointed time, MK's representative opened and read the other bids and then opened Anderson's letter. The letter stated that Anderson fully intended to abide by all INEL practices but that Anderson had been unsuccessful in working out an accord with the local union; therefore, the company "[found] it very difficult to comply with [MK's] 'union-only' request." After reading Anderson's letter, MK's representative announced that the public bid opening was closed, but did not open Anderson's bid. DOE insists, however, that MK informed Anderson that it would "take Anderson's bid under advisement." After some discussion, Anderson sought and obtained the return of its unopened bid.

Anderson protested orally to MK on April 6, 1982, and was advised by MK that its protest would have to be filed in writing within 10 days in order to be considered. Anderson filed its protest with MK on April 12. DOE denied Anderson's protest on April 28. Anderson filed this protest with our Office on May 10, 1982.

Anderson contends that MK's failure to open its bid was tantamount to a rejection of its bid solely because Anderson is a nonunion firm and argues that MK excludes nonunion firms from the competition for these subcontracts. Anderson asserts that this policy is unduly restrictive and violates the requirement that prime contractors contracting for the Government adhere to the

"Federal norm"—a shorthand reference to certain fundamental principles of Federal procurement law applicable to subcontract awards reviewable by our Office. Anderson also asserts that MK cannot justify this policy on the basis of concern for labor unrest because the onsite unions cannot strike against MK or any other contractor at INEL to enforce the restrictive subcontracting clause in MK's collective-bargaining agreement without violating the "no-strike" provisions of that agreement or the National Labor Relations Act. Anderson also asserts that if the unions were to picket Anderson, it would neither disrupt Anderson's work nor, given the remote location of the substation, would it affect other work at INEL. Last, Anderson contends that the restrictive provisions of MK's collective-bargaining agreement are irrelevant to this protest because "the only issue here is whether the union-only practice is in conformance with the 'federal norm,' not whether the practice has its origins in a collective-bargaining agreement."

MK and DOE assert that Anderson's characterization of MK's policy as being one of excluding nonunion bidders is inaccurate. As stated by DOE:

> It is MK's policy to solicit proposals from all qualified suppliers as evidenced by twenty four open shop firms who are on MK's bid lists. In addition, MK has awarded subcontracts to fifteen open shop firms. In each case the successful bidder has been able to negotiate a specific project agreement with the appropriate union which is limited to the work at the specific INEL job site. MK has never rejected a low bidder on the basis that it was nonunion. Based upon our previous experience at the INEL site and the attached letter from the IBEW [see below *], we believe that * * * Anderson and Wood * * * could have entered into a project agreement applicable only to the Scoville Substation job site.
>
> * The IBEW letter to which MK refers states, in part, "On the question you asked, if we would have worked out an agreement on the substation if Anderson had gotten the job, the answer is yes."

DOE and MK also argue that MK's policy is a reasonable restriction on competition based on MK's recognized interest in avoiding labor strife and assert that the restrictive provision on which MK bases this policy is part of a legally enforceable collective-bargaining agreement with which MK is obligated to comply.

DOE and MK also question the timeliness of Anderson's protest under our Bid Protest Procedures, 4 C.F.R. part 21 (1983). In this respect, DOE and MK contend that Anderson is protesting an "impropriety apparent in a solicitation" and that Anderson therefore should have filed its protest prior to bid opening. *See* 4 C.F.R. § 21.2(b)(1). Alternatively, DOE and MK argue that Anderson's protest is untimely because it was not filed within 10 working days of bid opening—when Anderson, at the latest, should have learned of the basis for its protest. *See* 4 C.F.R. § 21.2(b)(2). DOE and MK argue that, under either interpretation of events, Anderson's protest is untimely.

DOE also argues that we have considered the precise issue here—whether a "union-only" policy comports with the Federal norm—in *Motley Construction Company, Inc.*, B-204037, December

14, 1981, 81-2 CPD 465 (*Motley*), and states that Anderson's protest therefore does not fall within the "significant issue" exception to the timeliness requirements of our Procedures, 4 C.F.R. § 21.2(c).

Anderson argues that its protest is timely and that, even if it were not, we should consider it on the merits under the significant issue exception.

We need not decide whether Anderson's protest is timely because we consider the issue in this procurement to fall within the significant issue exception to our timeliness requirements. We reach this conclusion mindful of *Motley*. In *Motley*, we did not decide that *any* union-only policy—or actions under that policy—complies with the Federal norm. Moreover, *Motley* involved a protester who refused to take *any* steps to reach an accord with the onsite unions unlike Anderson in this procurement. If we accept Anderson's view for the moment, it was rejected *solely* for lacking a union agreement. Thus, we consider it appropriate to decide the propriety of the particular union-only policy involved here as well as to amplify on our observations in *Motley* about union-only requirements.

In our opinion, MK's policy does not unduly restrict competition and is consistent with the Federal norm so long as MK permits nonunion bidders to compete for these contracts and affords them the opportunity to seek prehire agreements with the unions.

We recognize that there is no legal justification for the rejection of the lowest bid received solely because the low bidder may not employ union labor. *See* 31 Comp. Gen. 561 (1952), cited by Anderson. Nevertheless, it is also settled that the potential for labor unrest is a legitimate interest in the evaluation of a prospective awardee's responsibility. *Motley, supra;* 43 Comp. Gen. 323 (1963). Any such evaluation must include consideration of the subcontracting restriction in MK's collective-bargaining agreement if MK is to avert labor problems. In this regard, we have held in an analogous context (*see* 53 Comp. Gen. 51 (1973)) that we consider it reasonable for a contractor to be more concerned with whether the contract would be performed properly and without interruption rather than with whether the contractor would ultimately prevail in litigation, a consideration which we think might occur to MK concerning the possibility of litigation to halt strikes or other labor action which might result from MK's breach of its agreement. Moreover, we find nothing in MK's collective-bargaining agreement which would give MK the right to dictate or specify the terms of the subcontractor—onsite union agreement—and we think it would be inappropriate for considerations of the Federal norm to intrude into what are essentially labor negotiations between private parties for a prehire agreement under the National Labor Relations Act.

In these circumstances, we are persuaded of the reasonableness of MK's requirement for its subcontractors to have an agreement with the onsite unions. The protest is denied.

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In future procurements, however, we recommend that MK keep in mind that a potential contractor's ability or inability to avoid conflicts with onsite labor organizations is a matter of responsibility. Questions concerning a bidder's responsibility may be resolved, time permitting, after bid opening at any time up to the award of the contract. See, e.g., *Gaffny Plumbing and Heating Corporation*, B-206006, June 2, 1982, 82-1 CPD 521. Absent any indication in the record before us of any urgent requirement for immediate award of the contract, we are persuaded that MK should have opened and considered Anderson's bid and afforded Anderson a reasonable opportunity to reach an agreement with the onsite unions.

Futhermore, this protest is traceable directly to MK's failure to notify prospective bidders in the solicitation of this requirement and its application to this procurement. We therefore recommend that future solicitations for construction work at INEL clearly apprise bidders of this policy. In addition, future solicitations should not use, as a matter of sound policy, the designation "request for proposals" where an advertised procurement is intended.

[B-210346]

Pay—Retired—Foreign Employment—Congressional Consent—Pub. L. 95-105—Applicability

Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of Federal officers or employees by a foreign government without the consent of Congress in Art. I, sec. 9, cl. 8 of the Constitution and the approvals required by section 509 of Public Law 95-105 (37 U.S.C 801 note) in order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government.

Matter of: Lieutenant Colonel Marvin S. Shaffer, USAF, Retired, June 2, 1983:

This decision responds to a request from the Acting Assistant Secretary of Defense (Comptroller) concerning the limitations of Article I, section 9, clause 8 of the Constitution and the application of section 509 of Public Law 95-105, to those retired members of uniformed services employed by American corporations whose principal shareholders are foreign corporations which are in turn controlled by foreign governments. We do not find that the Constitutional provision or Public Law 95-105 is applicable.

This request for decision has been assigned Committee Action Number 556 by the Department of Defense Military Pay and Allowance Committee.

The Air Force is in receipt of a DD Form 1357, Statement of Employment, dated August 31, 1981, from Lieutenant Colonel Marvin S. Shaffer, USAF, Retired. It indicates that Colonel Shaffer is employed by American Motors Corporation (American Motors) as

director of that firm's "China Project." This is apparently a "joint venture" between American Motors and the People's Republic of China, but the exact nature of the arrangement is unknown. The Committee Action notes that 46.9 percent of American Motors' stock has been acquired by the French automotive firm of Regie Nationale des Usines Renault (Renault), 92 percent of which is owned by the French government. Further, Colonel Shaffer has not requested or obtained permission from the Secretary of State and the Secretary of the Air Force to accept "foreign employment" as required by section 509 of the Foreign Relations Authorization Act, Fiscal Year 1978, Public Law 95-105, August 17, 1977, 91 Stat. 844, 859-860, 37 U.S.C. 801 note.

On the basis of these facts the submission poses the question:

> Whether a corporation, incorporated in the United States, becomes an instrumentality of a foreign government when its principal stockholder is a foreign corporation substantially owned by a foreign government, so as to subject retired members of the uniformed services employed by such corporation to the constraints of Article I, section 9, clause 8 of the Constitution?

Article I, section 9, clause 8 of the Constitution prohibits any person "holding any Office of Profit or Trust" under the United States from accepting any compensation, office or title from a foreign government without the consent of Congress. It is well established that that prohibition applies to retired members of the uniformed services. 58 Comp. Gen. 487 (1979), and cases cited therein. However, by enacting section 509 of Public Law 95-105, cited above, Congress gave its consent to the employment by foreign governments in the case of various categories of personnel, including retired members of a Regular component of a uniformed service, provided they receive the approval of both the Secretary of State and the Secretary of their service or department.

However, we feel that neither Article I, section 9, clause 8, nor section 509 of Public Law 95-105 is applicable in this case.

The Committee Action refers to a decision of the Comptroller General, 53 Comp. Gen. 753 (1974), in which we concluded that a retired Regular officer of the Air Force, although nominally employed by a domestic corporation, was actually employed by a foreign corporation which was a wholly owned instrumentality of a foreign government. In that case the foreign corporation was determined to be the instrumentality of the foreign government. It was further determined that the corporation had the right to control and direct the retiree as an employee; i.e., in the performance of his work and the manner in which it was to be done. In that decision we relied upon the common law of agency. In this case, it is also necessary to rely on some of the principles of the law of corporations. While these principles were developed for entirely different reasons, we find that their application in situations such as this one will adequately protect the interests of the United States without being overly restrictive on the individuals involved.

As a general rule, a corporation is a legal entity separate and distinct from its shareholders. However, where equity dictates the corporate entity will be disregarded. For example, this may be done when there is such unity of interest and ownership that the separate personalities of the corporation and its shareholders no longer exist. *FMC Corporation* v. *Murphree,* 632 F.2d 413 (1980). Also, when a parent corporation used its subordinate corporation as an instrumentality or mere agent, the corporate entity was disregarded. *C. M. Corporation* v. *Oberer Development Co.,* 631 F.2d 536 (1980). These are but two of many variables to be considered in establishing whether a corporate entity should be disregarded in dealing with corporations and their shareholders. For the purposes of this decision we do not believe a detailed discussion of these concepts is necessary.

Here, Colonel Shaffer is an employee of American Motors Corporation, a domestic corporation. While it is true that a controlling interest has been acquired by a foreign corporation, which is in turn controlled by a foreign government, we find no basis to disregard the corporate entity of American Motors Corporation. No indication or evidence appears which requires a conclusion that American Motors is acting as an agent or instrumentality of Renault. Nothwithstanding that both American Motors and Renault may have common directors, we see no indication that American Motors and Renault are not separate entities.

Accordingly, since Colonel Shaffer is employed by a domestic corporation which appears to be a separate legal entity from its dominant shareholder, and the power to control and direct his employment is with the domestic corporation, it is our view that no violation of Article I, section 9, clause 8 of the Constitution exists. As a result, it is not necessary for Colonel Shaffer to seek the Secretarial approval required by Public Law 95-105. Additionally, we do not view the fact that Colonel Shaffer will be working on the "China Project" as having any bearing so long as his employment is exclusively with American Motors. The basic question is answered in the negative. Since the two other questions presented were contingent on an affirmative answer, they are not relevant.

We would like to add that in circumstances where it appears that a domestic corporation is ultimately controlled by a foreign government and the domestic corporation acts as an agent or instrumentality of a foreign government, the approval required by Public Law 95-105 should be secured prior to employment. Since this is a complex area, and in order to avoid a violation, if any doubt exists concerning an employment situation, the individual concerned should request the required approval.

[B-210232]

Compensation—Double—Severance Pay

Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. 5533(a).

Compensation—Severance Pay—Eligibility—Actual Separation Requirement

Certain HUD employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Since individuals must be actually separated from United States Government service to receive severance pay, those employees were not entitled to severance pay until they were actually separated after the lifting of the injunction. They are entitled to severance pay beginning on the date of actual separation, with years of service and pay rates based on the originally intended date of the RIF, assuming that the retroactivity of the RIF is upheld by the Merit Systems Protection Board.

Matter of: HUD Employees—Severance Pay—Retroactive Reduction-in-Force, June 3, 1983:

Ms. Deborah S. DuSault, Director, Personnel Systems and Payroll Division, Department of Housing and Urban Development (HUD), has requested an advance decision under our procedures for labor-management relations cases found at 4 C.F.R. Part 22 (1983). The interested parties were served with copies of that request in accordance with those regulations. The American Federation of Government Employees (AFGE) submitted a response. In reaching our decision, we have considered all materials provided to us.

This request concerns the entitlement to severance pay of certain former HUD employees whose employment was terminated by a reduction-in-force (RIF), after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued in a pay status and performed their normal duties with HUD. After the injunction was lifted, HUD made the RIF retroactively effective. The essential issues before us are whether the employees are entitled to severance pay, and if they are, in what amounts and when should the payments begin. For the reasons set forth below, we hold that the employees are entitled to receive severance pay, with the payments beginning following their actual separation on December 10, 1982, based upon their years of service and pay rates as of the date of the retroactively effective RIF.

On August 20, 1982, HUD issued a general RIF notice. Specific RIF notices were issued September 29, 1982, with an effective date of October 31, 1982. However, on October 29, 1982, the United States District Court for the District of Columbia, in *American Federation of Government Employees* v. *Pierce,* Civil Action No. 82-3111

(D.D.C. 1982), granted a temporary restraining order staying the RIF. This was followed on November 15, 1982, by the issuance of a permanent injunction in the same action. The court's order was based on language prohibiting the use of appropriated funds for certain reorganizations within HUD prior to January 1, 1983, without the approval of the Committees on Appropriations. Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1983, Pub. L. 97-272, September 30, 1982, 96 Stat. 1160, 1164. This injunction was reversed by the United States Court of Appeals for the District of Columbia Circuit on December 8, 1982, holding that the basis for the permanent injunction, the restriction on the use of appropriated funds, was, in fact, an unconstitutional legislative veto. *American Federation of Government Employees,* v. *Pierce,* No. 82-2372 (D.C. Cir. 1982).

On December 9, 1982, HUD notified the affected employees that they would be separated at the close of business on December 10, 1982. The separations were made retroactively effective to October 31, 1982. We have been informed by HUD officials that if the separations had not been made retroactively effective, the retention status, under 5 C.F.R. Part 351, Subpart E (1982), of some affected employees would have changed, necessitating the separation of some different employees in place of some of those originally given RIF notices. It is contended that this would result in the injunction creating new rights, which HUD views as being prohibited by *Pauls* v. *Seamans,* 468 F.2d 361 (1st Cir. 1972).

We have not been asked to—and will not—decide the issue of the propriety of retroactively effecting the RIF. We have been informed that that issue is currently before the Merit Systems Protection Board (MSPB) for decision, the proper forum for consideration of the issue. Instead, we will assume—without deciding—that the retroactive RIF was proper, so that we may answer the questions asked. The AFGE submission contests the propriety of the RIF. Since we are not considering that issue, we will not discuss AFGE's position on the issue.

During the period that the RIF was stayed by the court, the affected employees continued their employment. The agency contends that these employees were "de facto" employees who are entitled to pay, but not creditable service. In support of this position, they cite our decision *Victor M. Valdez, Jr.,* 58 Comp. Gen. 734 (1979), analogizing this situation to that of a person who serves after his appointment expires.

Specifically, the agency poses these two questions:

1. If the severance pay is effective on November 1, 1982, can the Department legally pay the severance pay in light of the dual compensation restrictions?

2. If the agency is precluded from paying the severance pay until December 11, 1982, is the employee entitled to severance pay that would have been received during the 6-week injunction period, November 1, through December 10, 1982, or would the employee forfeit 6 weeks of severance pay?

DUAL PAY PROHIBITION

The first issue is whether the prohibition on pay from more than one position contained in 5 U.S.C. § 5533(a) (1976) prohibits the payment of severance pay under 5 U.S.C. § 5595 (1976) to the affected HUD employees. Under section 5595, an employee employed currently for a continuous period of at least 12 months who has been involuntarily separated—not by removal for cause on charges of misconduct, delinquency, or inefficiency—is entitled to be paid severance pay. Under section 5533(a), an individual is not entitled to receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week.

Under section 5533(a), the prohibition is on "basic pay" from more than one position. The implementing regulations for section 5533 define "pay" as "pay paid for services." 5 C.F.R. § 550.502(b) (1982). We view severance pay as a benefit paid upon involuntary separation, rather than as "pay paid for services." The involuntary separation—not the provision of services—gives rise to the entitlement to severance pay. This view is reinforced by subsection 5595(f), which provides that severance pay under that section is not a basis for the computation or payment of any other type of Government benefit, and a period covered by severance pay is not a period of United States Government service. Therefore, section 5533(a) has no application to the receipt of severance pay. The prohibition on dual pay from more than one position contained in section 5533(a) does not prohibit the payment of severance pay under section 5595 in this case.

WHEN SEVERANCE PAY ENTITLEMENT BEGINS

The second issue is whether severance pay should be paid to the employees during the period that the RIF was stayed by the court, while they continued their employment.

We view severance pay as being incompatible with pay for services rendered. In our decision B-178446, May 4, 1973, we stated that in order for an individual to receive severance pay, he must be separated from the United States Government service. The agency contends that those HUD employees should be treated as if they had actually been separated on the originally planned date of separation, not on the date of actual separation following the lifting of the injunction. The agency relies upon *Pauls* v. *Seamans,* cited above, which prohibits the acquisition of rights through an injunction that is eventually lifted. That case was based on the theory that an injunction is intended to maintain the *status quo ante.* During the period that the RIF was stayed by the court, and the affected employees continued their employment, the agency believes these employees were "de facto" employees who were entitled to pay, but not creditable service. They rely upon our decision in *Valdez,* cited above, analogizing this situation to that of a person

who serves after his appointment has ended. Such a person does not satisfy the definition of an "employee" in 5 U.S.C. § 2105 (Supp. IV 1980), as an individual who is appointed in the civil service by a designated official. It is AFGE's contention that the affected employees remained "employees" under section 2105 until the day they were actually separated, December 10, 1982.

Whether the affected employees were "de facto" employees, or employees under section 2105, is not relevant to this decision. The employees' status during the period of the injunction will depend upon whether the MSPB upholds the retroactive effective date of the RIF. For purposes of severance pay, since we have already held that the payment of severance pay cannot begin until an employee is actually separated, no entitlement to severance pay exists until the employee actually leaves the payroll. Thus, for these employees, until they were actually separated on December 10, 1982, there was no entitlement to severance pay. Just as the RIF was stayed by the court's order, so was the employees' entitlement to severance pay. Therefore, beginning on December 10, 1982, the employees who were separated in the RIF are entitled to receive severance pay. Since we have assumed—without deciding—for purposes of this decision that the retroactive RIF was proper, we believe that the amount of severance pay and the period of entitlement to severance pay should be the same as if the employees had been separated on October 31, 1982, as originally intended by HUD.

Accordingly, the affected individuals' rights to section 5595 severance pay should be treated as starting on the day that they were actually separated—December 10, 1982, but with the amount of severance pay computed on the basis of each such individual's pay rate and years of service as of the date the RIF would have gone into effect had there been no injunction—October 31, 1982. If the Merit Systems Protection Board decides that the RIF should not have been retroactively effected, then the changes in pay rate and time of service during the period of the injunction should be included in computing their severance pay entitlement.

[B-210555]

Vehicles—Government—Home To Work Transportation—Government Employees—Prohibition

GAO disagrees with the legal determinations of officials of the Departments of State and Defense that it is proper under 31 U.S.C. 1344(b) for agency officials and employees (other than the Secretaries of those departments, the Secretaries of the Army, Navy, and Air Force, and those persons who have been properly appointed or have properly succeeded to the heads of Foreign service posts) to receive transportation between their home and places of employment using Government vehicles and drivers. GAO construes 31 U.S.C. 1344(b) to generally prohibit the provision of such transportation to agency officials and employees unless there is specific statutory authority to do so.

Vehicles—Government—Home To Work Transportation—Government Employees—Prohibition—Exemptions

GAO disagrees with the Legal Advisor of the Department of State and the General Counsel of the Defense Department who have interpreted the phrase "heads of executive departments," contained in 31 U.S.C. 1344(b)(2), to be synonymous with the phrase "principal officers of executive departments." Congress has statutorily defined the "heads" of the executive departments referred to in 31 U.S.C. 1344(b)(2) (including the Departments of State and Defense) to be the Secretaries of those departments.

Vehicles—Government—Home To Work Transportation—Government Employees—Prohibition—Exemptions

GAO disagrees with the State Department's Legal Advisor and the General Counsel of the Defense Department who have construed the phrase "principal diplomatic and consular officials," contained in 31 U.S.C. 1344(b)(3), to include those high ranking officials whose duties require frequent official contact on a diplomatic level with high ranking officials of foreign governments. GAO construes 31 U.S.C.1344(b)(3) to only include those persons who have been properly appointed, or have properly succeeded, to head a foreign diplomatic, consular, or other Foreign Service post, as an ambassador, minister, charge d'affaires, or other similar principal diplomatic or consular official.

Vehicles—Government—Official Use Determination—Administrative Discretion

The State Department's reliance on the GAO decision in 54 Comp. Gen. 855 (1975) to support the proposition that the use of Government vehicles for home-to-work transportation of Government officials and employees lies solely within the administrative discretion of the head of the agency was based on some overly broad dicta in that and several previous decisions. Read in context, GAO decisions, including the one cited by the State Department's Legal Advisor, only authorize the exercise of administrative discretion to provide home-to-work transportation for Government officials and employees on a temporary basis when (1) there is a clear and present danger to Government employees or an emergency threatens the performance of vital Government functions, or (2) such transportation is incident to otherwise authorized use of the vehicles involved.

Vehicles—Government—Home To Work Transportation—Government Employees—Misuse of Vehicles—Liability of Employees

Because so many agencies have relied on apparent acquiescence by the Congress during the appropriations process when funds for passenger vehicles were appropriated without imposing any limits on an agency's discretion to determine the scope of "official business," and because dicta in GAO's own decisions may have contributed to the impression that use of cars for home-to-work transportation was a matter of agency discretion, GAO does not think it appropriate to seek recovery for past misuse of vehicles (except for those few agencies whose use of vehicles was restricted by specific Congressional enactments). This decision is intended to apply prospectively only. Moreover, GAO will not question such continued use of vehicles to transport heads of non-cabinet agencies and the respective seconds-in-command of both cabinet and non-cabinet agencies until the close of this Congress.

Matter of: Use of Government vehicles for transportation between home and work, June 3, 1983:

We have been asked by the Chairman of the House Committee on Government Operations to review a Department of State, July 12, 1982 legal memorandum and an earlier Department of Defense legal opinion which interpret the exemptions in 31 U.S.C. § 1344(b)

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(formerly 31 U.S.C. § 638a(c)(2)) from the prohibition in 31 U.S.C. § 1344(a) against using appropriated funds to transport Government officials between their homes and places of employment. Relying on these interpretations, the Department of State has expanded its internal list of officials for whom such transportation is authorized. The Chairman seeks our opinion on whether that action is in accordance with the meaning and intent of the law. As explained below, it is our opinion that the determination of the State Department (and that of the General Counsel of the Department of Defense, Legal Opinion No. 2, October 12, 1953, upon which the State Department action is based) is not in accordance with the law.

Notwithstanding these conclusions, we recognize that the use of Government-owned or leased automobiles by high ranking officials for travel between home and work has been a common practice for many years in a large number of agencies. (See, for example, our report to the Senate Committee on Appropriations on "How Passenger Sedans in the Federal Government are Used and Managed," B-158712, September 6, 1974.) The justification advanced for this practice is the apparent acquiescence by the Congress which regularly appropriates funds for limousines and other passenger automobiles knowing, in many instances, the uses to which they will be put but not imposing limits on the discretion of the agencies in determining what uses constitute "official business."

In addition, the General Accounting Office (GAO) may, itself, have contributed to some of the confusion. As we studied our past decisions in order to respond to the Chairman's request, we recognized that in some instances, we may have used overly broad language which implied exceptions to the statutory prohibition we did not intend. (This will be discussed in more detail later.) For these reasons, we do not think that it is appropriate to seek recovery from any officials who have benefited from home-to-work transportation to date. Our interpretation of the law is intended to apply prospectively only.

Finally, we note that the GAO has made several legislative recommendations to the Congress over a period of years to clarify its intent about the scope of the prohibition. Among other things, we suggested that the Congress consider expanding the present exemption to include the heads of all agencies and perhaps their principal deputies. This decision, therefore, need not be considered effective with respect to agency heads and their principal deputies until the end of the present Congress in order to allow the Congress sufficient time to consider our suggestions. (This does not, of course, include any agency whose use of motor vehicles has been the subject of a specific Congressional restriction.)

The Law

Section 1344 of title 31 of the United States Code states:

(a) Except as specifically provided by law, an appropriation may be expended to maintain, operate, and repair passenger motor vehicles or aircraft of the United States Government that are used only for an official purpose. An official purpose does not include transporting officers or employees of the Government between their domiciles and places of employment except—
(1) medical officers on out-patient medical service; and
(2) officers or employees performing field work requiring transportation between their domiciles and places of employment when the transportation is approved by the head of the agency.
(b) This section does not apply to a motor vehicle or aircraft for the official use of—
(1) the President;
(2) the heads of executive departments listed in section 101 of title 5; or
(3) principal diplomatic and consular officials.

Since vehicles may not be operated with appropriated funds except for an "official purpose" and the term "official purpose" does not include transportation between home and work (except as otherwise specifically provided), we regard subsection (a), above, as constituting a clear prohibition which cannot be waived or modified by agency heads through regulations or otherwise.

While the law does not specifically include the employment of chauffeurs as part of the prohibition in subsection (a), GAO has interpreted this section, in conjunction with other provisions of law, as authorizing such employment only when the officials being driven are exempted by subsection (b) from the prohibition. B-150989, April 17, 1963.

The State Department Determination

After researching and considering the provisions of section 1344, the State Department's Legal Advisor informed the State Department's Under Secretary for Management (in a memorandum dated July 12, 1982) that there is "no legal impediment" to authorizing the State Department's Under Secretaries and Counselor to use Government vehicles and drivers for transportation between their homes and places of employment. (Previous to that opinion, the State Department had restricted such transportation to the Secretary and Deputy Secretary.) The Legal Advisor founded his determination upon several bases.

For his first basis, the Legal Advisor relied upon an October 12, 1953 opinion by the General Counsel of the Defense Department which concluded that the phrase "heads of executive departments" contained in 31 U.S.C. § 1344(b)(2) (then referred to as section 16(a)(c)(2) of the Act of August 2, 1946, 60 Stat. 810) "is not limited to Cabinet Officers or Secretaries of executive departments, but includes also the principal officials of executive departments appointed by the President with the advice and consent of the Senate." Applying the DOD General Counsel's conclusion, the State Department's Legal Advisor found that the Secretary, Deputy Secretary,

Under Secretaries, and Counselor (whom he refers to as the "Seventh Floor Principals") may be regarded as "heads of departments" for the purposes of section 1344(b)(2), and are therefore eligible to use Government vehicles and drivers for home-to-work transportation.

Secondly, the Legal Advisor determined that home-to-work transportation for the Seventh Floor Principals is also authorized based upon his construction of the exemption in section 1344(b)(3) for "principal diplomatic and consular officials." The Legal Advisor stated in his memorandum that the Seventh Floor Principals "all share in discharge of the Secretary's diplomatic responsibilities in much the same way as ambassadors abroad; and the [State] Department * * * is uniquely qualified to determine what diplomatic functions are and who performs them." In his interpretation, the restriction on home-to-work transportation in section 1344(a) would not apply to the Seventh Floor Principals because they are all "principal diplomatic * * * officials."

For his final basis, the Legal Advisor cited our decision in 54 Comp. Gen. 855 (1975). That decision, according to the Legal Advisor, "holds that where there is a clear and present danger, use of Government vehicles to transport employees to and from home is not proscribed." The Legal Advisor also quoted the following passage from that decision:

> In this regard we have long held that use of a Government vehicle does not violate the intent of the cited statute where such use is deemed to be in the interest of the Government. We have further held that the control over the use of Government vehicles is primarily a matter of administrative discretion, to be exercised by the agency concerned within the framework of applicable laws. 25 Comp. Gen. 844 (1946). 54 Comp. Gen. at 857.

Based upon that passage, the Legal Advisor concluded that GAO's decisions support the proposition that home-to-work transportation is permissible whenever there is an administrative determination by the head of the agency that this would be in the interest of the Government, and not merely for the personal convenience of the employee or official concerned.

The Legal Advisor then referred to the Foreign Affairs Manual (FAM) to demonstrate that the Secretary, Deputy Secretary, Under Secretaries and Counselor "share in discharging the substantive responsibilities of the Secretary," and have been placed by law in the order of succession to be Acting Secretary of State. According to the Legal Advisor, those officials "constitute a management group—the Seventh Floor Principals." The Legal Advisor noted that those officials have "heavy after hours official representation responsibilities and a heavy load of other official responsibilities which requires virtually around the clock accessibility * * *." The Legal Advisor concluded that these considerations "would support an administrative determination that it is in the interest of the United States, not personal convenience," to provide home-to-work

transportation for the Seventh Floor Principals. In his opinion, such a determination would satisfy the requirements of GAO's decisions.

Discussion

We disagree with the analysis and conclusions of the Legal Advisor. With regard to the Legal Advisor's first basis, we have reviewed the October 12, 1953 Legal Opinion No. 2 of the General Counsel of the DOD, upon which the Legal Advisor relied. (We have been informally advised that DOD has never overturned or modified that opinion although, as a matter of internal policy it has, over a period of years, curtailed the use of Government vehicles for such transportation.) We do not agree with the DOD General Counsel's conclusion that the exemption in subsection 1344(b)(2) for "the heads of executive departments listed in section 101 of title 5" includes the "Principal officers of executive departments appointed by the President with the advice and consent of the Senate." The term "heads" of executive departments is not synonymous with the term "principal officers," particularly when the "head" of each of the 13 "executive departments" listed in section 101 of title 5 is explicitly designated in other statutory provisions. For example, 10 U.S.C. § 133 provides that "[t]here is a Secretary of Defense, who is the head of the Department of Defense * * *." [1] In 22 U.S.C. § 2651, it is provided that "[t]here shall be at the seat of government an executive department to be known as the Department of State, and a Secretary of State, who shall be the head thereof." (The State Department's own regulations provide that the Secretary of State "is the head of the Department of State." 1 FAM 110 (June 18, 1976).) Similar designations of the "head" of each of the other "executive Departments" may also be found in the United States Code. 49 U.S.C. § 1652 (Transportation); 42 U.S.C. § 3532 (Housing and Urban Development); 29 U.S.C. § 551 (Labor); 15 U.S.C. § 1501 (Commerce); 43 U.S.C. § 1451 (Interior); 31 U.S.C. § 301 (Treasury); 42 U.S.C. § 7131 (Energy); 42 U.S.C. § 3501 note, *as amended by* 20 U.S.C. § 3508 (Health and Human Services); 28 U.S.C. § 503 (Justice); 7 U.S.C. § 2202 (Agriculture); 20 U.S.C. § 3411 (Education). Therefore, we construe subsection (b)(2) of section 1344 to refer strictly to those officers who are appointed (or who duly succeed) to the positions designated by law to be "the heads of executive departments" as listed in 5 U.S.C. § 101.

[1] There is one statutory exception for the Department of Defense. When the Department of Defense was created by the National Security Act Amendments of 1949, Pub. L. No. 81-216, 81st Cong., 1st Sess., 63 Stat. 578, 591-92 (1949), Congress expressly provided in subsection 12(g) that, despite the consolidation of the three military departments into the DOD, the Secretaries of the Army, Navy, and Air Force continue to be vested with the statutory authority which was vested in them when they enjoyed the status of Secretaries of executive departments, *See e.g.*, S. Rep. No. 366, 81st Cong. 25 (1949). That authority is to be exercised subject to the discretion and control of the Secretary of Defense. *Id.* For this reason, the Secretaries of the Army, Navy, and Air Force may also be regarded as heads of the executive departments, even though their respective agencies are not listed in 5 U.S.C. § 101.

Morever, the legislative history upon which the General Counsel relied does not support his conclusions. For example, the General Counsel cited the Act of March 3, 1873, 17 Stat. 485, 486, and the debate on that Act in the Congressional Globe, 42d Cong., 3rd Sess. 2104 (1873), for the proposition that "when Congress wanted to limit the expression [heads of executive departments] specifically to Cabinet Officers, it did so in precise terms and added after 'heads of executive departments' the qualification 'who are members of the President's Cabinet.'" However, our examination of the cited Act and debates failed to reveal the use of either phrase in the Act or the legislative debates. On the contrary, from our examination, it appears that the Act and the debates on it explicitly and repeatedly distinguish between the heads of the executive departments, and the "persons next in rank to the heads of Departments." See Cong. Globe, 42d Cong., 3rd Sess. 2100–2105 (1873); Act of March 3, 1873, 17 Stat. 485, 486.

As his second basis for concluding that the "Seventh Floor Principals" may be authorized to receive home-to-work transportation, the State Department Legal Advisor construed subsection (b)(3) of section 1344 (which exempts "principal diplomatic and consular officials" from the restrictions on home-to-work transportation) to include the "*principal officers* of this [State] Department." [Italic supplied.] According to the Legal Advisor, the "principal officers" of the State Department are the Seventh Floor Principals. We do not concur in that construction of subsection 1344(b)(3). For similar reasons we also disagree with the DOD General Counsel who concluded in his 1953 opinion (as cited and relied upon by the State Department Legal Advisor) that the phrase "principal diplomatic and consular officials" includes "those principal *officers* of the Government whose duties require frequent official contact upon a diplomatic level with ranking officers and representatives of foreign governments." [Italic supplied.]

Although the Congress has not defined the term "principal diplomatic and consular officials" as used in section 1344, it has defined "principal officer" as that term is used in the context of performing diplomatic or consular duties. In 22 U.S.C. § 3902, it is provided that the term "principal officer" means "the officer in charge of a diplomatic mission, consular mission * * *, or other Foreign Service post." Consistent with that statute, the State Department's Foreign Affairs Manual also defines a "principal officer" to mean the person who "is in charge of an embassy, a legation, or other diplomatic mission, a consulate general or consulate of the United States, or a U.S. Interests Section." 2 F.A.M. § 041(i) (October 11, 1977). See also 3 F.A.M. 030 (Nov. 27, 1967) (similar definition of "principal officer"). Our reading of these statutory and regulatory definitions, in conjunction with the plain meaning of subsection (b)(3) of section 1344 leads us to conclude that neither the Legal Advisor's definition, nor that of the DOD General Counsel, is correct. In

our view the term "principal diplomatic and consular officials" only encompasses those individuals who are properly designated (or succeed) to head a foreign diplomatic, consular or other similar Foreign Service Post.

Furthermore, examination of the original enactment which was later codified as section 1344 by Pub. L. No. 97-258, 96 Stat. 877 (1982) also supports the conclusion that the Congress intended to limit the meaning of the phrase "principal diplomatic and consular officials" to the officers in charge of foreign posts. Section 16(a) (c) (2) of the Act of August 2, 1946, Chap. 744, 60 Stat. 810-811 provided, in pertinent part:

> The limitations of this paragraph [now contained in section 1344 (a)] shall not apply to any motor vehicles or aircraft for official use of the President, the heads of the executive departments enumerated in 5 U.S.C. 1, *ambassadors, ministers, charges d'affaires, and other principal diplomatic and consular officials.* [Italic supplied.]

As the underlined language makes clear, Congress intended the term "principal diplomatic and consular officials" to include ambassadors, ministers, charges d'affaires and other similar officials. The codification of title 31 was not intended to make any substantive changes in the law. *See* H.R. Rep. No. 97-651, 97th Cong., 2d Sess. 69 (1982). *Compare also,* 2 F.A.M. §§ 041(i), 043 (October 11, 1977) (principal officers are ambassadors, ministers, charges d'affaires, and other similar officers who are in charge of Foreign Service Posts; each such person is the "principal diplomatic representative of the United States * * * to the government to which he is accredited"). Therefore, we conclude that the Seventh Floor Principals are not "principal diplomatic and consular officials" who may legally receive home-to-work transportation.

In arguing the third basis for his determination, the Legal Advisor relied specifically on our decision in 54 Comp. Gen. 855 (1975). That case concerned the provision of home-to-work transportation for DOD employees who were stationed in a foreign country where, according to the DOD submission, there was serious danger to the employees because of terrorist activities. As the Legal Advisor initially acknowledged, our decision in that case holds that where there is a "clear and present danger" to Government employees and the furnishing of home-to-work transportation in Government vehicles will afford protection not otherwise available, then the provision of such transportation is within the exercise of sound administrative discretion. 54 Comp. Gen. at 858.

The Legal Advisor then quotes the second passage from the decision (set forth earlier) which, as the reference indicates, was taken from 25 Comp. Gen. 844 (1946). That passage has been repeated a number of times as dicta in other Comptroller General decisions. (See, for example, B-181212, August 15, 1974, or B-178342, May 8, 1973.) Standing alone, it certainly implies that what constitutes official business is a determination that lies within the discretion of

the agency head, and it is not surprising that many agencies chose to act on that assumption. However, all decisions must be read in context. The seminal decision, 25 Comp. Gen. 844 (1946), denied a claim for cab fare between an employee's home and the garage where a Government car was stored, prior to beginning official travel, on the general principle that an employee must bear his own commuting expenses. The decision then said, in passing, that if an agency decided that it was more advantageous to the Government for official travel to start from an employee's home rather than from his place of business or, presumably, from the garage, "[S]uch use of a Government automobile is within the meaning of 'official purposes' as used in the act."

Deputy Assistant Attorney General Leon Ulman, Department of Justice, wrote a memorandum opinion on this topic for the Counsel to the President on August 27, 1979. After quoting the above-mentioned generalization about administrative discretion to authorize home-to-work transportation, Ulman concluded:

> But this sweeping language has been applied narrowly by both the Comptroller General and this Department * * *. We are aware of nothing that supports a broad application of the exception implied by the Comptroller General. That exception may be utilized only when there is no doubt that the transportation is necessary to further an official purpose of the Government. As we view it, only two truly exceptional situations exist: (1) where there is good cause to believe that the physical safety of the official requires his protection, and (2) where the Government temporarily would be deprived of essential services unless official transportation is provided to enable the officer to get to work. Both categories must be confined to unusual factual circumstances.

Moreover, even under the circumstances discussed in the terrorist activities case relied on by the State Department Legal Advisor, we pointed out that section 1344 does not expressly authorize either the exercise of such discretion or the provision of such transportation. We then stated:

> * * * the broad scope of the prohibition in [what is now section 1344], as well as the existence of specific statutory exceptions thereto, strongly suggests that specific legislative authority for such use of vehicles should be sought at the earliest possible time, and that the exercise of administrative discretion in the interim should be reserved for the most essential cases. 54 Comp. Gen. at 858 (footnote omitted).

Thus, it was the need to protect Government employees from a clear and present danger (not simply an administrative determination of the Government's interest) which led us to authorize the interim provision of home-to-work transportation until specific legislative authority for such transportation could be obtained.

Subsequent Comptroller General's decisions have not relied upon an administrative determination of the Government's interests as the sole basis for either approving or disapproving home-to-work transportation.[2] We have, however, somewhat broadened the con-

[2] An audit report which was primarily concerned with misue of Federal employees as personal aides to Federal officials, GAO/FPCD-82-52 (B-207462, July 14, 1982) may have created a contrary impression. It, too, quoted our 1975 decision, without fully describing the limited context in which the exercise of administrative discretion might be permissible. The error was inadvertent.

cept of an emergency situation to include temporary bus service for essential employees during a public transportation strike. 54 Comp. Gen. 1066 (1975). *Cf.* 60 *id.* 420 (1981).

There is one other narrow exception to the prohibition which should be mentioned. When provision of home-to-work transportation to Government employees has been incident to otherwise authorized use of the vehicles involved, *i.e.,* was provided on a "space available" basis, and did not result in additional expense to the Government, we have raised no objection. See, *e.g.,* B-195073, November 21, 1979, in which additional employees were authorized to go home with an employee who was on field duty and therefore was exempt from the prohibition.

Unless one of these exceptions outlined above applies, agencies may not properly exercise administrative discretion to provide home-to-work transportation for their officers and employees, unless otherwise provided by statute. (See *e.g.* 10 U.S.C. § 2633 for an example of a statutory exemption for employees on military installations and war plants under specified circumstances.)

Conclusion

In light of the foregoing, we conclude that, unless one of the exceptions outlined above applies, the Deputy Secretary of State, the Under Secretaries, and the Counselor may not be authorized under 31 U.S.C. § 1344(b) to use Government vehicles or drivers for transportation between their homes and places of employment, nor may any other official or employee of the Departments of State and Defense (other than the Secretaries of those two Departments, and the Secretaries of the Army, Navy, and Air Force) be so authorized under that subsection, unless that person has been properly appointed (or has succeeded) to be the head of a foreign diplomatic, consular, or other Foreign Service post as an ambassador, minister, charge d'affaires, or another similar principal diplomatic or consular official.

[B-207694]

Compensation—Overtime—Early Reporting and Delayed Departure—Lunch Period, etc. Setoff

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under Title 5 of the United States Code. Although officers are restricted to Library premises and subject to call during lunch breaks, they are relieved from their posts of duty. Moreover, the officers have not demonstrated that breaks have been substantially reduced by responding to calls. *Baylor* v. *United States,* 198 Ct. Cl. 331 (1972).

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Compensation—Overtime—Fair Labor Standards Act—Early Reporting and/or Delayed Departure—Lunch Period, etc. Setoff—*Bona Fide* Break Requirement

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* The Library of Congress, authorized to administer FLSA with respect to its own employees, has found that the lunch breaks are *bona fide*—although officers are required to remain on duty and subject to call, they are relieved from their posts during lunch breaks and the breaks have been interrupted infrequently. Since there is no evidence that these findings are clearly erroneous, this Office will accept the Library's determination that the breaks are *bona fide.*

Matter of: Edward L. Jackson, *et al.*—Setoff for Meal Periods Under Title 5 and Fair Labor Standards Act, June 9, 1983:

Mr. Donald C. Curran, Acting Deputy Librarian of Congress, requests a decision as to whether 81 former and current officers of the Library of Congress Special Police Force are entitled to overtime compensation for preshift and postshift duties under the provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* (1976), and the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. § 5542 (1976).

Specifically, the issue for determination is whether the officers regularly have been afforded duty-free lunch breaks which would serve to offset allegedly compensable periods of preshift and postshift work. For the reasons stated below, we hold that lunch breaks provided the officers do not constitute compensable hours of work within the meaning of either overtime law, and, therefore, such breaks may offset compensable periods of preshift and postshift duty.

At the outset, the Library acknowledges that members of the Special Police Force are covered by FLSA. Generally, in cases involving claims for overtime compensation under FLSA, we request a report from the agency responsible for administering FLSA with respect to the affected Federal employees. See, for example, *Guards at Rocky Mountain Arsenal,* 60 Comp. Gen. 523 (1981). Under the provisions of 29 U.S.C. § 204(f), the Secretary of Labor is authorized to enter into an agreement with the Librarian of Congress for enforcement of FLSA with respect to employees of the Library. Section 10d.01 of the Department of Labor Field Operations Handbook (August 30, 1976) states that an agreement is now in effect which provides that the Library will investigate its employees' complaints under FLSA. Thus, the Library is placed in the dual position of defending its interests as an employing agency, and, at the same time, providing our Office with an objective statement of the facts and circumstances surrounding the officers' claims. We have held that we will not disturb the findings of fact issued by the agency responsible for administering FLSA with respect to the affected employees unless the findings are clearly erroneous; the burden of

proof lies with the party challenging the findings. *Paul Spurr*, 60 Comp. Gen. 354 (1981).

BACKGROUND

The claimants, represented by Officers Edward L. Jackson and Banks T. Johnson, are employed by the Library as uniformed guards and are required to work three 8-hour shifts, commencing at 7 a.m., 3 p.m., and 11 p.m. As the basis for their claims for overtime compensation under Title 5 and FLSA, they allege that they are required to report at least 15 minutes before their scheduled shifts to perform required preliminary activities, which include changing into uniform, receiving assignments, attending an informal roll call and inspection, and proceeding from the control room to their designated duty posts. Postshift activities allegedly constitute the reverse of the preshift routine, taking approximately the same amount of time to perform.

The administrative report sets forth findings of fact which conflict with the officers' allegations regarding the duties they are required to perform before and after their shifts, and the amount of time that is required to perform those duties. For example, the Library states that officers are not required to change into and out of their uniforms on Library premises, and that the average time spent performing preshift duties is 10 minutes. The Library, however, has chosen not to contest the officers' assertion that they perform 30 minutes of compensable preshift and postshift work per day. Rather, the Library contends that the officers have been provided duty-free lunch breaks which should offset periods of preshift and postshift work. The question, therefore, is whether the officers have been afforded duty-free meal periods which are not compensable hours of work and which would serve to offset periods of preliminary and postliminary duty.

The Library reports that members of the Special Police Force regularly are afforded a 30-minute lunch break, and, in this regard, refers to provisions of the collective bargaining agreement between the Library and the American Federation of State, County and Municipal Employees, Local 2477, the bargaining representative of the Special Police Force. Article XXI of the agreement, effective in 1981, provides as follows:

> During the daily tour of duty, insofar as possible, consistent with operational requirements, the employee will receive two rest breaks of twenty (20) minutes duration and a lunch period of thirty (30) minutes. The times of the rest breaks and lunch period are to be determined by the watch supervisor, so as to least interfere with building physical protection requirements. During the rest break and lunch period, the employee is officially on duty and subject to all, unless otherwise scheduled.

The Library states that officers are relieved from their posts of duty during lunch breaks, and that they are provided 10 minutes

in addition to the 30-minute lunch period to permit them to walk between their posts and the Library's dining facilities.

Further, the Library reports that, although officers are officially on duty and subject to call during their lunch breaks, interruptions of breaks have been "so infrequent as to be nonexistent." In support of this statement, the Library has submitted affidavits from six watch supervisors, stating that they "never" or "very rarely" have had to interrupt an officer's lunch period for an emergency or non-emergency incident, and, when such an interruption has occurred, the break has been rescheduled. The Library also has provided us with the results of a survey performed by its Buildings Management Division during the period October 17 to December 30, 1982, showing that eight of 7,500 lunch breaks scheduled during that period were interrupted; in each of the eight instances, the break was rescheduled. A separate survey conducted during the period January 1 to February 28, 1983, showed that five of the 13,500 lunches scheduled during that period were interrupted and consequently rescheduled.

LIBRARY OF CONGRESS POSITION

Based on the information it has furnished to us, the Library contends that lunch breaks provided the officers are substantially duty-free and therefore may be offset against compensable preshift and postshift work. In this regard, the Library cites portions of the Court of Claims' opinions in *Baylor* v. *United States*, 198 Ct. Cl. 331 (1972) and *Albright* v. *United States*, 161 Ct. Cl. 356 (1963), and our decisions in *Lorenzo G. Baca, et al.*, B-167602, August 4, 1976; B-179412, February 28, 1974; and 47 Comp. Gen. 311 (1967). Those cases express the general principle that lunch breaks during which an employee is restricted to the employment premises and subject to call may be offset against overtime which is compensable under 5 U.S.C. § 5542 if the employee is not required to perform substantial duty during the breaktime.

SPECIAL POLICE FORCE POSITION

The officers challenge the Library's finding that they have been afforded duty-free lunch breaks, contending that, during the period of the Library's survey, the agency took "special care" not to recall an officer during his lunch break and to reschedule any breaks which were interrupted. In support of their position that, contrary to the Library's finding, they have been required to perform substantial duty during lunch breaks, the officers have submitted sworn statements to the effect that they "occasionally" have been called back from breaks to respond to emergency and non-emergency incidents. In this regard, they have furnished us with copies of Library of Congress incident reports for 1982, indicating that the

Special Police Force handled 28 emergency incidents and 16 borderline emergency incidents during that year, together with the District of Columbia Fire Department's listing of fire alarms reported by the Library in 1982. Additional documentation submitted by the officers includes: (1) a memorandum issued by the Captain of the Special Police Force instructing officers to remain on Library premises during their lunch periods; (2) a memorandum from the Head of the Protective Services Section directing officers to respond to incidents, including those involving disorderly conduct, which are brought to their attention during lunch breaks; and (3) the report of a grievance filed by an officer who was required to respond to a non-emergency incident during his lunch break.

The officers further argue that regulations in the Library of Congress Handbook for Special Police pertaining to lunch breaks are substantially similar to regulations which the Court of Claims in *Baylor* v. *United States*, cited above, contrued as failing to prescribe a duty-free lunch period. Section 42 of the Handbook provides as follows:

> LUNCH PERIODS. An officer works a straight 8-hour tour of duty. He is authorized to eat his lunch during his tour of duty for a period not in excess of 30 minutes at a time to be determined by his supervisor. Lunch periods will be scheduled so as to least interfere with building protection requirements. During the lunch break, the officer is officially on duty and subject to call.

In addition to the Court of Claims decision in *Baylor*, the officers rely generally on *Albright* v. *United States*, cited above, and our decisions in *John L. Svercek*, 62 Comp. Gen. 58 (1982), and B-56940, May 1, 1946, sustained in 44 Comp. Gen. 195 (1964).

Finally, the officers contend that Library of Congress Regulation 2014-7 supports their position that lunch breaks may not be offset against compensable preshift and postshift work. That regulation provides that "[r]est periods will not be considered as leave, and they are not to be accumulated, used to extend the luncheon period or to offset tardiness or early departure from work."

OPINION

"Title 5" overtime under 5 U.S.C. § 5542 at one and one-half times the basic rate of compensation is payable to Federal employees whose authorized or approved hours of work exceed 40 hours in an administrative workweek or 8 hours in a day. It is payable only if ordered or approved in writing or affirmatively induced by an official having authority to do so. *Guards at Rocky Mountain Arsenal*, cited above.

On May 1, 1974, the Fair Labor Standards Act Amendments of 1974, Public Law 93-259, approved April 8, 1974, extended FLSA coverage to Federal employees. The FLSA requires payment of overtime compensation to nonexempt employees for hours worked in excess of 40 hours per week. 29 U.S.C. § 207 (1976).

An employee who meets the requirements for both Title 5 and FLSA overtime is entitled to overtime compensation under whichever one of the laws provides the greater benefit. 54 Comp. Gen. 371 (1974). Since we are unable to ascertain from the record which computation would be more beneficial to the officers, the question whether their lunch breaks are subject to offset will be addressed under both Title 5 and FLSA standards.

SETOFF FOR LUNCH BREAKS UNDER TITLE 5

The standards for determining whether a lunch break is subject to offset under Title 5 are discussed extensively in *Baylor*, cited above, wherein the Court of Claims addressed the question whether the General Services Administration (GSA) afforded its uniformed guards a duty-free lunch break which would offset compensable preshift and postshift work. As indicated by the officers, the court in *Baylor* stated that provisions of the GSA Handbook for Building Guards, requiring guards to remain on duty and subject to call during lunch periods, did not "prescribe" a duty-free lunch break. Nevertheless, the court applied the following standard to determine whether, in actual practice, guards were provided a duty-free break:

> * * * [w]hen the employer makes lunch break time available, and the employee actually takes advantage of such privilege, such time may offset otherwise compensable preshift or postshift hours of work. This is true even when such breaktime is not regularly scheduled so long as it is regularly taken; and it applies when the employee is nevertheless subject to emergency call unless he has shown that responding to such calls substantially reduced his duty free time.
>
> Where applicable, such away-from-post lunch breaks will offset an equal amount of compensable overtime. Such offset will operate only in cases where the employee was actually permitted to leave his post for his lunch break.* * * 198 Ct. Cl. 331, 365.

Applying the above-quoted standards, we have consistently held that the mere fact that an employee is on call and not permitted to leave the employment premises will not defeat a setoff for lunch breaks unless the employee demonstrates that his breaktime was substantially reduced by responding to calls. *Frank E. McGuffin*, B-198387, June 10, 1980; *Raymond A. Allen*, B-188687, September 21, 1977.

The officers have not demonstrated under the *Baylor* standards that they have been restricted to the extent that they lacked duty-free meal breaks. Although the collective bargaining agreement and regulations in the Special Police Handbook require officers to remain on duty and subject to call during lunch breaks, the Library states, and the officers do not dispute, that they regularly have been relieved from their posts during breaktime and are free to eat lunch elsewhere on Library premises.

While the officers challenge the Library's finding that lunch breaks have been interrupted infrequently, they have not produced evidence to support a contrary determination. Specifically, the offi-

cers' sworn statements to the effect that they "occasionally" have been interrupted during lunch breaks are general in nature, and do not indicate the number of times that officers were required to work during meal periods. Furthermore, although the Library's incident reports and the District of Columbia Fire Department's listing of fire alarms show the dates of various emergency and non-emergency incidents, there is nothing to indicate that any of the incidents occurred during an officer's meal period. In fact, the Library has advised us that most of the incidents reported by the Library were handled routinely by patrol units. Finally, while the report of a grievance filed by an officer and a memorandum issued by a supervisor of the Special Police Force refer to several specific instances in which an officer has been expected to respond to a non-emergency incident, they do not provide any indication of the frequency with which such incidents have caused officers' lunch breaks to be interrupted.

Under these circumstances, we have no basis for questioning the Library's determination that lunch breaks afforded the officers are substantially duty-free. Accordingly, we hold that the lunch breaks may be offset against periods of preshift and postshift work which would be compensable under 5 U.S.C. § 5542.

The Court of Claims' decision in *Albright* v. *United States,* cited above, and our decision in B-56940, May 1, 1946, sustained in 44 Comp. Gen. 195, relied upon by the officers, involve facts which are substantially different from those presented by the officers' claims. In *Albright,* the court found that civilian guards employed by the Department of the Navy did not have duty-free lunch periods since no definite time for meals was provided, and, when lunch breaks were allowed, the guards generally were restricted to their assigned posts. See 161 Ct. Cl. 356 at pages 361-362, and 368-369. In our decision B-56940, above, we concurred with the determination of the Bureau of Engraving and Printing that, in view of the unique conditions to which employees of the Bureau were subjected, the lunch periods of all of its employees (including guards), which for many years had been regarded administratively as duty time, properly could continue to be considered as work time. That decision was not intended to constitute authority for treating lunch periods as duty or work time for other guards employed by the Government solely because of the fact that the guards—or other employees—are required to remain in the building and subject to call. See 47 Comp. Gen. 311, cited above.

The officers additionally contend that Library of Congress Regulation 2014-7, pertaining to rest breaks, supports their position that lunch breaks are not offsetable. We find that the cited regulation has no bearing on the question before us since it refers only to rest periods, and the Library has not claimed an offset against such breaktime.

SETOFF FOR LUNCH BREAKS UNDER FLSA

The standards for determining whether a lunch break is *bona fide* and thus subject to offset against preshift and postshift work otherwise compensable as FLSA overtime are essentially the same as the Title 5 standards delineated in *Baylor,* above. See *Guards at Otis Air Force Base,* B-198065, October 6, 1981. The courts have held that, under FLSA, the essential consideration as to whether a meal period is *bona fide* is whether the employee is in fact completely relieved from work for the purpose of eating regularly scheduled meals. *Blain* v. *General Electric Co.,* 371 F. Supp. 857 (W. D. Ky. 1971). Explaining this criterion, instructions contained in Federal Personnel Manual Letter 551-1, May 15, 1974, Attachment 4, para. C, state in relevant part:

> Bona fide meal periods are not considered as "hours worked." The employee must be completely relieved from duty for the purpose of eating regular meals. When an employee's meal periods are uninterrupted except for rare and infrequent emergency calls, the meal periods can be excluded from working time. On the other hand, if the meal periods are frequently interrupted by calls to duty, the employee would not be considered relieved of all duties and all the meal periods must be counted as "hours worked." If an employee is completely freed from duties during his meal periods it is not necessary that he be permitted to leave the premises for the time to be excluded from work time.

With regard to the standard of proof necessary to substantiate a claim under FLSA, the Act requires employers to "make, keep, and preserve such records of persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." See 29 U.S.C. § 211(c). On this basis, our decisions impose a special burden of proof on Federal agencies. See *Jon Clifford, et al.,* B-208268, November 16, 1982. Initially, however, the employee must prove that he has performed work for which overtime compensation is payable with sufficient evidence to show the amount and extent of the work as a matter of just and reasonable inference. *Guards at Rocky Mountain Arsenal,* cited above. At that point, the burden of proof shifts to the employing agency to show the exact amount of overtime worked or to rebut the employee's evidence. *Civilian Nurses,* 61 Comp. Gen. 174 (1981). Accordingly, the employing agency does not have the burden of proving that a meal period is *bona fide* and thus excludable from "hours worked" within the meaning of FLSA unless the employee provides some evidence of the amount and extent of work performed during breaktime.

Since, in this case, the employing agency is also the agency responsible for objectively reporting the facts surrounding the FLSA claims, a more stringent standard of proof must be applied to evidence submitted by the officers. That is, the officers not only must present evidence of the amount and extent of work performed during breaktime, but must establish by such evidence that the Library's findings of fact are clearly erroneous. *Paul Spurr,* above.

As noted previously, the officers do not dispute that they regularly have been relieved from their posts of duty during lunch breaks and are free to eat lunch elsewhere on Library premises. Although they challenge the Library's finding that lunch breaks have been interrupted infrequently, the officers have not produced evidence indicating the number of times that they have been required to work during meal periods, or that any record was made thereof. Since the officers have not shown that their lunch breaks were interrupted on other than an infrequent basis, we have no reason to question the Library's findings that such breaks are substantially duty-free. Accordingly, we hold that the breaks are *bona fide* and may be offset against periods of preshift and postshift activity which otherwise would be compensable under FLSA.

Our decision in *John L. Svercek,* above, relied upon by the officers, does not provide a basis for any different determination by us. In that case, we addressed the question whether, under FLSA, lunch breaks afforded the Federal Aviation Administration (FAA) Air Traffic Control Specialists were *bona fide* and therefore subject to offset against compensable preshift work. Our determination that the employees did not have *bona fide* lunch breaks was based on findings issued by the Office of Personnel Management (OPM), the agency authorized to administer FLSA with respect to individuals employed by FAA.

The officers imply that the findings upon which our decision in *Svercek* was based were those set forth in a compliance order issued by OPM to FAA. The order, quoted in *Svercek,* included OPM's conclusion that lunch breaks afforded the FAA employees were not *bona fide* because the breaks did not have a fixed length, "and since the employees remained subject to recall." While we accepted OPM's conclusion that the lunch breaks were not *bona fide,* our determination was not based solely on the fact that the employees were on call during breaktime. Instead, our decision to disallow a setoff for lunch breaks was grounded on OPM's further explanation that the employees either could not leave their work sites for lunch or that they were frequently interrupted if they did leave their work sites.

Thus, the facts presented by the officers' claims clearly are distinguishable from those basing our determination in *Svercek.* As noted above, the officers do not dispute that they are relieved from their post during lunch breaks, and they have not shown that interruption of breaks occurred on other than an infrequent basis.

For the reasons stated, we hold that lunch breaks provided the officers may be offset against periods of preshift and postshift work which allegedly would be compensable under the overtime provisions of Title 5 and FLSA.

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[B-209945]

Officers and Employees—Transfers—Real Estate Expenses—Finance Charges—Reimbursement Prohibition—Veterans Administration Funding Fee

The Veterans Administration (VA) questions whether the VA funding fee, consisting of one-half of 1 percent of the amount of a loan guaranteed or insured by the VA, required under the Omnibus Budget Reconciliation Act of 1982, is reimbursable under para. 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended. We hold that the funding fee is not reimbursable under FTR para. 2-6.2d because the fee constitutes a finance charge under Regulation Z (12 C.F.R. 226.4 (1982)).

Matter of: Veterans Administration—Relocation Expenses—Reimbursement of VA Funding Fee, June 9, 1983:

Conrad R. Hoffman, Assistant Deputy Administrator for Budget and Finance, Veterans Administration (VA), requests a decision as to whether a VA funding fee is reimbursable as a fee or charge that is similar to a loan origination fee within the purview of para. 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended (Supp. 4, October 1, 1982).

We hold that FTR para. 2-6.2d does not authorize reimbursement of the VA funding fee since the fee constitutes a finance charge within the meaning of Regulation Z, 12 C.F.R. § 226.4(a) (1982).

Section 1829 of Title 38, United States Code, added by the Omnibus Budget Reconciliation Act of 1982, Public Law 97-253, 96 Stat. 805 (1982), provides that a "loan fee" in the amount of one-half of 1 percent of a housing loan made, guaranteed, or insured by the VA must be collected from the veteran purchaser and remitted to the Administrator of the VA as a condition precedent to the VA making, guaranteeing, or insuring a loan. The fee is a user charge which is deposited into the U.S. Treasury as miscellaneous receipts.

The "loan fee" or "funding fee" is not the same as the VA fee for loan application. It is imposed in addition to a loan origination fee, which is a fee payable by the borrower to the lending institution and is limited by the VA to an amount not to exceed 1 percent of the amount of the loan. 38 C.F.R. § 36.4312(d)(2) (1982). The loan origination fee compensates the lender for expenses incurred in originating the loan, preparing documents, and related work.

Prior to the October 1982 revision of the FTR, loan origination fees assessed on a percentage rate basis for the purpose of defraying a lender's administrative expenses were not reimbursable. Specifically, FTR para. 2-6.2d prohibited reimbursement of expenses incurred in connection with the sale or purchase of a house whenever the expenses were determined to constitute a finance charge within the meaning of the Truth in Lending Act, Title I, Public Law 90-321, 82 Stat. 146 (1968) (15 U.S.C. 1601 note), as implemented by Regulation Z, 12 C.F.R. § 226.4. Since Regulation Z expressly

categorizes service charges and loan fees as finance charges when they are imposed incident to or as a condition of the extension of credit, we consistently interpreted the provisions of FTR para. 2-6.2d as precluding reimbursement of loan origination fees. See, for example, *Stanley Keer,* B-203630, March 9, 1982.

However, the revised provisions of FTR para. 2-6.2d, effective October 1, 1982, specifically authorize reimbursement of loan origination fees and similar charges, providing in pertinent part as follows:

d. *Miscellaneous expenses.*
(1) *Reimbursable items.* The expenses listed below are reimbursable in connection with the sale and/or purchase of a residence, provided they are customarily paid by the seller of a residence in the locality of the old official station or by the purchaser of a residence at the new official station to the extent they do not exceed amounts customarily paid in the locality of the residence.
(a) FHA or VA fee for loan application;
(b) Loan origination fee;
(c) Cost of preparing credit reports;
(d) Mortgage and transfer taxes;
(e) State revenue stamps;
(f) *Other fees and charges similar in nature to those listed above, unless specifically prohibited in (2), below;*

* * * * * * *

(2) *Nonreimbursable items.* Except as otherwise provided in (1), above, the following items of expense are not reimbursable:

* * * * * * *

(e) *No fee, cost, charge, or expense determined to be part of the finance charge under the Truth in Lending Act, Title I, Pub. L. 90-321, and Regulation Z issued in accordance with Pub. L. 90-321 by the Board of Governors of the Federal Reserve System, unless specifically authorized in (1), above;* * * * [Italic supplied.]

The VA funding fee may be considered similar to a loan origination fee which has been made reimbursable under the 1982 amendment to the FTR. Nevertheless, under the above-quoted FTR provisions, those fees and charges which are regarded as similar to the expenses for which reimbursement is specifically authorized in FTR para. 2-6.2d(1) may be reimbursed only if such expenses do not constitute a finance charge within the contemplation of the Truth in Lending Act, as implemented by Regulation Z. Accordingly, in determining whether or not an item of real estate expense not specifically listed in FTR para. 2-6.2d(1) is reimbursable under that provision as a similar fee or charge, the item must be examined in light of Regulation Z and decisions of this Office.

The relevant part of Regulation Z, 12 C.F.R. Part 226, states:

226.4 *Determination of finance charge.* (a) *General rule.* Except as otherwise provided in this section, the amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party, including any of the following types of charges:

* * * * * * *

(7) Premium or other charge for any other guarantee or insurance protecting the creditor against the customer's default or any other credit loss.

Applying these provisions, we held that a prior VA funding fee imposed by the Veterans' Readjustment Benefits Act of 1966, 38 U.S.C. § 1818(d) (repealed in 1970), was not reimbursable under section 4.2d of Office of Management and Budget Circular A-56 (June 1969), a predecessor to FTR para. 2-6.2d. 49 Comp. Gen. 483 (1970). Specifically, we determined that the prior funding fee constituted a finance charge since, like the current funding fee, it is paid by the veteran purchaser incident to and as a condition precedent to his obtaining from the creditor a loan that is guaranteed by the VA. Further, the fee was not specifically excluded from the definition of a a finance charge by 12 C.F.R. § 226.4(e).

The VA funding fee imposed by the Omnibus Budget Reconciliation Act of 1982 is substantially similar to the prior funding fee discussed in 49 Comp. Gen. 483, above, and the fee is not excluded from the definition of a finance charge by the current provisions of 12 C.F.R. § 226.4(e). Based on the rationale stated in our earlier decision, the VA funding fee constitutes a finance charge within the meaning of Regulation Z, since it would only be imposed in connection with the extension of credit, as opposed to a charge imposed for services rendered without regard to whether credit is sought or obtained. See *Donald W. Espeland*, B-186583, March 30, 1978. Therefore, reimbursement of the fee is specifically prohibited by FTR para. 2-6.2d, regardless of whether the fee may be considered similar to a loan origination fee or any of the other expenses authorized by FTR para. 2-6.2d(1).

Accordingly, we hold that under FTR para. 2-6.2d, the VA funding fee constitutes a nonreimbursable item of real estate expenses.

[B-210407]

Contracts—Protests—Interested Party Requirement—Small Business Set-Asides

Protester rejected as other than small business under 100-percent small business set-aside procurement contending it was improperly rejected is interested party under General Accounting Office Bid Protest Procedures because if protest is sustained the protester would be eligible for award.

Contracts—Small Business Concerns—Awards—Set-Asides—Qualifications of Small Businesses—Business Entity Organized for Profit Requirement

To qualify as a small business concern a concern must be a business entity organized for profit. The contracting officer acted reasonably in rejecting bid in which bidder represents that it is a nonprofit organization, thus indicating that bidder is other than a small business concern and ineligible for award under a small business set-aside.

Bids—Invitation For Bids—Defective—Evaluation Criteria—Evaluation Mainly Based on Factors Other Than Price

An invitation for bids which states that in the evaluation for award the bidders' "technical submittals" will be weighted at 80 percent and cost 20 percent is improper because award under this evaluation scheme could be made to a bidder other than the one which bid the lowest price. A formally advertised contract must be awarded on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder is responsible.

Matter of: Institute for Aerobics Research, June 9, 1983:

The Institute for Aerobics Research protests the rejection of its bid under invitation for bids No. DABT15-83-B-0001, a 100-percent small business set-aside, issued by the Department of the Army for developing and presenting physical fitness classes at Ft. Benjamin Harrison, Indiana. Aerobics contends that the Army erroneously determined it to be other than a small business concern and followed improper procedures in making this determination.

We deny the protest.

This procurement was for a "pilot course of instruction on Physical Fitness and Wellness Systems and their impact on soldier lifestyle." The contractor was to develop and deliver all the course materials necessary for 20- and 80-hour basic programs of instruction and an 80-hour advanced program of instruction, as well as present these programs of instruction to personnel at Ft. Benjamin Harrison. The training program, including all supplemental training aids, lesson plans, programs of instruction, course outlines, tests and handouts would then become the property of the Government, whose employees presumably would conduct any subsequent courses.

A public bid opening was held on December 3, 1982. The Army's Abstract of Bids shows the following bids were received:

Bidder	Size status	Amount
Chicago State University	"Non-profit"	$53,348
Institute of Human Performance (awardee)	Small	73,195
Walter G. Moore & Sons	Small	75,000
Institute for Aerobics Research (protester)	"Non-profit"	90,910

The protester's bid included Standard Form 33, in paragraph 1 of which the protester represented that it is a small business concern and in paragraph 5 of which it represented that it is "a nonprofit organization." The Army regarded these two representations as inconsistent. The Army consequently telephoned the firm, explaining its concern over these representations, and asked Aerobics for "clarification." Aerobics responded that it is a nonprofit organiza-

tion. The Army then telephoned a regional office of the Small Business Administration (SBA) about Aerobics' bid and was advised that a nonprofit organization is not eligible to receive award under a small business set-aside procurement. The Army subsequently made award to the Institute of Human Performance, whose bid was described by the Army in its report to our Office as "the lowest * * * received from a small business concern."

Upon being notified of the award to the Institute of Human Performance, Aerobics protested to our Office, objecting to the Army's rejection of its bid. For the reasons stated below, we deny Aerobics' protest. In addition, however, although Aerobics did not object to the procedures used by the Army for evaluating bids, we find these procedures to be inappropriate. We discuss the deficiencies in those procedures below also.

As a preliminary matter, the Army contends that since Aerobics is a nonprofit organization, Aerobics does not qualify as a small business concern and therefore is not an interested party capable of pursuing this protest. *See* 4 C.F.R. § 21.1(a) (1983). Our Office has held that where an other than small business protests that the procuring agency followed improper procurement procedures in a small business set-aside, the protester is not an interested party, because if our Office determines that the challenged procedures are improper and sustains the protest, the protester would still be ineligible for award. See *Central Texas College,* B-209626, January 17, 1983, 83-1 CPD 49. However, where a bidder for a small business set-aside procurement protests that it was improperly determined to be an other than small business after bid opening and would otherwise be eligible for award of the contract in question, as is the case here, it clearly has a direct interest in the outcome of the protest. Therefore, we will consider the protest.

Aerobics' principal contention is that since it represented itself as a small business concern in its bid, the Army could not reject it as an other than small business without referring any question of the firm's small business status to the SBA for a size determination. *See* Defense Acquisition Regulation (DAR) § 1-703(b). It also argues that it is in fact a small business concern eligible for award under this procurement, even though it is a nonprofit organization. It reasons that since the SBA's regulations provide that an entity organized for profit owned by a nonprofit entity qualifies as a small business concern, the SBA could not have intended to preclude a nonprofit entity from receiving a small business set-aside contract since it would only be a matter of "form" for a nonprofit entity to create a for-profit subsidiary. *See* 13 C.F.R. § 121.3-2(i) (1982). It adds that since the solicitation treated small business status and type of business organization in separate questions, the answers to these questions are not mutually exclusive.

"Small business concern" is defined by DAR § 1-701.1(a)(1), which states that "concern" means any business entity organized

for profit. The SBA regulations define "concern" in the same manner and add that this includes a "for profit" entity even if it is owned by a nonprofit entity. 13 C.F.R. § 121-3.2(i). Aerobics correctly represented in its bid that it is a nonprofit organization. By making such a representation, Aerobics indicated on the face of its bid that it is other than a small business concern and thus ineligible for award under this small business set-aside. We therefore believe the contracting officer acted reasonably in rejecting Aerobics' bid. We cannot accept Aerobics' rationale that the SBA must not have intended to disqualify nonprofit entities from the award of small business set-asides in the the face of clear and unambiguous language to the contrary in SBA's regulations.

The protest is denied.

We note, however, that this procurement was deficient in that the solicitation set out a method for evaluating bids which was inappropriate for a formally advertised invitation for bids. There are references throughout this solicitation which identify it as an invitation for bids and those who respond to it as "bidders," and there was a public bid opening. The award of a formally advertised contract must be made on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder responsible. 10 U.S.C. § 2305(c); *Emerson Electric Company, Environmental Products Division,* B-209272, November 4, 1982, 82-2 CPD 409.

Most of the solicitation does not conflict with the requirements for award for a formally advertised contract. Sections L and M, however, required bidders to submit "proposals" and provided that the contract would be awarded based on an evaluation of both the technical submittal and of "cost," in which the technical score would be weighted at 80 percent and "cost" at 20 percent. These provisions are inappropriate to a formally advertised procurement because they establish an evaluation scheme under which cost becomes secondary to the quality of a bidder's "technical submittal" and the qualifications of its employees. This kind of evaluation is appropriate only in a negotiated contract, which the record suggests may have been more suitable for the kind of services the Army was seeking here. As it was, the solicitation was a checkerboard of "formal advertising" and "negotiation" provisions.

These evaluation provisions explain something which the Army did not address in its report to our Office: why it gave first consideration for award to the highest bidder. Aerobics is of the "belief" that its technical submittal received the highest rating. Since the solicitation stated that the technical evaluation would be weighted at 80 percent in determining the award, Aerobics contends that it should have received the contract.

It may be, as Aerobics asserts, that if eligible it would have been first in line for award according to the solicitation's evaluation criteria. Those criteria, however, cannot be used under the method of

procurement—formal advertising—which the Army chose here. Aerobic's protest was not filed until after award; had we been in a position to review this procurement earlier, we would have recommended that IFB -0001 be canceled and the procurement resolicited with evaluation provisions appropriate to the method of procurement used. Even if Aerobics had not been rejected on the basis of its size status, therefore, we would not have concluded that it should receive the award of this contract.

Since the contract has been completely performed, it is not feasible to recommend any corrective action. However, we are advising the Secretary of the Army of the deficiencies noted.

[B-210767]

Public Health Service—Commissioned Personnel—Separation—Subsequent Appointment To Civilian Position—Relocation Expense Reimbursement and Allowances

A Commissioned Officer in the Public Health Service (PHS) was separated from the officer corps and recruited to fill a manpower shortage position in the Veterans Administration. Employee seeks reimbursement of real estate expenses occasioned by sale of his old residence in Maryland and purchase of new residence in California. Reimbursement is denied because as a commissioned officer in the PHS, employee was a member of a uniformed service whose pay and allowances are prescribed by Title 37 of U.S. Code, which does not provide for such reimbursement. Consequently, claimant was not embraced by reimbursement provisions of sections 5721-5733 of Title 5, applicable to civilian employees of Government only. Thus, purported transfer was a separation from uniformed service followed by subsequent new appointment, and there is no authority for reimbursement of real estate expenses for new appointees.

Matter of: Dr. Albert B. Deisseroth—Reimbursement of Real Estate Expenses—Public Health Service Officer, June 9, 1983:

This responds to a request for decision submitted by the Assistant Deputy Administrator for Budget and Finance, Office of Budget and Finance, Veterans Administration (VA), concerning a claim for reimbursement of real estate expenses for Dr. Albert B. Deisseroth under the provisions of 5 U.S.C. § 5724a(a)(4).

The issue presented is whether a Commissioned Officer of the Public Health Service (PHS) is entitled to reimbursement of real estate expenses after separation from service and subsequent to reemployment with the VA. For the reasons stated below, we find no statutory authority which would allow for such reimbursement.

Dr. Albert B. Deisseroth had served on active duty in the Commissioned Corps of the PHS, and was stationed at the National Institutes of Health in Bethesda, Maryland. On June 28, 1981, Dr. Deisseroth began work as the Chief of the Hematology/Oncology Section of the VA Medical Center in San Francisco. He states that he was recruited by the VA to fill "an existing void" at the Center. The VA has confirmed that Dr. Deisseroth's appointment was to a manpower shortage position. According to the PHS, Dr. Deisseroth's last day on active duty was June 30, 1981, and he was sepa-

rated on July 1, 1981. On March 30, 1982, Dr. Deisseroth applied for reimbursement of $9,736.50 in real estate expenses occasioned by the sale of his former residence in Potomac, Maryland, and the purchase of his new home in Novato, California.

The authorizing official at the VA Medical Center authorized miscellaneous expenses, travel and transportation for Dr. Deisseroth, his wife and three children, shipment of household goods, and real estate expenses.

The matter has come before us because of a disagreement between personnel within the VA as to whether or not Dr. Deisseroth is entitled to reimbursement. The Assistant General Counsel of the VA has concluded that Dr. Deisseroth is an employee "transferred" from one agency to another—a position not shared by the Assistant Deputy Administrator for Budget and Finance who has submitted this request for decision.

Specifically, the Assistant General Counsel has urged that our holdings in 46 Comp. Gen. 628 (1967) and 47 *id.* 763 (1968) are applicable to Dr. Deisseroth's situation, and therefore as a "transferred" employee without a break in service, he is entitled to reimbursement of real estate expenses pursuant to 5 U.S.C. § 5724a(a)(4). However, those holdings are not applicable in the instant case, for both decisions pertained to overseas *civilian* employees transferred to agencies within the United States.

This Office has held that Commissioned Officers of the PHS are to be considered as members of a uniformed service. 45 Comp. Gen. 680 (1966); B-201706, March 17, 1981. Dr. Deisseroth, as an officer in the Commissioned Corps of the PHS, was consequently a member of a uniformed service at the time of his separation in June 1981. Therefore, he was not embraced by the travel and relocation reimbursement authority of 5 U.S.C. § 5721-5733, which is applicable to civilian employees of the Government only. As a member of a uniformed service, claimant's pay and allowances were prescribed by Title 37 of the United States Code, and that title does not provide for reimbursement of real estate expenses. Further, section 101(3) of that title specifically includes the PHS as a "uniformed service." In addition, paragraph 2-1.2(b)(3) of the Federal Travel Regulations, FPMR 101-7 (May 1973 (FTR)), issued pursuant to 5 U.S.C. §§ 5721-5733, *supra,* specifically excludes from coverage all persons whose pay and allowances are prescribed by Title 37.

An examination of the legislative history of Title 5 reveals that it codifies, *without substantive change,* various laws relating to travel and relocation expenses of *civilian* employees of the Government. For example, Title 5 codifies the Administrative Expenses Act of 1946, Pub. L. 79-600, 60 Stat. 806, which prescribed travel reimbursement regulations for "any civilian officer and employee of the Government." The qualifying adjective "civilian" is found in the 1952, 1958 and 1964 editions of the Code. In 1966, Congress en-

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acted Pub. L. 90-83, 81 Stat. 195, which amended Title 5 and added the section pertaining to relocation expenses, 5 U.S.C. § 5724a(a). Section 5721 of the amended title defined "employee" as an "individual employed in or under an agency." Although the adjective "civilian" no longer preceded "employee," nothing in the legislative history indicates a Congressional intent that this deletion was to serve as a substantive change in the law so as to include members of the uniformed services as "employees." In fact, Senate Report No. 482 which accompanied the legislation, although referring to the definition of "agency" under the Back Pay Act, 5 U.S.C. § 5596, stated that: "The definition in subsection (a)(2) continues the application of the section to only civilian officers and employees, and does not encompass members of the uniformed services as they are not 'employed' in or under an agency." See 1967 U.S. Code Cong. & Ad. News, p. 1549.

Therefore, at the time of his move from the PHS to the VA, Dr. Deisseroth was not covered by the real estate expenses reimbursement authority of 5 U.S.C. § 5724a(a)(4) since he was not a civilian employee. Also, Title 37 contains no analogous provision which would allow for such reimbursement. Therefore, we must regard Dr. Deisseroth's purported "transfer" to have been a separation from a uniformed service followed by a subsequent new appointment, and there is no authority for reimbursement of real estate expenses for new appointees. See B-164854, August 1, 1968; *cf. Stephen E. Goldberg,* B-197495, March 18, 1980.

Accordingly, as no statutory authority exists to reimburse the claimant for real estate expenses under either Title 5 or Title 37, his claim for such must be denied.

We also note that the VA has allowed Dr. Deisseroth travel and transportation expenses. This would be a proper reimbursement to Dr. Deisseroth only under either 5 U.S.C. § 5723, as a new employee in a manpower shortage position, or under 37 U.S.C. § 404(3) as a separated member of a uniformed service upon return to his home of record. We were informed that Dr. Deisseroth was a manpower shortage appointee. However, reimbursement under such authority is limited. Thus, residence sale and purchase expenses, miscellaneous expense allowance, and per diem for family are not allowable. See FTR paragraph 2-1.5f(4); 54 Comp. Gen. 747 (1975). Therefore, any amounts erroneously paid to Dr. Deisseroth beyond the scope of this authority will have to be repaid by him. See *Dr. Frank A. Peak,* 60 Comp. Gen. 71 (1980).

[B-206237]

Attorneys—Fees—Civil Service Reform Act of 1978—Payment in the Interest of Justice

Employee's attorney claims attorney fees in case where GAO held Army committed an unjustified and unwarranted personnel action following the denial of an agency-

filed application for disability retirement. *David G. Reyes,* B-206237, August 16, 1982. Claim for reasonable attorney fees under the Back Pay Act, 5 U.S.C. 5596, as amended, is allowable since General Accounting Office, as an "appropriate authority" under the Back Pay Act, finds fees to be warranted in the interest of justice. See 5 C.F.R. 550.806.

Attorneys—Fees—Civil Service Reform Act of 1978—Reasonableness of Fees Claimed

Claim for reasonable attorney fees under the Back Pay Act requested payment for 29 hours at $100 per hour. Following criteria established by Merit Systems Protection Board, the hourly rate is reduced to $75 to be consistent with rates charged by other attorneys in the locality.

Matter of: Shelby W. Hollin—Claim for Attorney Fees Under the Back Pay Act, June 10, 1983:

The issue in this decision concerns a claim for attorney fees for representation of a Federal employee whose claim for backpay and restoration of leave we allowed in a prior decision. We hold that reasonable attorney fees may be paid under the Back Pay Act, 5 U.S.C. § 5596, and implementing regulations since payment is warranted in the interest of justice.

Mr. Shelby W. Hollin claims attorney fees in the amount of $2,900 in connection with his representation of David G. Reyes, the subject of our decision *David G. Reyes,* B-206237, August 16, 1982. In *Reyes,* we held that, although the Department of the Army could place the employee on involuntary leave while the agency filed for his disability retirement since the agency's determination was based on a medical opinion that the employee was incapacitated for duty, the Army was obligated to either restore Mr. Reyes to active duty or to take steps to separate him on grounds of disability after the Office of Personnel Management (OPM) denied the application for disability retirement. We concluded that the Army's failure to restore Mr. Reyes to active duty or to take steps to separate him on grounds of disability constituted an unjustified or unwarranted personnel action under 5 U.S.C. § 5596 (1976). Accordingly, we granted Mr. Reyes' claim for backpay and restoration of leave for the period March 27, 1980, to May 8, 1980. Following our decision, Mr Hollin filed a claim for attorney fees in the amount of $2,900.

The authority for the payment of attorney fees is contained in the Back Pay Act, 5 U.S.C. § 5596, as amended by the Civil Service Reform Act of 1978. Under the amended Act, reasonable attorney fees may be paid to employees found to have been affected by unjustified or unwarranted personnel actions. See 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. III 1979). Final regulations implementing the amended Back Pay Act were issued by the Office of Personnel Management, 46 Fed. Reg. 58271, December 1, 1981, and appear in 5 C.F.R. Part 550, Subpart H. Section 550.806(a) of 5 C.F.R. provides as follows:

> An employee or an employee's personal representative may request payment of reasonable attorney fees related to an unjustified or unwarranted personnel action

that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. Such a request may be presented only to the appropriate authority that corrected or directed the correction of the unwarranted personnel action * * *.

The fact that Mr. Reyes incurred attorney fees pursuant to an attorney-client relationship is supported by an affidavit provided in the request. The statement of services provided to Mr. Reyes are all related to defending Mr. Reyes against the actions of the Army which, in part, resulted in our finding of an unjustified or unwarranted personnel action. Finally, since this Office rendered the decision granting part of Mr. Reyes' claim for backpay and restoration of leave, we are "the appropriate authority that * * * directed the correction of the unjustified or unwarranted personnel action * * *." Therefore, the request for attorney fees is properly presented to this Office.

Section 550.806(b) of title 5, C.F.R., provides that:

(b) The appropriate authority to which such a request is presented shall provide an opportunity for the employing agency to respond to a request for payment of reasonable attorney fees.

We forwarded Mr. Hollin's claim for attorney fees to the Director of Civilian Personnel, Department of the Army. By letter of October 26, 1982, the Office of the Judge Advocate General, Department of the Army, responded and stated, in part:

We have reviewed the file and interpose no legal objection to the payment of reasonable attorney fees. Based on the affidavit of claimant's attorney * * *, we accept a claimed attorney fee of $2,900.00 * * * as reasonable.

Under the provisions of 5 C.F.R. § 550.806(c) the payment of reasonable attorney fees shall be deemed to be warranted only if:

(1) Such payment is in the interest of justice, as determined by the appropriate authority in accordance with standards established by the Merit Systems Protection Board under section 7701(g) of title 5, United States Code; and
(2) There is a specific finding by the appropriate authority setting forth the reasons such payment is in the interest of justice.

The Merit Systems Protection Board (MSPB) has enumerated the criteria relating to payment of attorney fees in the interest of justice. In a leading case, *Allen* v. *U.S. Postal Service*, 2 MSPB 582 (1980), the MSPB held that "in the interest of justice" is not coextensive with the concept of prevailing party, but is not limited to cases involving prohibited personnel actions as defined by 5 U.S.C. § 2302 (Supp. III 1979) or agency actions which are "clearly without merit." After reviewing the legislative history of the amendments to the Back Pay Act which provide for the payment of attorney fees, the MSPB held in *Allen* that payment would be "in the interest of justice" under the following circumstances as summarized below:

(1) The agency engaged in a prohibited personnel practice;

(2) The agency's action was clearly without merit or was wholly unfounded or the employee was substantially innocent of the charges brought by the agency;

(3) The agency inititated the action in bad faith;

(4) The agency committed a gross procedural error (not simply harmful procedural error) which prolonged the proceeding or severely prejudiced the employee; or

(5) The agency knew or should have known that it would not prevail on the merits when it brought the proceeding.

The MSPB cautioned in *Allen* that the above list was not exhaustive, but illustrative, and the examples should serve as "directional markers" towards the interest of justice.

In his request for payment, Mr. Hollin argues that payment is warranted in the interest of justice since the agency failed to comply with its own "directives" which constituted a prohibited personnel practice. However, based on our review of the statutorily defined "prohibited personnel practices" contained in 5 U.S.C. § 2302(b), we do not find that the Army committed a prohibited personnel practice. On the other hand, we conclude that attorney fees may be paid "in the interest of justice" since the Army has interposed no objection to payment and since the error committed by the Army borders on gross procedural error.

As we held in *Reyes*, B-206237, *supra*, once the agency-filed application for disability retirement was denied, the Army was obligated to either restore the employee to active duty or to take steps to separate him on grounds of disability, and the Army failed to do either. Our decisions have long held that such action constitutes an unjustified or unwarranted personnel action under the Back Pay Act. Therefore, we conclude that under the circumstances such action constitutes gross procedural error which prejudiced the employee by prolonging the period of involuntary leave and leave without pay for 5 weeks. Accordingly, we conclude that payment of attorney fees is warranted in the interest of justice. 5 C.F.R. § 550.806(c)(2).

The Back Pay Act regulations provide further in 5 C.F.R. § 550.806(d) that:

> (d) When an appropriate authority determines that such payment is warranted, it shall require payment of attorney fees in an amount to be determined to be reasonable by the appropriate authority. * * *.

The MSPB in *Kling* v. *Department of Justice*, 2 MSPB 620 (1980) ruled on the question of what constitutes reasonable fees. The MSPB reviewed the considerable judicial precedent available including the 12 factors outlined in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). However, the MSPB stated that the preferred approach for cases appealed to the MSPB would be to review the lawyer's customarily hourly billing and the number of hours devoted to the case. See *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973). Therefore, the MSPB concluded that the *Lindy* approach

(hourly rate × hours devoted) would be utilized while the *Johnson* factors could provide guidance. *Kling, supra.*

In his affidavit Mr. Hollin states that the hours devoted to the case totaled 29 hours and the hourly rate is $100. Mr. Hollin has also supplied a statement responding to the 12 factors outlined by the *Johnson* case and has submitted affidavits from 11 other attorneys in the San Antonio, Texas, area attesting to their normal hourly rates. These rates range from $60 to $125 per hour with five attorneys attesting to the fact that they normally charge $75 per hour.

We note that according to Mr. Hollin all of the billable hours were spent conferring with his client and preparing letters and petitions for review. There was no trial or appellate work in this case for which several of the attorneys in the San Antonio area charge hourly rates in excess of $75. Mr. Hollin also states there is no customary fee for such cases but he adds that he was paid $100 per hour in a recent case involving the Social Security Administration. Finally, Mr. Hollin argues that since his fee was contingent upon the success of the case his fee of $2,900 should be adjusted upward.

As Mr. Hollin notes, the MSPB held in *Kling* that a public policy "bonus multiplier" of the attorney's fee would not be justified in cases before the MSPB but that when counsel's compensation is contingent on success, the award could be adjusted upward to compensate the attorney for the risk the attorney accepted of not being paid at all.

Although Mr. Hollin states that his fee was contingent upon success in Mr. Reyes' case, we note that Mr. Reyes paid a retainer of $560 which would be refunded if Mr. Hollin obtained fees from the Government. Thus, Mr. Hollin's reimbursement was not strictly contingent upon success in Mr. Reyes' case. In addition, we believe a reasonable hourly rate under the circumstances in this case is $75. We adopt this figure as most nearly representative of customary hourly rate in San Antonio as evidenced by affidavits supplied by Mr. Hollin from 11 other attorneys in the area. See also the Equal Access to Justice Act, Public Law 96-481, October 21, 1980, codified in 5 U.S.C. § 504, which limits attorney fees awarded under that Act to $75 per hour unless special factors justify a higher award.

Accordingly, we conclude that payment of attorney fees by the Department of the Army is warranted in the interest of justice and that reasonable fees in this case would be Mr. Hollin's hours claimed (29) times a reasonable hourly rate ($75) for a total fee of $2,175.

[B-210200]

Contracts—Small Business Concerns—Awards—Responsibility Determination—Nonresponsibility Finding—Certificate of Competency Denial on Recent Procurement—Resubmission to SBA Not Required

Under limited circumstances, a recent denial by the Small Business Administration (SBA) for a certificate of competency may be used by a contracting officer as SBA confirmation of another finding of nonresponsibility.

Contracts—Default—Reprocurement—Defaulted Contractor—Not Entitled to Award—Full Price Already Paid Under Defaulted Contract

Where a defaulted contractor has been paid the full contract price under the defaulted contract, it is not entitled to award of the repurchase contract because it is not permitted to be paid more than the original contract price. Award of the repurchase contract would be tantamount to modification of the original contract without consideration flowing to the Government.

Matter of: Sayco Ltd., June 14, 1983:

Sayco Ltd., a defaulted contractor under contract No. N00102-81-C-4921, protests the award of a reprocurement contract under request for proposals (RFP) No. N00102-82-R-0247, issued by the Department of the Navy for a quantity of tube fittings. Sayco, having been found nonresponsible under the RFP, protests that it has the right as a small business to have the matter of its responsibility reviewed by the Small Business Administration (SBA) under the certificate of competency (COC) procedures, but that the Navy has refused to refer the matter to SBA. We deny the protest.

The solicitation was a 100 percent small business set-aside with a closing date of September 27, 1982. Sayco submitted the low proposal of $44,676.00 in response to the RFP but was found nonresponsible because of numerous production deficiencies and delinquencies. As a result of the nonresponsibility determination, an award was made to another contractor for $52,990.70.

Sayco maintains that upon being found nonresponsible under the subject solicitation it had a right to apply to SBA for a COC, but that in violation of the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. IV, 1980), the Navy will not refer the matter to SBA. Sayco requests that our Office direct the Navy to do so.

The Navy, on the other hand, takes the position that the contracting officer's nonresponsibility determination was proper because it was based on the following factors:

(1) Sayco's termination for default on its contract for the item;

(2) A pre-award survey for similar items conducted within 75 days of the closing of this solicitation which concluded that Sayco's production capability, purchasing and subcontracting practices, performance record, and ability to meet required schedules were all "unsatisfactory";

(3) The fact that SBA refused to issue Sayco a COC for similar items only 27 days before the closing date of this solicitation; and

(4) Current information obtained from the Defense Contract Administration Services Management Area, Reading, Pennsylvania DCASMA which detailed Sayco's continuing delinquency.

The Navy emphasizes that the contracting officer based his nonresponsibility determination on his personal knowledge of Sayco's recent default and continuing inability to perform the contract requirements. In this regard, the Navy points to the following statement from DCASMA concerning Sayco:

> The subject contractor's current performance record shows there are 53 delinquent contracts of a total of 63 Government contracts on hand.
>
> This situation has been caused by contractor's bidding on solicitations knowing that deliveries can't be met. Bidding on items that require close tolerances and will require waivers, in most cases, prior to acceptance. Lack of adequate production planning, scheduling and control through the plant.
>
> It is considered extremely likely that subsequent awards will result in late deliveries and additional costs until corrective action is taken.

The Navy argues that, under the circumstances, the record clearly supports the Navy's determination that Sayco was not responsible. The Navy further states, citing *Sigma Industries, Inc.*, B-195377, October 5, 1979, 79-2 CPD 242, that this case was an appropriate one for not referring the matter to SBA.

We think the Navy acted reasonably in not referring the question of Sayco's responsibility to SBA. In *Sigma*, we recognized, in effect, that in very limited circumstances a recent SBA denial of a COC could apply prospectively. In that case, SBA, 4 days before bid opening, had denied a COC in another procurement for a similar item, and contracting officials had ascertained that the firm's capabilities had not improved. Under those circumstances, we did not require referral to SBA. We viewed the very recent denial of the COC as SBA confirmation of the contracting officer's subsequent determination of nonresponsibility. Similarly, in this case, SBA denied the protester a COC for the production of a similar item only 27 days before the closing date for the receipt of proposals. In addition, Sayco already had defaulted on the original contract, and current information available to the contracting officer at the time the finding of nonresponsibility was made indicated no change in the protester's capability to perform.

In any event, we do not believe Sayco properly could have been awarded the reprocurement contract. Sayco's original contract price was $139,612, which was fully paid by the Government. It is well established that a repurchase contract may not be awarded to the defaulted contractor at a price that would give the contractor more than the terminated contract price because this would be tantamount to modification of the terminated contract without consideration. *PRB Uniforms, Inc.*, 56 Comp. Gen. 976 (1977), 77-2 CPD 213. Sayco was unwilling to correct what the Navy views as a defect in what Sayco originally furnished without charge, and here

argues that its proposal price of $44,676 should have been accepted. Since Sayco already has received the full price called for in the original contract, it is not entitled to this additional amount. Although Sayco is challenging the termination for default before the Armed Services Board of Contract Appeals and could, of course, prevail in that litigation, as of the time of award of the repurchase contract Sayco had been defaulted and simply was not entitled to additional compensation for doing what its original contract called for.

The protest is denied.

[B-203393]

Pay—Retired—Survivor Benefit Plan—Spouse—Social Security Offset—Computation

Computation of setoffs from Survivor Benefit Plan annuities which are required to be made in an amount equal to the retiree's social security benefit based solely on military service must take into account the reduction in social security benefits when the retiree received benefits before reaching age 65. Thus, where a widow's social security benefit is reduced because of the reduction in the retiree's benefit, the services may not calculate the offset against the Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment.

Matter of: Dora M. Lambert, June 15, 1983:

This decision is being rendered on the question as to whether the required setoff from an annuity under the Survivor Benefit Plan, 10 U.S.C. 1447-1455, on account of receipt of social security widow's benefits is being correctly computed by the military services. For the reasons stated, we find that a different method of computation which will more closely reflect social security benefits received should be used.

Mrs. Dora M. Lambert, the widow of Major General Joe Lambert, USA, Retired, who died April 21, 1979, is receiving a Survivor Benefit Plan annuity reduced due to her social security benefits. Mrs. Lambert advised us that when she became entitled to the annuity, the amount of the setoff computed by the Army Finance and Accounting Center was $13.50 greater than the social security widow's benefit she was receiving. She pointed out that all of her late husband's social security coverage was earned through his military service and contended that the setoff required by 10 U.S.C. 1451(a) should not exceed the amount of her widow's benefit under social security.

The setoff from Mrs. Lambert's annuity is computed by the Army Finance and Accounting Center in accordance with the regulations contained in Chapter 5 of the Department of Defense Military Retired Pay Manual (DOD Manual 1340.12M) and Chapter 6 of Army Regulations 608-9. We were advised by the Social Security Administration that Mrs. Lambert's monthly social security widow's benefit was correctly computed. They pointed out that Mrs. Lambert's benefit was reduced because General Lambert re-

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ceived old age benefits at age 62. This caused his monthly benefits to be less than they would have been had he waited until age 65 (the age at which full benefits are paid). But since Mrs. Lambert was age 65 at the time of his death, she became entitled to a social security widow's benefit equal to his reduced benefit.

Paragraph 90514 of the Department of Defense Military Retired Pay Manual provides that "the reduction factor applies against the total military PIA [primary insurance amount] calculated to member's age 65 regardless of the age when the member claimed benefits under social security."

Failure to reduce the setoff from a survivor annuity when the retired member received reduced social security benefits before reaching age 65 makes the reduction in the annuity of the widow concerned more than the social security benefit received on account of the member's military service. The Department of Defense has taken the position that their regulations and this result are consistent with the provisions of 10 U.S.C. 1451(a). This position is predicated on the requirement that setoff is to be "calculated assuming that the person concerned lives to age 65."

Although we agree that language requires computations of survivor annuity setoffs which will produce setoffs in amounts different from the social security benefit received on account of military service, we do not find that that language supports the reduction made in this type of case.

The Survivor Benefit Plan was designed to supplement the social security benefits received by surviving spouses and dependent children of retired military members and surviving spouses of active duty personnel who die while eligible to retire. To make participating less costly to the retired member while limiting cost to the Government, an offset against the annuity paid to a surviving spouse was required when the spouse becomes entitled to a widow's or widower's benefit under social security.

The language used to implement that purpose is contained in 10 U.S.C. 1451(a) which, as it related to Mrs. Lambert's situation in 1979, provided:

> * * * When the widow or widower reaches age 62 * * * the monthly annuity shall be reduced by an amount equal to the amount of the survivor benefit, if any, to which the widow or widower would be entitled under subchapter II of chapter 7 of title 42 based solely upon [military] service by the person concerned * * * and calculated assuming that the person concerned lived to age 65. * * *

Regarding the integration of the Survivor Benefit Plan with social security benefits, the legislative history of the Plan shows that the offset was intended to be the equivalent of the social security payment which is attributable to the retired member's military service. The method of computing the offset was intended to be a "most generous formula * * * to assure that a widow will receive at least 55 percent of the man's military retired pay." H. Rept. No. 92-481, 92d Cong., 1st Sess., September 16, 1971, accom-

panying H.R. 10670, at page 14. Similar statements appear on pages 30, 31, and 53 of S. Rept. No. 92-1089, 92d Cong., 2d Sess., September 6, 1972.

It is clear, therefore, that the Congress did not intend to authorize an offset which would amount to more than the comparable social security benefit. We do not find that the statutory language of the Survivor Benefit Plan requires or permits that result.

The Department apparently reads the language "assuming that the person concerned lived to age 65" to mean that the person not only lived to age 65 but that he did not apply for social security benefits before reaching that age. We do not agree with that interpretation of the language concerned because, as is evident from Mrs. Lambert's case, that interpretation results in a reduction in total survivor benefits, whereas the provision was intended to be beneficial. Further, under that interpretation the widow's benefit under the Plan plus the social security may be less than 55 percent of the member's retired pay.

The benefit provided by the age 65 provision relates to the annuity reductions applicable to widows or widowers of retired members who die at an early age. If this provision were not included the reduction of survivor benefits received by these survivors would be disproportionately large when compared to the reduction applicable to those beneficiaries whose principals lived to be 65. This is so because the amount of income from military service is a fixed amount. To determine the benefit upon retirement this amount is divided by the number of years between 1950 (or the year the individual became 21) and the year of death or the year he or she became 62. Thus, if the retiree died at an early age the computed social security benefit for military service would be higher than that of the individual who lived longer. This would result in a correspondingly larger reduction in the survivor benefits payable to the widow of the retiree who died at an early age.

The use of age 65 in 10 U.S.C. 1451(a) apparently resulted from the fact that the calculation of the social security primary insurance amount was based upon work performed up to age 65 for covered men. The calculation was based on work performed until age 62 for covered women. See 42 U.S.C. 415(b)(3) (1970). This provision was changed by section 104(b) of the Social Security Act Amendments of 1972, Public Law 92-603, October 30, 1972, 86 Stat. 1329, 1334, to base calculations for both men and women on work performed until age 62. That amendment did not become fully effective until January 1975.

We recognize that the calculation of the social security offset is a theoretical calculation not predicated on the actual social security payments made to the beneficiary. Further, the requirement to include in the calculation the factor of when the retiree claimed social security benefits, if before age 65, will require the Department to obtain information that is not included in the member's

military pay records. However, as in the case of the survivors of retirees who did not qualify for social security benefits, the calculation could be made based on the assumption that the retiree did not receive social security benefits until age 65, but permit a recalculation of the social security offset if the beneficiary demonstrates to the Department concerned that the retiree was receiving a reduced social security payment due to the fact that benefits were initiated before he or she reached 65.

For the reasons stated, in calculating the offset in this case General Lambert's covered military income should be divided by the covered years after 1950 until he reached age 62, less 5 years, as was required in calculating his social security benefit. In that connection the fact that he actually lived to age 65 or is considered to have lived to age 65 would not change the computation of his social security benefit. Further, the reduction in his annuity because he applied for and received social security benefits before he became 65 should also be calculated and the effect of that on Mrs. Lambert's annuity should be determined. Her annuity should be reduced only by the amount of her social security benefit predicated on those calculations.

For the reasons stated the setoff in Mrs. Lambert's case should be recomputed effective April 1979 and her survivor annuity payments adjusted to reflect a setoff not to exceed her social security widow's benefit for the period prior to December 1, 1980. For the period subsequent to that date, section 3 of Public Law 96-402, approved October 9, 1980, 94 Stat. 1705, amended 10 U.S.C. 1451(a) to provide that reduction of a widow's survivor annuity shall not exceed 40 percent of the unadjusted Survivor Benefit Plan annuity. Such further correction as is required under that provision should also be made in Mrs. Lambert's case.

[B-210647]

Bids—Evaluation—Discount Provisions—Applicable Regulation

Agency refusal to consider prompt-payment discount in bid evaluation is proper where solicitation incorporates revision to Defense Acquisition Regulation which precludes consideration of such discounts.

Contractors—Responsibility—Determination—Review by GAO—Affirmative Finding Accepted

Complaint that agency improperly found offeror to be responsible without first conducting preaward survey is not for consideration since preaward survey is not legal prerequisite to affirmative determination of responsibility and such determinations are not reviewed by GAO except in situations not applicable to this case.

Matter of: Sunshine Machine, Inc., June 20, 1983:

Sunshine Machine, Inc. (Sunshine), protests the proposed award of a contract to Mimco Company (Mimco) under invitation for bids

(IFB) No. DLA700-83-B-0434 issued by the Defense Construction Supply Center (DCSC), a field activity of the Defense Logistics Agency. The protest is denied in part and dismissed in part.

On December 10, 1982, DCSC issued a solicitation for 1,607 fire-hose nozzles. Sunshine wired a bid to the Agency on January 12, 1983, the bid opening date. The bid clearly established Sunshine's unit price as $93.89, but it stated Sunshine's prompt-payment discount as "20 percent days" rather than the 2-percent discount for payment received in 20 days, which Sunshine intended. Sunshine sent another wire on January 13, 1983, clarifying its intent regarding the prompt-payment discount. The Agency did not consider Sunshine's revision to its bid and found Mimco, with a $93.50 unit price, to be the low bidder. In protesting to our Office on January 28, 1983, Sunshine argued that its prompt-payment discount should be considered by the Agency and that, when the discount was considered, Sunshine became the low bidder on the solicitation.

The Agency argues that Sunshine's prompt-payment discount could not be considered because the Defense Acquistion Regulation (DAR) states that prompt-payment discounts should not be considered in the evaluation of offers. DAR § 7-2003.35 (Defense Acquisition Circular 76-36, June 30, 1982). While such discounts were considered in the past, Defense Acquisition Circular 76-36, dated June 30, 1982, revised the prompt-payment discount provisions to preclude consideration of such discounts in bid evaluation.

The solicitation incorporates by reference Standard Form (SF) 33A, Solicitation Instructions and Conditions; SF 33A still contains the conditions under which such discounts can be considered. However, the solicitation also contains a list of modifications to SF 33A, one of which incorporates the provision at DAR § 7-2003.35 and states:

> Paragraph 9(a) of Standard Form 33-A, "Solicitation Instructions and Conditions," is deleted, and prompt payment discounts will not be considered in the evaluation of offers. However, any offered discount will form a part of the award, and will be taken if payment is made within the discount period indicated in the offer by the offeror. As an alternative to offering a prompt payment discount in conjunction with the offer, offerors awarded contracts may include prompt payment discounts on individual invoices.

While our Office has held that prompt-payment discounts must be considered in the bid evaluation process if the discount provisions are included in the solicitation in their unrevised form, *Geronimo Service Co.*, B-209613, February 7, 1983, 83-1 CPD 130, consideration of the discount would be improper here since the solicitation was revised to reflect the changes in the discount provisions.

In view of the above, it is unnecessary to consider the effect of the clarifying wire because the discount could not be considered in any event.

This portion of Sunshine's protest is denied.

On February 17, 1983, Sunshine amended its protest with our Office and raised questions regarding the Agency's determination

of Mimco's responsibility. Sunshine argues that the contracting officer improperly relied upon a December 1982 preaward survey of Mimco, conducted in connection with another procurement, in reaching his decision to find Mimco responsible. Sunshine contends that Mimco lacks the facilities, experienced personnel, and equipment to perform the contract and that a preaward survey would have confirmed these contentions.

We have consistently held that affirmative determinations of responsibility made by the procuring agency will not be reviewed by our Office unless fraud or bad faith on the part of the contracting agency is alleged or the solicitation contains definitive responsibility criteria which have been misapplied. *D & M Fiberglass Services, Inc.*, B-211165, April 4, 1983, 83-1 CPD 354. Since Sunshine does not argue that these exceptions are applicable here and since there is no legal requirement that a preaward survey be conducted in all cases to determine the responsibility of a prospective contractor, *Klein-Sieb Advertising & Public Relations, Inc.*, B-194553.2, March 23, 1981, 81-1 CPD 214, we will not question the Agency's determination regarding Mimco's responsibility.

This portion of Sunshine's protest is dismissed.

[B-211440, et al.]

Accountable Officers—Accounts—Irregularities, etc.—Reporting to GAO—Federal Claims Collection Standards Compliance Requirement

In erroneous or improper payment cases General Accounting Office (GAO) will exercise its discretion under 31 U.S.C. 3527(c) and deny relief, unless the requesting agency demonstrates that it has pursued diligent collection action. In order to show that such efforts have been taken, relief request must demonstrate compliance with the Federal Claims Collection Standards.

Accountable Officers—Relief—Officials Requiring Relief

Relief should be requested for all persons who had responsibility for or custody of the funds during the relevant stages of a transaction where an improper or erroneous payment was made. Thus, relief requests should include both the person or persons who made the erroneous payment and the official responsible for the account at the time the questionable transaction occurred.

Accountable Officers—Relief—Requirements for Granting—Relief of Supervisor

Relief is granted to a supervisor upon a showing that he or she properly supervised his or her subordinates. Proper supervision is demonstrated by presenting evidence that the supervisor maintained an adequate system of procedures and controls to avoid errors and that appropriate steps were taken to ensure the system's implementation and effectiveness.

Accountable Officers—Accounts—Irregularities, etc.—Reporting to GAO—Time Limitation

An agency must report financial irregularities to GAO within 2 years from the time that the agency is in receipt of substantially complete accounts. This requirement is

to allow the Government the opportunity to raise a charge against the account within the 3-year statute of limitations period.

To Brigadier General Robert B. Adams, Department of the Army, June 20, 1983:

This responds to 10 separate requests for relief from liability for erroneous or improper payments made on behalf of various Army Finance and Accounting officers and agents under 31 U.S.C. § 3527(c) (formerly 31 U.S.C. § 82a-2).[1] For the reasons stated below, we grant relief in nine cases. In the tenth, no decision is necessary because the person for whom relief was requested was not the accountable officer.

We have consolidated these requests primarily in order to draw attention to the lack of effective collection action, and to provide notice that in the future we will exercise our discretion under section 3527(c) and deny requests for relief unless the submission contains evidence that diligent collection action has or is being pursued. In addition, this consolidation of cases provides us with an opportunity to address the following recurring deficiences in the relief requests from your office which, if not corrected, may require a denial of relief in the future: (1) there appears to be some confusion about the proper official for whom relief should be sought; (2) there is frequently insufficient evidence to support a relief request for a supervisor; and, (3) in a few instances, the submissions were delayed so long in reaching our Office that proper consideration could not be given to the requests because the statute of limitations was about to expire. Furthermore, our review of the cases shows specific problem areas which we believe should be brought to your attention. These include (1) issuance of checks without the amounts spelled out in words, which we believe serves to increase the incidences of check alteration; (2) the processing of substitute checks without a sufficient time lag to allow the original check to return through the banking system and be recorded as paid; and (3) the lack of coordination between the Finance and Accounting Center and the Staff Judge Advocate, minimizing the opportunity for restitution. We will address each of these issues in turn, followed by a summary of each case. (The number or letter designation following the statement of facts in each case refers to the problems or deficiencies, discussed below, which we found with the corresponding relief request.)

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[1] Three of the 10 cases here involve situations in which the loss occurred when both an original and replacement check were cashed. In 62 Comp. Gen. 91 (1982), we discussed the fact that a duplicate check case could be handled under either 31 U.S.C. § 3333 (1982) (formerly 31 U.S.C. § 156 (1976)) or 31 U.S.C. § 3527(c). We found that there is a need for Congress and the Treasury Department to determine under which statute these cases are to be resolved and which appropriation should bear the loss. Recognizing that such a process would take time, we decided to follow the *status quo* for a "reasonable time." Therefore, if an agency submits a duplicate check case to this Office under 31 U.S.C. § 3527(c), we will continue to consider it under that statute. We will follow that practice herein and decide the cases pursuant to 31 U.S.C. § 3527(c).

I. Debt Collection

As you are aware, our authority to relieve disbursing officials and agents from liability for illegal, improper, or incorrect payments stems from section 3527(c) which provides:

> (c) On the initiative of the Comptroller General or written recommendation of the head of any agency, the Comptroller General may relieve a present or former disbursing official of the agency responsible for a deficiency in an account because of an illegal, improper, or incorrect payment, and credit the account for the deficiency, when the Comptroller General decides that the payment was not the result of bad faith or lack of reasonable care by the official. *However, the Comptroller General may deny relief when the Comptroller General decides the head of the agency did not carry out diligently collection action under procedures prescribed by the Comptroller General.* [Italic supplied.]

Generally, we have granted relief upon finding, either independently or in concurrence with written determinations by the agency concerned, that the payment was not the result of bad faith or lack of due care on the part of the disbursing official. Debt collection, in the past, has not received much attention due primarily to agencies' overriding concern for disbursing, rather than collecting funds, and to slow and ineffective Government collection methods. Recently, however, Congress highlighted the importance of diligent collection action by the passage of the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (1982), 31 U.S.C. 3711, et seq. (formerly 31 U.S.C. 952). This Act provides Federal agencies with tools and resources essential to aggressive debt collection.

In keeping with congressional intent to place greater emphasis on collection, we believe it is incumbent upon each agency to pursue effective collection action. Therefore, in the future, we will exercise our discretion under section 3527(c) and grant relief only where there is evidence that a diligent collection effort has been made. In order to show that such effort has been made a relief request must demonstrate compliance with the Federal Claims Collection Standards issued jointly by the General Accounting Office (GAO) and the Department of Justice. 4 C.F.R. Parts 101 through 105.

These regulations prescribe the standards for agencies to follow in undertaking collection action, as well as the administrative procedures for use in compromising and terminating agency collection activities. In addition, the regulations provide guidelines for when and how agency collection action is to be referred to GAO for further collection or to the Department of Justice for litigation of civilian claims.

Proposed amendments to the Federal Claims Collection Standards were published in the *Federal Register* on May 24, 1983. 48 Fed. Reg. 23,249-23,257 (to be codified at 4 C.F.R. Parts 101 through 105). The proposed regulations reflect the changes to the fundamental claims collection authority made by the Debt Collection Act, cited above. However, even under the present standards, the head of an agency is required to pursue aggressive collection

action. Such action must be taken in a timely manner with effective follow-up procedures. 4 C.F.R. § 102.1.

At a minimum, collecting agencies must make an appropriate written demand on the debtor informing him of the basis for the indebtedness and specifying a due date for payment. 4 C.F.R. § 102.2. Further, the initial notification should inform the debtor of the consequences of his failure to cooperate. *Id.* Three progressively stronger written demands, at not more than 30-day intervals, should be made unless a response to the first or second letter indicates that future communication would be futile. *Id.* These procedures remain basically the same under the proposed regulations. (See proposed regulation 48 Fed. Reg. 23,251-54, 4 C.F.R. Part 102.)

If more action is necessary, the Federal Claims Collection Standards specify other devices for the agency to employ that entail minimal burden and expense. Under existing standards, these include collection by offset, reporting delinquent debts to commercial credit bureaus and contracting for collection services. *See* 4 C.F.R. §§ 102.3, 102.4, 102.5. The proposed regulations would enhance these tools of collection by giving Federal agencies broader authority to collect debts by administrative offset, by encouraging the use of credit bureaus, by specifically authorizing agencies to contract for commercial collection services, and by permitting agencies to assess interest, processing, and handling costs and penalty charges under specified conditions. (See proposed regulations, 48 Fed. Reg. 23,251-54, 4 C.F.R. Part 102).

Although we are not denying relief due to inadequate debt collection in the cases covered in this decision, we emphasize that regardless of whether relief is granted, the agency still has an affirmative duty to pursue aggressive collection of the erroneous payment from the recipient. 31 U.S.C. § 3711(a)(1) (formerly 31 U.S.C. § 952).

II. Deficiencies in the Requests for Relief

A. *For whom should relief be requested?* We note that in several of these 10 requests, there appeared to be some confusion about the official for whom relief should be requested. As you know, an accountable official or agent is any Government officer or employee who by reason of his employment is responsible for or has custody of Government funds. 59 Comp. Gen. 113, 114 (1979). Also, *see* Title 7 GAO Policy and Procedures Manual for the Guidance of Federal Agencies, § 28.14. There may be more than one accountable officer in a case and the concept of accountability is not limited to the person or persons in whose name the account is officially held. In each case, it is necessary to examine the particular facts and circumstances to determine who had responsibility for or custody of the funds during the relevant stages of the transaction.

The person or persons who made the erroneous or improper payment is financially liable to the Government in the first incidence. In addition, the person in whose name the account is officially held

at the time the wrongful payment is made is also liable for the loss. Therefore, it is necessary to request relief for all of these individuals, unless the agency determines that one or more should be held liable for the loss.

B. *Evidence to support a request for relief of a supervisor.* We found that in a number of instances, the request did not contain sufficient information for us to grant relief to a supervisor whose subordinate made the erroneous payment. This leads us to believe that there is some uncertainty over the evidentiary standard necessary to relieve a supervisor.

The basic rule is that a disbursing agent, officially responsible for an account, is personally liable for the wrongful payments made by his subordinates. *See* B-194877, July 12, 1979. In such cases, we grant relief to the supervisor upon a showing that the disbursing officer properly supervised his employees. Proper supervision is demonstrated by evidence that the supervisor maintained an adequate system of procedures and controls to avoid errors and that appropriate steps were taken to ensure the system's implementation and effectiveness. *See* B-192109, June 3, 1981. Therefore, in order for us to grant relief, it must be clear from the submission what the procedures were and how they were implemented at the time of the questioned transaction.

C. *Timeliness.* We found that a few of your requests were more than 2 years old when submitted. This raises the problem of the statute of limitations, since an accountable officer can escape liability for an improper expenditure if the Government does not raise a charge against the account within 3 years. 31 U.S.C. § 3526(b) (formerly 31 U.S.C. § 82i); B-206591, April 27, 1982. The 3-year period begins to run when the agency is in receipt of substantially complete accounts. B-206591, April 27, 1982. To avoid any statute of limitations problems, the GAO Policy and Procedures Manual requires prompt reports of financial irregularities. An agency must report irregularities not more than 2 years after the date the accounts are made available to GAO for audit (that is, the date the agency has substantially complete accounts). 7 GAO Policy and Procedures Manual § 28.14; B-199542, November 7, 1980.

III. Problem Areas

In several cases, the investigation officers expressed concern over substantive areas of finance procedures. Chief among their complaints were the issuance of checks without the amounts spelled out in words, and the lack of coordination between the Staff Judge Advocate and the Finance and Accounting Center. We concur in their concerns and want to bring these issues to your attention for review. Additionally, we want to include for your consideration the question of substitute checks and when they should be issued, which was the subject of a 1981 General Accounting Office report to the Congress entitled "Millions Paid Out in Duplicate and

Forged Checks," AFMD-81-68, October 1, 1981. While we have made recommendations for corrective action, we understand that the situations may need further investigation. We hope you will give serious consideration to these matters.

A. *Issuance of checks without the amount spelled out in words.* A number of your requests involved losses due to check alteration. In each case, the wrongdoer was able to alter the numerals on the check and receive a larger amount than the real value of the check. The altered checks were able to be cashed because the agents lack time to adequately check the instrument due to the heavy volume of check cashing at the various finance offices. It is our belief that by spelling out, in words, the amount of the check on the face of the instrument the incidents of alteration would decrease. The cashiers would then be able to quickly compare the numerals and words to see that the amounts match.

B. *Coordination between the Finance and Accounting Office and the Staff Judge Advocate.* We note that in several instances the recipient of the illegal or improper payment was a service member. Although charges were brought and the member convicted by the Staff Judge Advocate (SJA), no restitution was sought by the Finance and Accounting Office (FAC). In fact, in one case, collection action was not instituted until after the member was discharged from the service. We would suggest that better communications and coordinations between your office and the SJA be instituted so that restitution could be maximized. Specifically, we suggest that collection efforts would be enhanced if the FAC intervened in the SJA proceedings and if payment of the debt was made an element of the sentence.

C. *No lag time for the issuing of a substitute check.* Three of your requests stemmed from the cashing of duplicate checks. We note that in two instances, the replacement check was issued within 1 week of the original check. We are aware that under the applicable Army regulation, a duplicate check is authorized if the stop payment request by the payee is made within 15 days from the issue date of the original check for checks mailed to addresses in the continental United States, and within 30 days for checks mailed to overseas addresses. AR 37-103, ¶ 4-164. However, we do not think that the regulation requires the issuance of a substitute check immediately upon receipt of the payee's request. In the 1981 GAO report to the Congress, *supra,* we recommended slowing the issuance of some substitute checks. This recommendation was made to allow more time for the original check, if cashed, to be returned through the banking system and recorded as paid. Moreover, we believe that prior to issuing a replacement check, an agency should check to see that the original check has not been negotiated. *See* 62 Comp. Gen. 91 (1982), *supra.* We understand that the purpose behind the quick processing of claims for substitute checks is to

avoid potential hardship for the payee; however, we do not believe the time frame we are suggesting to be unduly harsh.

We now proceed to a discussion of the specific cases.

IV. Cases

B-211045

In this case, you requested that Finance and Accounting Officer, Major (MAJ) P.J. O'Hagan, Finance Corp., Fort Sam Houston, Texas, be relieved of liability for an improper payment in the amount of $682.68.

The loss resulted when former Private Dolores M. Slaid negotiated both the original and substitute checks representing her end-of-month pay. Both checks were drawn on Major O'Hagan's account and were issued on the same day. III C. The substitute check was issued to Ms. Slaid on the basis of her allegation that she had not received the original check and her request for stop payment.

It appears that the request for stop payment and the issuance of a substitute check in this case were within the bounds of due care as established by Army regulations. *See* AR 37-103, paragraphs 4-143(b), 4-161 and 4-164. There also was no indication of bad faith on the part of the Army disbursing officer. Accordingly, relief is granted.

We note that, to date, the entire collection effort has consisted of sending one letter, dated September 15, 1981, to Ms. Slaid, informing her of her indebtedness. That letter was returned undelivered. Although a new address has been obtained for Ms. Slaid, there have been no further attempts to reach her. I.

B-211110

In this case, you requested that Finance and Accounting Officer MAJ M.H. Fleumer, Finance Corps, Presidio of San Francisco, California, be relieved of liability for an improper payment in the amount of $566.49. We find that MAJ Fleumer is not liable for the loss and that there was no need for relief to be requested on his behalf.

The loss occurred when Mr. Michael W. Haliburton negotiated both the original and substitute check representing his civilian pay. Both of these checks were drawn on the account of MAJ J.B. Keller, Jr. Before the loss was recorded, MAJ Fleumer assumed responsibility for MAJ Keller's account. Therefore the loss was reflected in MAJ Fleumer's account. However, it is MAJ Keller who remains liable for the loss since he was officially in charge of the account when both checks were issued. Relief should be requested on his behalf. II A.

We note that MAJ Fleumer sent one letter, dated August 30, 1982, to Mr. Haliburton. The letter was returned undelivered and

attempts to reach the debtor by telephone were equally unsuccessful. I.

As in the previous case, B-211045, we note that the replacement check was issued shortly after the date of the original instrument (here 5 days). III C.

B-211288

In this case, you requested that Finance and Accounting Officers MAJ Billie E. Braswell and his successor, Lieutenant Colonel (LTC) H.D. Flynn, U.S. Army Finance and Accounting Center, Europe, be relieved of liability for an improper payment in the amount of $676.24.

The loss occurred when Mr. Brian A. Miller negotiated both the original and substitute checks representing his civilian pay. Both of these checks were drawn on the account of MAJ Braswell. As we stated in the previous case, B-211110, it is the official responsible for an account when the questioned payments were made that has pecuniary liability for the loss. A successor official, in whose name the account is held when the loss is reported, is not liable. In this case, then, only MAJ Braswell has pecuniary liability. Therefore, it was not necessary to request relief for LTC Flynn. II A.

The first check was issued to Mr. Miller on November 8, 1979. On December 3, 1979, a replacement check was issued based on Mr. Miller's claim that he had not received the first check. III C. Since Mr. Miller's request for stop payment was within the appropriate time frame for checks mailed overseas, it appears that the issuance of the replacement check was proper. *See* AR 37-103, para. 4-164. Accordingly, we grant relief to MAJ Braswell.

According to the record, the sole attempt to recover from Mr. Miller seems to have been one letter sent in February 1981. The letter was never acknowledged by Mr. Miller. I.

The irregularity in the account was recorded in January 1981, but was not reported to our office until more than 2 years later. II C.

B-209716

In this case, you requested that LTC L.M. Crook, Jr., Finance and Accounting Officer, 5th Infantry Division, Fort Polk, Louisiana, be relieved of liability for an improper payment in the amount of $890 made by his subordinate, Specialist Five (SP5) Martin A. Steiner, Cashier.

The loss resulted on February 28, 1980, when SP5 Steiner paid a DA Form 2139, Military Pay Voucher, in the amount of $890 to a person claiming himself to be SP5 Danny L. Reynolds. A subsequent challenge of the payment by SP5 Reynolds initiated an investigation which revealed that the signature of both the certifying officer and that of the payee were forgeries. According to your

letter, a forgery suspect was designated and collection action instituted against him, but a criminal investigation failed to substantiate the charges against him. However, a Finance and Accounting Center (FAC) investigation found that the loss occurred because SP5 Steiner failed to follow the established procedures of comparing the officer's signature on the forged voucher with the officer's signature card. Evidence indicates that SP5 Steiner was aware of the procedure and that he has been held liable for the loss.

It appears from the record that LTC Crook properly supervised his subordinates and we, therefore, grant him relief.

The loss in LTC Crook's account was recorded in June 1980. We should have received a report of this irregularity no later than June 1982. However, it did not reach our Office until November 1982. II C.

Although SP5 Steiner has been held financially liable for the loss, no collection action has been instituted against him. I.

B-201286

In this case, you requested that LTC J.E. Rusk, Finance and Accounting Officer, Fort Lewis, Washington, be relieved of liability for an improper payment made by a subordinate in the amount of $822.

The loss resulted on February 28, 1979, when an unidentified cashier or Class A agent cashed the altered paycheck of then-Sergeant Louis P. Cox. The check as issued was for $322, but Mr. Cox had altered the amount to read $822. In May 1980 the Pacific National Bank, a designated depository, discovered that the check had been altered and notified the Finance and Accounting Center. The loss was reflected on LTC Rusk's June 1980 account.

In order for us to grant relief to LTC Rusk, we must find that he properly supervised his subordinates. However, the record contains no information as to what system of procedures was in effect when the improper payment was made, nor how the system was enforced. We have unsuccessfully attempted to acquire this information from your office. II B. Normally, we would deny relief but the statute of limitations is about to run and the question will soon be moot. II C.

At this point, *only* one collection letter, dated March 4, 1982, has been sent to Mr. Cox. I.

The investigation report suggests that in the future, the check's amount be spelled out in words on the face of the instrument. Alterations would be made more difficult if this were done. We concur. III A.

B-210030

In this case, you requested that LTC T.O. Langhorne, Jr., Finance and Accounting Officer, U.S. Army Infantry Center at Fort

Benning, Georgia, be relieved of liability for an improper payment made by his subordinate, Second Lieutenant (2LT) Anthony J. Deskis, Class A Agent Officer, in the amount of $239.

The loss occured on May 29, 1981, when 2LT Deskis cashed the apparently altered check of former Private Alphonso B. Nelson. Mr. Nelson altered his $39 check to reflect an amount of $239. The alteration was discovered later that day by a Cash Control Officer. Mr. Nelson was apprehended by military police but because of his civilian status, the case was forwarded to the Secret Service. The Secret Service has turned the case over to a Federal prosecutor with the Army's recommendation that Mr. Nelson be prosecuted for forgery. 2LT Deskis has been held jointly and severally liable for the loss. One letter, dated March 15, 1982, was sent to 2LT Deskis informing him of this fact. I.

In order for us to relieve LTC Langhorne from liability it must be demonstrated in your request that he properly supervised his subordinates at the time of the transaction. While there was insufficient evidence in your original submission, your office later supplied us with the necessary information to enable our Office to grant relief. II B.

This was another instance in which the amount of the check was not spelled out in words on the face of the instrument. III A.

B-209697

In this case, you requested that MAJ J.D. Harwood, Finance Officer, 1st Armored Division, Fuerth, Germany, be relieved of liability for an improper payment made by his subordinate, First Lieutenant (1LT) Harvey A. Menden, Class A Agent, in the amount of $654, reduced to $312 by the recovery of $342.

The loss occurred on May 29, 1981, when 1LT Menden cashed the altered check of then Private Earnest Q. Walker. Private Walker had altered his $54 end-of-month pay to read $654. The same day that the check was cashed, a clerk at the Nuernberg Finance Office noticed the alteration. Private Walker was apprehended and $342 was recovered at that time. Private Walker was tried by Summary Court Martial and received a sentence of forfeiture of $334 out of 1 month's pay and 30 days at hard labor. The remaining $312 of Private Walker's debt was not recovered. I.

The record indicates that MAJ Harwood provided all Class A Agents with detailed instructions governing their duties and responsibilities. Specific procedures were established to ensure the certification of all pay recipients. Accordingly we find that MAJ Harwood properly supervised his subordinates and we relieve him of liability for the loss.

While the investigation report recommended that 1LT Menden be relieved of pecuniary liability for the improper payment, no relief request was made on his behalf. Any Government officer or

employee who physically handles Government funds, even if only occasionally, is "accountable" for those funds while in his or her custody. Since 1LT Menden had physical control of the funds and actually made the erroneous payment, he is jointly and severally liable for the loss. Therefore, collection action should be taken against 1LT Menden, unless you decide to request relief for him also. *See* B-202037, August 31, 1981. II A.

The amount of the check was not spelled out in words on the face of the instrument. III A.

Finally, we note that the debtor was apprehended and brought to trial by the SJA. However, the FAC did not intervene to seek restitution. Although the sentence against Private Walker included a forfeiture of pay, this money went into a general fund instead of toward repayment of the debt. We have been informally advised that collection efforts and the legal proceedings against a debtor are two separate and distinct processes in the Army. III B.

B-209717

In this case, you requested that LTC G.L. Comfort, Finance and Accounting Officer at Fort Lewis, Washington, and his deputies, Ms. Doris M. Peterson and 2LT Michael T. Slye, be relieved from liability for the improper payment of $391.28, made by their subordinate, Private Sharon Perkins, Cashier. Before proceeding with the facts of this case we would like to point out that it was not necessary to request relief for LTC Comfort's deputies. In this situation, the accountable officers liable for the loss are the person(s) who had physical control or custody of the funds and the person in whose name the account is held. Here, LTC Comfort was responsible for the account, and Private Perkins was the person with control over the funds. Ms. Peterson and 2LT Slye, while senior to Private Perkins and in the chain of command, were not responsible for the loss. Therefore, since it had been previously determined to hold Private Perkins jointly and severally liable for the loss, it was only necessary to seek relief for LTC Comfort. II A.

The loss occurred when Private Perkins paid former Private Sanford Johnson, Jr., a soldier separating from the service, $840.83 in cash on a pay voucher in which only $449.95 had been certified for payment. The $391.28 overpayment apparently resulted from the payment of a sum in the wrong column of the voucher. Mr. Johnson was promptly notified of the overpayment and acknowledged his awareness that a mistake had been made. Although Mr. Johnson agreed to return the overpayment to the finance office, he failed to do so. At present his whereabouts are unknown.

LTC Comfort, in whose name the account is held, is responsible for his subordinate's losses. In order to relieve him from liability, it is necessary to find that he properly supervised his employees. Although your initial submission did not contain sufficient evidence

for us to make this finding, in response to our request for more information, we were supplied with the necessary documentation. Accordingly, we grant relief. II B.

Only two letters have been sent to Mr. Johnson and Private Perkins has received but one. I.

B-201131

In this case, you requested that Colonel D.M. Posey, Finance and Accounting Officer, Fort Riley, Kansas, be relieved of liability for the improper payment made by his subordinate, Private James E. Harvey, Cashier, in the amount of $528.16.

The loss resulted from two separate payments made by Private Harvey. Private Harvey made a separation payment to Mr. Russell W. Mims, paying him $732.44 rather than $369.28, the amount actually due. Private Harvey also mistakenly paid Private Lewis P. Silva an advance travel payment of $235 rather than the $70 that was authorized. Mr. Mims has been held jointly and severally liable with Private Harvey for $363.16, the amount of his overpayment; Private Silva has been held jointly and severally liable with Private Harvey in the amount of his $165 overpayment.

The grant of relief to a supervisor for the improper payment made by his or her subordinate involves a determination that he or she maintained and enforced an adequate system of procedures and controls over his subordinates to avoid errors. In this case, the record indicates that the operating procedures were adequate and in effect when the loss occurred. Accordingly, relief is granted to Colonel Posey.

The record shows that two demand letters were sent to Mr. Mims on January 15 and May 27, 1981, and only one to Private Silva on May 27, 1981, without replies or rebuttal from either individual. No collection action has been instituted against Private Harvey although you indicate an intent to do so. We have had no further information about the extent or success of collection efforts in this case. I.

B-211440

On March 24, 1983, you requested relief from liability for MAJ B.W. Hausler, Finance and Accounting Officer, 78th Finance Section, for a subordinate's improper payment of a $500 check. The maker's signature was found to be a forgery.

The Criminal Investigation Division (CID) was contacted and an investigation conducted. The investigation failed to disclose who had written the check or who had authorized its cashing. It was determined that the check was either cashed by a Class A agent for 2nd Battalion, 64th Armor or by a cashier with the Finance Office at Ledward Barracks. On Saturday, November 15, 1980 (the date of the check), no Class A agents were on duty and there was only one

cashier available in the finance office. When questioned, the cashier, who was working on that date for the first time, insisted that he checked all ID cards against each check cashed. Furthermore, he could not recall handling the instrument in question. Since the possibility exists that the check's date was incorrect, the check might have been cashed by a Class A agent or a different cashier at another time. Due to the fact that no log was maintained, there is no way now of identifying the actual agent or cashier who accepted the check for payment.

The investigation concluded that the loss resulted from an authorized check cashing and occurred through no fault or negligence of MAJ Hausler or his subordinates. However, corrective measures were recommended so that the agent or cashier cashing personal or Government checks could be identified in the future. The report indicates that corrective measures were implemented.

The loss of funds was established on MAJ Hausler's January 1981 Statement of Accountability as an uncollectible check. In applying 31 U.S.C. § 3527(c) to instances in which a subordinate actually disburses the funds rather than the disbursing officer, we have granted relief upon a showing that the disbursing officer properly supervised his subordinates by maintaining an adequate system of procedures and controls to avoid errors, and took steps to insure the system's effectiveness. B-192109, June 3, 1981. The record before us includes the standard operating procedures in effect at the time, but little additional information to indicate whether MAJ Hausler actually maintained and practiced these procedures at the time of the loss. II B. However, in view of the uncertainty about the identity of the official who actually cashed the check, we agree that the extent of supervision would be difficult to prove, and therefore grant relief.

Conclusion

Although relief has been granted in 9 of the 10 cases included in this decision, there were weaknesses or deficiencies in the record submitted for each one. Most serious has been the lack of evidence that diligent collection action is or has been pursued, in compliance with the Federal Claims Collection Standards. This decision constitutes notice that in the future, relief may be denied under 31 U.S.C. § 3527(c) unless these problems are corrected and the submission of the relief request is bolstered by the necessary evidence and information.

[B-210998]

Commerce Department—Economic Development Administration—Loan Guarantees—Public Works and Economic Development Act—Defaulted Loans—Loan Collection Process

The Economic Development Administration (EDA) had the authority to sell defaulted loans to borrowers for less than the unpaid indebtedness. EDA's authority under 42 U.S.C. 3211(4) and 19 U.S.C. 2347(b)(2) to compromise loans allows it to accept from the borrower less than the outstanding indebtedness in complete satisfaction of EDA's claim, if EDA determines it is in the Government's interest to do so because of some doubt as to the borrower's liability or the collectibility of the full amount of the loan. However, it is not required to do so if it determines that allowing borrowers to bid on their own obligations would interfere with the integrity of the loan collection process or for other valid reasons.

Matter of: Economic Development Administration—Compromise Authority, June 22, 1983:

This decision is in response to a request from the General Counsel of the Department of Commerce for our legal opinion as to whether the Economic Development Administration (EDA) has the statutory authority to sell defaulted loans at a discount to the borrower or someone acting on the borrower's behalf. For the reasons set forth hereafter, it is our view that EDA does have the authority to sell these obligations to the borrowers for less than the unpaid indebtedness. However, EDA is not legally required to do so if it determines that allowing borrowers to bid on their own obligations would interfere with "the integrity of the loan collection process," or would otherwise be undesirable.

Under the authority of the Public Works and Economic Development Act of 1965, as amended (PWEDA), 42 U.S.C. §§ 3121-3246, and Title II of the Trade Act of 1974, as amended, 19 U.S.C. §§ 2341-2374, EDA makes or guarantees loans to eligible borrowers. When a borrower has defaulted on one of these loans, one of the options that EDA has sometimes used in attempting to collect is a private sale or transfer of its interest in the defaulted loan to a third party having no connection or relationship with the borrower. In September 1982, EDA offered, for the first time, a number of its defaulted loans for public sale. Paragraph 11 of the Offering Circular prohibited borrowers or anyone connected with them from bidding on their own loans as follows:

Bids from borrowers, guarantors, pledgors or affiliates will not be accepted. No person may bid who is acting directly or indirectly on behalf of any person who is absolutely or contingently liable on the indebtedness bid on, or any person who directly or indirectly controls, is controlled by, or is under common controls with any such person. The Bid Form contains a representation by the bidder that the bid is not made on behalf of any such person.[1]

[1] The exclusion of the borrower from the sale was in accordance with EDA's long-standing position, based on a 1976 opinion by its then Chief Counsel that it did not have the authority "to waive or cancel any amount of debt." EDA views allowing a borrower to acquire its own loan at a discount as equivalent to waiving or cancelling part of the debt.

The Commerce letter points out that EDA received numerous complaints from borrowers and others concerning this prohibition against a borrower bidding on his own loan. Also, in hearings on December 14 and 16, 1982, before the Subcommittee on Economic Development of the House Committee on Public Works, subcommittee members expressed concern about the prohibition.[2] In light of the public and congressional concern about this matter, the General Counsel requests us to answer the following questions:[3]

1. May EDA * * * sell an obligation at a discount (*i.e.*, for less than the unpaid indebtedness) to a person who is directly or indirectly liable on the obligation ("obligor")?

2. Where the answer to the first question is "yes," may EDA in the exercise of its discretion, determine that to preserve the integrity of its loan collection process, it will refuse to offer obligations for sale to obligors which it will offer for sale to non-obligors?

3. If the answer to the first question is "no," are there special circumstances in which such a sale would be permissible? For example, would such a sale be permissible when EDA has publicly solicited competitive bids on the obligation, and has received no offer as high as an offer made by an obligor?

In order for us to answer the first question, we must consider the legal basis for EDA's position in this matter. EDA maintains, both in its 1976 opinion and in the current letter from Commerce, that there are two factors which prohibit it from selling a loan to the borrower for less than the outstanding balance, resulting in what EDA would consider to be an unauthorized "cancellation or forgiveness of debt." First, EDA argues that without express statutory authority, which it says it does not have, it cannot approve such a waiver or cancellation of any part of a borrower's debt. Second, it relies on the long-standing position of this Office that no officer or agent of the Government has the authority to waive contractual rights which have accrued to the United States or to modify existing contracts to the detriment of the Government without adequate legal consideration or a compensatory benefit. *See* 45 Comp. Gen. 224, 227 (1965); 44 *id.* 746, 749 (1965); and 41 *id.* 169, 172 (1961). Also, see *Union National Bank of Chicago* v. *Weaver,* 604 F.2d 543 (7th Cir. 1979) which endorsed our unpublished decision, B–181432, March 13, 1975.

While, as recognized by EDA, the general rule is that the surrender of waiver of contract rights that have vested in the Government without compensation is prohibited, the rule is premised on the absence of any specific statutory authority that would allow such a surrender or waiver.[4] *See* 22 Comp. Gen. 260, 261 (1942).

[2] Shortly thereafter, EDA's authority to sell these loans without the consent of the borrower was restricted by the enactment of the following provision in the Joint Resolution of December 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830, 1870:

No funds in this title shall be used to sell to private interests, except with the consent of the borrower, or contract with private interests to sell or administer, any loans made under the Public Works and Economic Development Act of 1965 or any loans made under section 254 of the Trade Act of 1974.

[3] For the purpose of answering these questions, Commerce asks us to assume that in each case EDA would make a determination that the proposed sale price was reasonable in light of the available "evidence" as to the amount EDA would expect to realize as a result of a conventional liquidation proceeding.

[4] The rule as stated in the Commerce letter to us recognizes that the Government's contract rights can be surrendered if a statute so authorizes.

Thus, the only legal issue here is whether or not the statutory language governing these loan programs grants EDA the authority to accept from the debtor an amount less than the unpaid balance in complete satisfaction of the Government's claim.

The authority of the Secretary of Commerce, and by delegation the Administrator of EDA, to administer the loan programs established under PWEDA and the Trade Act is quite broad. Under 42 U.S.C. § 3211(4) the Secretary has the following authority with respect to PWEDA loans:

> * * * Under regulations prescribed by him [the Secretary is authorized to] assign or sell at public or private sale, or otherwise dispose of for cash or credit, in his discretion and upon such terms and conditions and for such consideration as he shall determine to be reasonable, any evidence of debt, contract, claim, personal property, or security assigned to or held by him in connection with loans made or evidences of indebtedness purchased under this chapter, and *collect or compromise all obligations assigned to or held by him in connection with such loans or evidences of indebtedness* until such time as such obligations may be referred to the Attorney General for suit or collection; [Italic supplied.] Also *see* 42 U.S.C. § 3211(9).

The authority of the Secretary under 19 U.S.C. § 2347(a)(2), which governs Trade Act loans, is set forth in virtually identical terms and includes the authority to "collect, compromise, and obtain deficiency judgments with respect to all obligations assigned to or held by him in connection with such guarantees or loans * * *."

(As noted above, EDA's broad authority to sell both types of loans was restricted by the provision in Public Law 97-377 which prohibits such sales for the remainder of the 1983 fiscal year without the consent of the borrower.)

Recognizing that both 42 U.S.C. § 3211(4) and 19 U.S.C. § 2347(a)(2) give EDA authority to compromise loans, the General Counsel states that there is a distinction between authority to compromise a debt on the one hand and authority to forgive or cancel a debt on the other.[5] In this respect the Commerce letter reads as follows:

> A compromise requires that there be a real dispute between the parties, or some uncertainty as to the facts. In the absence of such a good faith dispute or uncertainty, the acceptance of less than the full amount owing to the government in satisfaction of its claim would result in the forgiveness or cancellation of part of the obligation owing to it. Some government agencies are explicitly authorized by law to release claims and cancel obligations, *e.g.*, the Small Business Administration. There is no explicit authorization for this in PWEDA or the Trade Act. (Citations omitted.)

We do not agree with the General Counsel's position concerning the meaning the EDA's statutory authority to compromise obligations. Consideration of the statutory context in which the word appears—authorizing EDA to "collect or compromise" all of the obligations it holds prior to their referral to the Attorney General for suit or collection—suggests that the Congress intended to grant

[5] The primary focus of this decision, and the basis for our conclusion that EDA can sell loans to borrowers at a discount, is the compromise authority granted EDA in these statutes. However, we note that an argument could be made that the language in 42 U.S.C. § 3211(4) and in 19 U.S.C. § 2347(a)(2) authorizing EDA to sell loans at public or private sale upon such terms and conditions as it determines to be reasonable, standing alone, would give EDA the discretion to sell loans to borrowers at a discount. This decision does not specifically address this issue because Commerce's letter does not do so, and we were able to resolve the matter solely on the basis of EDA's compromise authority.

EDA the discretion either to insist on payment in full or to allow the borrower to discharge the debt by paying less than the outstanding balance. There is nothing in the legislative history of either statute that suggests "compromise" was intended to have a more limited meaning.

We recognize that the word "compromise" implies that both of the parties to a dispute make concessions in order to terminate the controversy by mutual agreement. *See* Black's Law Dictionary 260 (5th ed. 1979). Thus, as a general matter, we would not disagree with EDA's view that a compromise requires the existence of a real dispute between the parties or some uncertainty as to the facts. However, the underlying dispute or uncertainty needed to justify a compromise can be based on some genuine doubt as to the collectibility of the entire amount of an undisputed debt. For example, see the following explanation of the Government's compromise authority as set forth in 38 Op. Att'y Gen. 98, 99 (1934):

> There appears to be no statutory authority to compromise *solely* upon the ground that a hard case is presented which excites sympathy or is merely appealing from the standpoint of equity, but the power to compromise clearly authorizes the settlement of any case about which uncertainty exists as to liability or collection.

That doubt as to the collectibility of a liquidated debt can form the basis of a "compromise" is especially clear in this situation, since the claims that 42 U.S.C. § 3211(4) and 19 U.S.C. § 2347(a)(2) authorize EDA to compromise are based on written debt obligations—the type of claim about which there is ordinarily little or no question as to liability or amount.

Strong support for this position can be found in the Federal Claims Collection Act of 1966, Pub. L. No. 89-508, 80 Stat. 308 (1966), recodified at 31 U.S.C. § 3711, and its legislative history. That Act authorizes agencies to consider and compromise claims, not exceeding $20,000, that arise out of their activities. In this respect 31 U.S.C. § 3711(a) provides:

> (a) The head of an executive or legislative agency—
>
> * * * * * * *
>
> (2) may compromise a claim of the Government of not more than $20,000 (excluding interest) that has not been referred to another executive or legislative agency for further collection action; * * *

The following statement from one of the committee reports on the legislation when it was enacted in 1966, explaining the need for granting compromise authority to Federal agencies, is especially relevant:

> The committee is familiar with many of the problems which prompted the Department of Justice to recommend the legislation, and the committee feels that this bill embodies a practical and well drafted means to deal with those problems. Much of the difficulty derives from the fact that existing law, with a few exceptions, restricts the authority of the agencies to deal adequately and realistically with claims of the United States arising out of their respective activities. * * * *Very few of the agencies can compromise such claims; that is, accept a lesser amount in full settlement even if such a settlement would be in the interest of the Government and justi-*

fied by normal practice in business in the light of the debtor's ability to pay and the risks and costs inherent in litigation. * *

As has been noted, present law does in some instances permit compromise of claims on the agency level. However, those agencies which do have some compromise authority usually have it only with respect to limited types of claims or in a rather small amount. * * * *Only a few agencies like the Small Business Administration have unrestricted prelitigation collection and compromise authority (15 U.S.C. 634(b)(2)).* [Italic supplied.] S. Rep. No. 1331, 89th Cong., 2d Sess., reprinted in 1966 *U.S. Code Cong. and Ad. News* 2532, 2533.

In our view, the foregoing explanation makes it clear that our conclusion in this case is correct. First, it clearly sets forth the view of the Congress that consideration "of the debtor's ability to pay" can justify a compromise by a Federal agency. Second, it defines "compromise" merely as acceptance of "a lesser amount in full settlement" of the Government's claim. Third, it demonstrates that the word "compromise" was not being used in a different sense in the Claims Collection Act and the two EDA statutes. It does this by referring to the Small Business Administration (SBA) as one of the agencies that had "unrestricted prelitigation collection and compromise authority" prior to enactment of the Claims Collection Act. Examination of the cited provision in SBA's enabling legislation—15 U.S.C. § 634(b)(2)—reveals that the authority of the Administrator of SBA "to collect or compromise all obligations assigned to or held by him" is set forth in language that is virtually identical to that used to grant EDA its compromise authority. This indicates that the compromise provisions contained in both EDA's statutes also were intended to grant EDA "unrestricted prelitigation collection and compromise authority" that would allow EDA to forgive a portion of a claim when it determines the debtor is unable to pay the full amount.

Finally, consistent with the clearly expressed legislative intent, the Comptroller General and the Attorney General have prescribed regulations implementing the Claims Collection Act which further support our position. These regulations specifically provide that claims may be compromised "if the Government cannot collect the full amount because of (a) the debtor's inability to pay the full amount within a reasonable time, or (b) the refusal of the debtor to pay the claim in full and the Government's inability to enforce collection in full within a reasonable time by informal collection proceedings."

For the foregoing reasons we believe the word "compromise" as used in 42 U.S.C. § 3211(4) and in 19 U.S.C. § 2347(a)(2) must be interpreted as granting EDA the statutory authority to accept from the borrower less than the outstanding indebtedness in complete satisfaction of EDA's claim, where EDA determines it is in the Government's interest to do so because of some doubt either with respect to the borrower's liability or the collectibility of the full amount of the loan. Accordingly, since EDA may compromise directly with borrowers when there is legitimate doubt as to the collectibility of the full amount of a defaulted loan, there would

appear to be no statutory bar to allowing such borrowers to bid on their loans in similar circumstances.

Having reached this conclusion, however, we should point out that, to our knowledge, EDA has not adopted regulations establishing any specific standards governing its authority to sell defaulted loans or setting forth the circumstances in which such sales will be carried out instead of taking other actions to collect on defaulted loans, such as a conventional liquidation of collateral. Nor has EDA, as far as we know, published regulations establishing specific standards for collecting or compromising loans. Instead the applicable regulations merely restate the broad language set forth in the statutes. For example see 13 C.F.R. §§ 305.100 and 306.33. While we acknowledge that the Federal Claims Collection Act of 1966 did not diminish the existing authority of the head of an agency under statutes such as 42 U.S.C. § 3211(4) or 19 U.S.C. § 2347(a)(2) "to settle, compromise, or close claims," the following provision from the Claims Collection Act standards is relevant in this respect:

> Nothing contained in this chapter is intended to preclude agency disposition of any claim under statutes other than the Federal Claims Collection Act of 1966, 80 Stat. 308, providing for the compromise, termination of collection action, or waiver in whole or in part of such a claim. * * *. The standards set forth in this chapter should be followed in the disposition of civil claims by the Federal Government by compromise or termination of collection action (other than by waiver pursuant to statutory authority) under statutes other than the Federal Claims Collection Act of 1966, 80 Stat. 308, to the extent such other statutes or authorized regulations issued pursuant thereto do not establish standards governing such matters.

Accordingly, unless and until EDA adopts regulations establishing definitive standards governing the compromise of claims it should follow the applicable standards and guidelines set forth in the Claims Collection Act regulations. These standards are currently being revised by our Office and the Department of Justice in light of the increased claims collection authority granted agencies by the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749, approved October 25, 1982.

The General Counsel's second question is whether EDA has the discretion not to "compromise" with borrowers by refusing to sell them their own obligations. Considering the statutory language involved, as well as the basic meaning of the word "compromise," it is clear that EDA has such discretion. Both statutes, 42 U.S.C. § 3211(4) and 19 U.S.C. 2347(a)(2), grant the Secretary broad discretion to sell obligations "at public or private sale * * * upon such terms and conditions and for such consideration as he shall determine to be reasonable."

Moreover, both statutes are written in permissive terms giving the Secretary discretion as to whether to compromise any obligation. It would be contrary to the very concept of compromise to conclude that the Secretary could be compelled to accept less than the full amount from a borrower. Accordingly, EDA may decide to refuse to offer obligations for sale to borrowers which it offers for

sale to others if it determines that is necessary to preserve the integrity of its loan collection process or for any other valid reasons.

Having concluded that the decision of whether or not to permit borrowers to purchase their own obligations at a discount is within EDA's administrative discretion, we should point out that we have serious reservations about the advisability of allowing borrowers to submit bids on and ultimately to purchase their own loans. For example, while Commerce's submission sets forth various policy considerations that might support an administrative decision either to allow or to prohibit sales to borrowers the concerns expressed as to the negative impact of such sales on the integrity of EDA's loan collection process seem especially persuasive. That is, if borrowers knew that, in effect, they could have a portion of their debt cancelled if the loan went into default, they would have a strong incentive not to make the payments required to keep their loans current. Also, based on the information furnished in Commerce's submission, as well as in informal discussions with EDA officials, we understand that it might be very difficult for EDA to differentiate between those debtors that genuinely are unable to pay the entire amount of the debt and those that merely claim such inability in order to avoid repayment of the loan in full. This problem and the related one of establishing a fair and reasonable "upset" or lowest acceptable price for each defaulted loan to be sold, would be exacerbated if numerous loans are sold in a mass public sale rather than on an individual basis. It was precisely this type of "portfolio" sale that precipitated EDA's request to us for a legal opinion.

Moreover, as indicated above, the authority of Federal agencies generally in the area of debt collection was significantly increased by the enactment of the Debt Collection Act of 1982. For example, under section 13 of the Act, 31 U.S.C. § 3718, executive agencies can now enter into contracts with private collection agencies to recover indebtedness owed the United States Government. In light of this increased authority and the new collection mechanisms that are now available to Federal agencies, EDA might wish to consider whether any other method of debt collection would enable it to increase the amounts recovered on defaulted loans compared to the results obtained when defaulted loans are sold, whether or not borrowers are allowed to bid on their own loans.

In any event, the question of whether EDA should adopt a "noncompromise" policy of never selling loans to borrowers at less than full value or a policy of considering each loan individually to determine whether such a compromise would be in the best interests of the Government in a particular case should be left to EDA in the reasonable exercise of its discretion.

It is not necessary for us to answer the third question, in light of our affirmative answer to the first one.

[B-210132]

Travel Expenses—Air Travel—Fly America Act—Employee's Liability—Travel by Noncertificated Air Carriers—Involuntary Re-Routing

En route home from temporary duty overseas an employee indirectly routed his travel to take annual leave in Dublin and scheduled his return flight from Shannon to the United States on a U.S. air carrier. Upon arrival in Shannon the employee was informed that his scheduled flight had been discontinued and the carrier scheduled the employee's transoceanic travel on a foreign air carrier. Since there were no alternative schedules at that point under which the employee could have traveled on U.S. air carriers available under the Comptroller General's "Guidelines for Implementation of the Fly America Act" for the transoceanic portion of his travel, there need be no penalty for the use of a foreign air carrier.

Matter of: Fly America Act Penalty for Involuntary Re-routing, June 24, 1983:

The General Counsel of the Central Intelligence Agency has asked whether an employee must be assessed a penalty under the Fly America Act, 49 U.S.C. § 1517, when the U.S. air carrier flight on which he had scheduled his return to the United States from a point along an indirect route was discontinued and the U.S. air carrier rescheduled the employee's transoceanic travel on a foreign air carrier. The penalty is not applied where the employee originally planned his indirect or delayed travel by U.S. air carriers, but at the time he was to use that planned travel the U.S. air carrier was not available and no alternative schedule was available for travel on U.S. air carriers under the Comptroller General's "Guidelines for Implementation of the Fly America Act," B-138942, revised March 31, 1981.

The employee who was returning from temporary duty overseas arranged to return to the United States through Dublin, Ireland, with a period of leave, rather than returning directly. The employee had confirmed reservations from Shannon, Ireland, to Boston to Washington on U.S. air carriers, but when he arrived in Shannon on the Wednesday his flight was scheduled to depart, he was informed that the flight had been discontinued several weeks earlier and that the next flight by an American carrier was not until that Saturday. The ticket agent for the U.S. air carrier rewrote the employee's return ticket and placed him on the next direct flight to the United States aboard a foreign air carrier to New York. The employee completed his return from New York to Washington on a U.S. air carrier. If the employee had not interrupted his official travel for a period of annual leave in Dublin, his travel to Washington, D.C. would have been performed by U.S. air carrier.

The General Counsel is aware of our decisions involving indirect travel which hold the employee financially responsible to the extent his personal travel results in a reduction in receipt of Government revenues by U.S. air carriers over revenues they would have earned had the employee performed only authorized travel.

Matter of Keller, B-200279, November 16, 1981; *Matter of Griffis,* B-188648, November 18, 1977. However, the General Counsel believes that an employee should not be penalized when a U.S. air carrier involuntarily re-routes the employee and frustrates scheduling arrangements that would not have involved a loss of revenues by U.S. air carriers. In general, we agree that an employee should not suffer a financial loss when a U.S. air carrier frustrates previously made scheduling arrangements that would not have required assessment of a penalty. Derived from our earlier holding to that effect in *Matter of Norberg,* 59 Comp. Gen. 223 (1980), paragraph 3 of the Comptroller General's "Guidelines for Implementation of the Fly America Act," B-138942, revised March 31, 1981, provides in pertinent part:

> 3. Except as provided in paragraph 1, U.S. air carrier service must be used for all Government-financed commercial foreign air travel if service provided by such carriers is available. In determining availability of a U.S. air carrier the following scheduling principles should be followed unless their application results in the last or first leg of travel to or from the United States being performed by foreign air carrier:
>
> * * * * * * *
>
> (c) where a U.S. air carrier involuntarily reroutes the traveler via a foreign carrier, the foreign air carrier may be used notwithstanding the availability of alternative U.S. air carrier service.

Because an employee's obligation under the Fly America Act is essentially one of proper scheduling, we agree that subparagraph 3(c) should apply to indirect as well as direct travel where the employee's scheduling would otherwise be frustrated through no fault of his own. However, because the travel here in question involved the last leg of a trip to the United States, subparagraph 3(c) is not dispositive of the issue raised in this particular case.

The guidelines and our decisions place a higher degree of responsibility on the employee to schedule travel to and from the United States aboard U.S. air carriers. See, e.g., 55 Comp. Gen. 1230, 1233 (1976). For such travel, a foreign air carrier may be used only when U.S. air carrier service is otherwise unavailable under the guidelines. Insofar as applicable to transoceanic travel originating abroad, paragraph 4 of the guidelines provides:

> 4. For travel between a gateway airport in the United States (* * * the first U.S. airport at which the traveler's flight arrives) and a gateway airport abroad (that airport from which the traveler last embarks en route to the U.S. * * *), passenger service by U.S. air carrier will not be considered available:
>
> (a) where the gateway airport abroad is the traveler's origin * * * airport, if the use of U.S. air carrier service would extend the time in a travel status, including delay at origin * * * by at least 24 hours more than travel by foreign air carrier.
>
> (b) where the gateway airport abroad is an interchange point, if the use of U.S. air carrier service would require the traveler to wait 6 hours or more to make connections at that point, or if * * * accelerated arrival at the gateway airport in the United States would extend his time in a travel status by at least 6 hours more than travel by foreign air carrier.

If the employee in this case had been on official business rather than annual leave while in Dublin he would have been obliged,

upon learning that his flight had been discontinued, to travel by U.S. air carrier insofar as such service met the availability criteria set forth above. We see no reason to expect less of an employee who indirectly routes his travel, even though he may be in a leave status and personally responsible for subsistence expenses incurred during the period of delay. Therefore, we will apply the Fly America Act guidelines in determining liability for travel on an indirect route where a U.S. air carrier on which the employee has scheduled his travel discontinues or cancels that flight.

In this case, we find that U.S. air carrier service was unavailable and that the employee properly proceeded by foreign air carrier between Shannon and New York. Since there was no U.S. air carrier departing from Shannon to Boston or any other usual interchange point en route to Washington, D.C., within 24 hours of the foreign air carrier's departure time, U.S. air carrier service was unavailable at that gateway airport under subparagraph 4(a). However, the employee's duty of proper scheduling under subparagraph 3(b) of the guidelines required him to consider routings using foreign air carrier service from Shannon to "* * * the nearest interchange point on a usually traveled route to connect with U.S. air carrier service * * *" to the United States. That interchange point was London. Airline schedules show that an individual arriving at the Shannon airport to board a scheduled 3:05 p.m. flight would have had to stay overnight in London in order to make connections with a U.S. air carrier there. Under this scheduling London becomes the gateway airport. Since London would have been an interchange point rather than the traveler's origin airport, availability of U.S. air carrier service from London to the United States would be determined under subparagraph 4(b) quoted above. Since the wait in London was over 6 hours, U.S. air carrier would have been considered unavailable under subparagraph 4(b) and the employee would have been permitted to proceed by foreign air carrier from London to the United States without penalty.

Since there were no U.S. air carriers available under our guidelines for travel to the United States from Shannon, the employee is not subject to a penalty for proceeding by foreign air carrier.

[B-208515]

Accountable Officers—Accounts—Settlement—Statutes of Limitation

Although a certifying officer at National Institutes of Health (NIH) made a computational error in certifying a voucher for payment, thus proximately causing an overpayment of $11,184, his accounts are settled by operation of law and he cannot be held liable for the loss where the Government did not raise a charge against the account within 3 years of receipt by the NIH of the substantially complete accounts of the certifying officer.

Contracts—Payments—Surety of Defaulted Contractor—"Unexpended Contract Balance"—Calculation of Balance—Mistaken Overpayment to Contractor Included

Under surety law surety has election to pay Government's excess cost of completing contract or undertaking to finish the job himself. Under latter election, surety, upon successful completion, is entitled to his costs, up to the unexpended balance of the contract. In considering amount of unexpended balance available to pay performance bond surety his costs for completion of a defaulted National Institutes of Health contract, Government must consider contract balance to include amount of the Government's previous mistaken overpayment to the contractor.

Matter of: National Institutes of Health Funds Available to Pay Completing Performance Bond Surety, June 28, 1983:

The Chief Certifying Officer, Operations and Accounting Branch, Division of Financial Management, National Institutes of Health, has requested a decision as to whether we will relieve Steven Metcalf, a certifying officer, from liability for an $11,184 overpayment to the general contractor on a contract with the National Institutes of Health (NIH). She has also requested an advance decision as to whether a voucher for $14,394, submitted by a performance bond surety for completion of the contract, may be certified for payment. We conclude that the voucher for $14,394 may be certified for payment from the unexpended balance of the contract plus funds available for construction at the NIH facilities in Bethesda, Maryland. We also conclude that the certifying officer is free from liability by operation of law and that therefore we do not need to consider whether we should relieve him.

On August 30, 1977, NIH awarded T.G.C. Contracting Corporation of New York, a contract for construction work on NIH buildings in Bethesda, Maryland. As required by the Miller Act, 40 U.S.C. § 270a (1976), T.G.C. secured a bond guaranteeing performance of the contract from National Bonding and Accident Insurance Company of Missouri.

Some time after it began work, T.G.C. requested in invoice No. 1, dated September 11, 1978, a progress payment of $37,800. T.G.C requested in invoice No. 2, dated September 22, 1978, a progress payment of $34,806. The certifying officer, Steven Metcalf, apparently adding the sum requested in invoice No. 1, $37,800 (a copy of which was included in the documentation submitted with invoice No. 2) to an $8,190 subtotal on the third page of invoice No. 2, certified payment for $45,990 on invoice No. 2. This was an overpayment of $11,184. Payment was made on December 11, 1978. The error was not discovered until March or April 1979.

In September 1979, NIH, citing T.G.C.'s failure to satisfactorily complete the construction work, declared the corporation in default. In order to secure performance of the contract, NIH entered into a subsequent agreement with National, the performance bond surety, on September 12, 1980. Under surety law, National elected to take over and fulfill T.G.C.'s obligations under the 1977 contract

(as modified in October 1978). NIH released National from any liability on the overpayment and promised to pay National $14,394. National performed to the satisfaction of NIH and, on April 8, 1982, submitted an invoice for $14,394 for its completion costs.

Under the usual rules, applicable to surety take-over agreements, National would be entitled to its completion costs, up to the unexpended balance of the amounts obligated for the contract, without setoff by the Government of the contractor's debts. See FPR 1-18.603-4(c). The question here is whether the negligence of a Government employee in making an overpayment to the defaulted contractor and thus depleting the unexpended contract balance affects the rights of the surety. We think it does not. The overpayment to T.G.C. was not within the scope of the risk which National had consented to undertake. The Government promised in the contract with T.G.C. to make progress payments to T.G.C. as the work proceeded. The contract provided, however, that "there shall be retained 10 percent of the estimated amount [of progress payments] until final completion and acceptance of the contract work." Clause 7, March 8, 1978 Addendum to General Provisions. The contracting officer under this clause could release the retained progress funds only if he found satisfactory progress or if the work was substantially complete. In no case could he pay over the unearned contract balance. The certifying officer's erroneous calculation and his resulting overpayment contravened this provision. The result was a contract balance much lower than would otherwise have been the case.

The effect of premature or unauthorized payments on a performance bond surety was discussed at some length in a 1966 5th Circuit Court decision, *National Union Indemnity Co.* v. *G. E. Bass and Co., Inc.*, 369 F.2d 75, 77. The Court held that where there has been a material departure from the provisions of the contract, relating to the amount of payments and the security of retained funds, the surety is discharged from its obligations on the performance bond to the extent that the unauthorized payments prejudiced his interests. Calling this the "pro tanto release" rule, the Court explained:

> The purpose of the pro tanto release of surety rule is that the material departure from the terms of the contract deprives the surety of the inducement to perform which the contractor would otherwise have, and destroys, diminishes, or impairs the value of the securities taken.

The surety in *Reliance Insurance Co. of Philadelphia, Pa.* v. *Malcalum B. Colbert et al.*, 365 F.2d 530, 534-5 (1966) was also given a "pro tanto" discharge by the court because the defaulting contractor had been overpaid. The court explained the theory succinctly in a footnote on page 535:

> Sureties presumably rely on such payment provisions to provide a source of indemnity in case the contractor defaults. Apparently, the result of Church's failure to abide by [the payment schedule] was that more money was paid to the contractor than he should have received by the time he finally abandoned construction.

The total overpayments constituted the measure of the prejudice the surety suffered and he was therefore entitled to a discharge of his obligations to that extent.

In the present case, the surety did not seek a discharge of its obligations upon learning of the overpayment to T.G.C. Instead, it elected to complete the contract, but sought and received an assurance from NIH that it would not be made to suffer because of the Government's erroneous overpayments to the contractor. We think NIH was justified in giving National that assurance. In *Trinity Universal Insurance Co.* v. *United States,* 382 F.2d 317, 320 (1967), *cert. denied* 390 U.S. 906 (1968), the Court observed that the performance bond surety who elects to complete performance upon default of the contractor confers a benefit on the Government by relieving it of the task of completing performance itself. The Court then concluded:

> The surety who undertakes to complete the project is entitled to the funds in the hands of the Government not as a creditor and subject to setoff but as a subrogee having the same rights to the funds as the Government.

See also *Security Insurance Co. of Hartford* v. *United States,* 428 F. 2d 838, 844 (1970) in which the Court held that a performance bond surety who completed a contract upon the contractor's default was entitled to recover its costs free from any set-off because of taxes owed to the Government by the contractor. The Court explained that its decision "avoids the anomalous result whereby the performance bond surety, if set off were permitted, would frequently be worse off for having undertaken to complete performance."

While none of GAO's previous decisions deal with erroneous payments which deplete the contract balance, they all "recognize the right of a surety who completes a defaulted contract under a performance bond to reimbursement for the expenses it incurs in completing the contract free from set off by the Government of the debts of the contractor." B-192237, January 15, 1979. See also B-189137, May 19, 1978, and B-189679, September 7, 1977. We think the same reasoning applies in this case. The surety should not be made to suffer because of the debt owed by T.G.C. to the Government.

As to NIH's request to relieve the certifying officer from liability, our authority to settle the accounts of accountable officers, such as the certifying officer here, is limited to a 3-year period by 31 U.S.C. 3526(c), 96 Stat. 964 (formerly 31 U.S.C. § 82i), except when a loss is due to the fraud or criminality of the accountable officer. That statute, which was originally enacted when all accounts were physically transmitted to this Office for settlement, provides that such accounts shall be settled "within 3 years after the date the Comptroller General receives the account." As a result of changes in audit methods, however, accounts are now retained by the various agencies where they are subject to our audit and settlement. Ac-

cordingly, we consider the date of receipt by the agency of substantially complete accounts, or, where accounts are retained at the site, the end of the period covered by the account, as the point from which the 3-year period begins to run. B-206591, April 27, 1982; B-205587, June 1, 1982; B-181466, July 10, 1974; 3 GAO Policies and Procedures Manual for the Guidance of Federal Agencies sec. 69.1, fn. 1.

There is no indication of fraud or criminality by the certifying officer here. Since the 3-year statute of limitations began to run from March or April 1979, when the agency's records were complete, enabling it to discover the overpayment, the certifying officer's account with regard to the overpayment has been settled by operation of law. B-206591, *supra;* B-205587, *supra.* We thus need not consider the granting of relief. However, NIH should proceed with aggressive collection action to recover the overpayment from the contractor.

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APRIL, MAY AND JUNE 1983

ACCOUNTABLE OFFICERS
Accounts
Irregularities, etc.
Reporting to GAO
Federal Claims Collection Standards compliance requirement Page
In erroneous or improper payment cases General Accounting Office (GAO) will exercise its discretion under 31 U.S.C. 3527(c) and deny relief, unless the requesting agency demonstrates that it has pursued diligent collection action. In order to show that such efforts have been taken, relief requests must demonstrate compliance with the Federal Claims Collection standards. 476
Time limitation
An agency must report financial irregularities to GAO within 2 years from the time that the agency is in receipt of substantially complete accounts. This requirement is to allow the Government the opportunity to raise a charge against the account within the 3-year statute of limitations period. 476
Settlement
Statutes of limitation
Although a certifying officer at National Institutes of Health (NIH) made a computational error in certifying a voucher for payment, thus proximately causing an overpayment of $11,184, his accounts are settled by operation of law and he cannot be held liable for the loss where the Government did not raise a charge against the account within 3 years of receipt by the NIH of the substantially complete accounts of the certifying officer. 498
Relief
Officials requiring relief
Relief should be requested for all persons who had responsibility for or custody of the funds during the relevant stages of a transactions where an improper or erroneous payment was made. Thus, relief requests should include both the person or persons who made the erroneous payment and official responsible for the account at the time the questionable transaction occurred. 476
Requirements for granting
Relief of supervisor
Relief is granted to a supervisor upon a showing that he or she properly supervised his or her subordinates. Proper supervision is demonstrated by presenting evidence that the supervisor maintained an adequate system of procedures and controls to avoid errors and

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that appropriate steps were taken to ensure the system's implementation and effectiveness 476

AGENTS
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Mental incapacity of principal
Under the rules of agency, a known mental incapacity of the principal may operate to vitiate the agent's authority even in the absence of a formal adjudication of incompetency. Hence, Survivor Benefit Plan annuity payments may not be made to an agent designated in a power of attorney which was signed by an annuitant known to be suffering from mental illness but not adjudged incompetent, since in the circumstances the validity of the power of attorney is too doubtful to serve as a proper basis for a payment from appropriated funds. 44 Comp. Gen. 551 is modified in part 302

AGRICULTURE DEPARTMENT
Rural Electrification Administration
Guaranteed loans of Federal
Financing Bank
Cost of servicing
Reimbursable basis requirement
Rural Electrification Administration (REA) may not use funds either from its annual appropriation or REA's Revolving Fund to pay, on a nonreimbursable basis, for the cost of servicing REA guaranteed loans made by the Federal Financing Bank (FFB). Definition of a guaranteed loan under 7 U.S.C. 936 as one which is intially made, held, and seviced by a legally organized lender agency, together with other provisions in REA's and FFB's legislation, indicate that since FFB acts as the lender, REA can only perform servicing function as FFB's agent on a reimbursable basis. 309

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ANTI-DEFICIENCY ACT (*See* APPROPRIATIONS, Deficiencies, Anti-deficiency Act)

APPROPRIATIONS

Defense Department

Inaugural ceremonies

Extent of appropriation availability

Section 601 of the Economy Act, as amended, 31 U.S.C. 686 (now 31 U.S.C. 1535), permits one agency or bureau of the Government to furnish materials, supplies or services for another such agency or bureau on a reimbursable basis. However, since the Presidential Inaugural Committee (PIC) is not a Government agency and DOD used its own appropriations without reimbursement from either the PIC or Joint Congressional Committee on Inaugural Ceremonies in participating in the 1981 Presidential inaugural activities, the authority of the Economy Act was not available 323

Participation of members and employees only

Participation in the inagural ceremony and in the inaugural parade can be justified on the basis of its obvious significance for DOD, as well as for other Federal agencies. However, each agency may only incur and pay expenses directly attributable to the participation of its own employees. It is therefore improper for DOD, in the absence of specific statutory authority, to pay such costs as housing of high school ban participants in the parade, lending military jeeps to pull floats provided by non-military organizations, providing administrative and logistical support to PIC offices, etc 323

Use as chauffeurs, etc.

Use of military personnel for VIPs and other nonmilitary persons in the capacity of chauffeurs, personal escorts, social aides and ushers is improper under the general appropriations law principles and under DOD's community relations regulations. See 32 C.F.R. Parts 237 and 238 323

Deficiencies

Anti-deficiency Act

Violations

Federal Procurement Regulations sections 1-7.204-5 and 1-7.404-9

Indemnification provisions

Public Contract Law Section (PCLS), American Bar Association, urges reconsideration of B-201072, May 3, 1982, in which we held that a clause for use in cost reimbursement contracts entitled "Insurance-Liability to Third Persons," appearing in Federal Procurement Regulations 1-7.204-5, violates the Antideficiency Act, 31 U.S.C. 1341. PCLS sees no violation on face of clause because agencies are bound to contract in accordance with law and regulations and have adequate accounting controls to prevent such violations. General Accounting Office (GAO) points out that it is impossible to avoid violation if clause is used as written because maximum amount of obligation cannot be determined at time the contract is signed. May 3 decision is distinguished and affirmed. 361

In B-201072,. May 3, 1982, GAO recommended modified indemnity clause to avoid violation of Antideficiency Act, 31 U.S.C. 1341. Modi-

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Violations—Continued
Federal Procurement Regulations sections 1-7.204-5 and 1-7.404-9—Continued
Indemnification provisions—Continued
fication would limit Government liability to amounts available for obligation at time loss occurs and that nothing should be construed to bind the Congress to appropriate additional funds to make up any deficiency. PCLS says this gives contractor an illusory promise because appropriation could be exhausted at time loss occurs. GAO agrees. Modification could be equally disastrous for agencies if entire balance of appropriation is needed to pay an indemnity. GAO suggests no open-ended indemnities be promised without statutory authority to contract in advance of appropriations. May 3 decision is distinguished and affirmed 361
PCLS believes holding in B-201072, May 3, 1982, conflicts with another line of decisions holding that "Insurance-Liability to Third Persons" clause was valid. Decisions cited by PCLS all involved indemnities where maximum liability was determinable and funds could be obligated or administratively reserved to cover it. B-201072 is distinguished and affirmed 361

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Employee's attorney claims attorney fees in case where GAO held Army committed an unjustified and unwarranted personnel action following the denial of an agency-filed application for disability retirement. *David G. Reyes,* B-206237, August 16, 1982. Claim for resonable attorney fees under the Back Pay Act, 5 U.S.C. 5596, as amended, is allowed since General Accounting Office, as an "appropriate authority" under the Back Pay Act, finds fees to be warranted in the interest of justice. See 5 CFR 550.806 464
Reasonableness of fees claimed
Claim for reasonable attorney fees under the Back Pay Act requested payment for 29 hours at $100 per hour. Following criteria established by Merit Systems Protection Board, the hourly rate is reduced to $75 to be consistent with rates charged by other attorneys in the locality 464

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BIDS

Evaluation

Discount provisions

Applicable regulation

Agency refusal to consider prompt-payment discount in bid evaluation is proper where solicitation incorporates revision to Defense Acquisition Regulation which precludes consideration of such discounts. ——

Invitation for bids

Ambiguous

Invitation for bids (IFB) which specified class "A" security guards but contained Service Contract Act Wage Determination for class I and class II security guards was ambiguous and should have been amended. However, where the record indicates that no bidders were prejudiced by the ambiguity and the Government will receive the desired services, no "cogent and compelling reason" exists for cancellation of the IFB and resolicitation 354

Service Contract Act provisions

Our Office will consider a protest alleging terms of a solicitation to be defective although those terms concern the Service Contract Act, the enforcement of which is under the jurisdiction of the Department of Labor 354

Defective

Evaluation criteria

Evaluation mainly based on factors other than price

An invitation for bids which states that in the evaluation for award the bidders' "technical submittals" will be weighted at 80 percent and cost 20 percent is improper because award under this evaluation scheme could be made to a bidder other than the one which bid the lowest price. A formally advertised contract must be awarded on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder is responsible. 458

Rejection

Subcontractor's bid

Failure to comply with "union-only" requirement

Requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions neither unduly restricts competition nor conflicts with Federal norm so long as prime contractor permits nonunion firms to compete for contracts and affords them opportunity to seek prehire agreements under the National Labor Relations Act. B–204037, Dec. 14, 1981, is amplified 428

BUY AMERICAN ACT

Bids

Evaluation

Domestic product proposed

Responsibility determination

Not required

Protest that Buy American Act evaluation should not have been conducted because sole domestic bid, which was not low, was, allegedly, bogus is rejected. Bogus charge relates to allegation concerning domestic bidder's alleged nonresponsibility. But Buy American regulatory scheme does not require responsibility determination of do-

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mestic bidder in this situation. Moreover, General Accounting Office does not consider that a responsibility determination need be made absent collusion or other extraordinary circumstances not present in this procurement. Finally, domestic bid contained no indication that it was other than domestic. 345
Foreign country classification
Not prejudicial to protester
Protester was not prejudiced by classification of foreign countries involved in Buy American evaluation of bids submitted for requirement of hexachlorethane. 345
Inapplicability of Buy American Act evaluation factor
Quantities on which only foreign bids submitted
Sole domestic bidder submitted bid for quantity which was less than maximum specified in Invitation For Bids (IFB). Partial bid was authorized by IFB. Contracting officer applied Buy American Act evaluation factor against nondomestic bidder as to maximum quantity which nondomestic bidder bid on. Application of evaluation factor as to quantities on which domestic bidder submitted partial bid was proper. Application of evaluation factor as to quantities on which only foreign bids were submitted was improper. Partial termination of contract is recommended 345

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COMMERCE DEPARTMENT
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Loan guarantees
Public Works and Economic Development Act
Defaulted loans
Loan collection process
The Economic Development Administration (EDA) has the authority to sell defaulted loans to borrowers for less than the unpaid indebtedness. EDA's authority under 42 U.S.C. 3211(4) and 19 U.S.C. 2347(b)(2) to compromise loans allows it to accept from the borrower less than the outstanding indebtedness in complete satisfaction of EDA's claim, if EDA determines it is in the Government's interest to do so because of some doubt as to the borrower's liability or the collectibility of the full amount of the loan. However, it is not required to so if it determines that allowing borrowers to bid on their own obligations would interfere with the integrity of the loan collection process or for other valid reasons. 489

COMPENSATION
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Removals, suspension, etc. (*See* COMPENSATION, Removals, suspensions, etc., Backpay)

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Backpay—Continued
Retroactive promotions
Computation
A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with back pay under 42 U.S.C. 2000e-16(b). Under regulations implementing sec. 2000e-16(b), set forth in 29 C.F.R. 1613.271(b)(1), back pay must be computed in the same manner as if awarded pursuant to the Back Pay Act, as amended, 5 U.S.C. 5596, and its implementing regulations set forth in 5 C.F.R. 550.805. The standards for computing back pay must be applied in light of the make-whole purposes of 42 U.S.C. 2000e-16(b) 343
A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with back pay under 42 U.S.C. 2000e-16(b). A cash award was granted to the employee under the Employee Incentive Awards Act during the period of the discriminatory personnel action. We hold that the award should not be offset against back pay since such an offset would contravene the make-whole purposes of 42 U.S.C. 2000e-16(b). Moreover, once the cash award was duly granted in accordance with the awards statute and regulations, the employee acquired a vested right to the amount awarded 343
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Severance pay
Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. 5533(a) 435
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Early reporting and delayed departure
Lunch period, etc. setoff
Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under Title 5 of the United States Code. Although officers are restricted to Library premises and subject to call during lunch breaks, they are relieved from their posts of duty. Moreover, the officers have not demonstrated that breaks have been substantially reduced by responding to calls. *Baylor* v. *United States,* 198 Ct. Cl. 331 (1972) 447

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Overtime—Continued

Fair Labor Standards Act

Early reporting and/or delayed departure

Lunch period, etc. setoff

Bona fide break requirement

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* The Library of Congress, authorized to administer FLSA with respect to its own employees, has found that the lunch breaks are *bona fide*— although officers are required to remain on duty and subject to call, they are relieved from their posts during lunch breaks and the breaks have been interrupted infrequently. Since there is no evidence that these findings are clearly erroneous, this Office will accept the Library's determination that the breaks are *bona fide* 447

Removals, suspensions, etc.

Backpay

Entitlement

Alternative employment offered

Effect of refusal to accept offer

Agency denied backpay for a portion of employee's involuntary separation since he had refused an offer of temporary employment during his appeal to the Merit Systems Protection Board, and also because he did not show he was ready, willing, and able to work during that period. Employee, however, was not obligated to accept alternative employment while administrative appeals were pending. Further, no evidence shows that employees's medical condition during that period differed from his medical condition during the period for which he was awarded backpay. Accordingly, employee's claim for additional backpay is granted, with appropriate adjustments in annual and sick leave 370

Overtime, etc. inclusion

Computation method

Agency determination

Employee claims that he is entitled to additional overtime pay as part of his backpay award based on overtime hours worked by other employees during period of his separation. Agency based overtime payment on amount of overtime worked by the employee during preceding year. Based on the facts presented, this Office cannot say that the formula used by the agency in computing his entitlement to overtime is incorrect. Employee's claim for additional overtime in this respect is denied 370

Saved

Downgrading actions. (*See* COMPENSATION, Downgrading, Saved compensation)

Severance pay

Eligibility

Actual separation requirement

Certain HUD employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their

COMPENSATION—Continued Page
Severance pay—Continued
Eligibility—Continued
Actual separation requirement—Continued
employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Since individuals must be actually separated from United States Government service to receive severance pay, those employees were not entitled to severance pay until they were actually separated after the lifting of the injunction. They are entitled to severance pay beginning on the date of actual separation, with years of service and pay rates based on the originally intended date of the RIF, assuming that the retroactivity of the RIF is upheld by the Merit Systems Protection Board 435

CONTRACTING OFFICERS
Responsibility
Small business size status determination
Error investigation duty. (*See* CONTRACTS, Small business concerns, Awards, Self-certification, Indication of error, Contracting officer's duty to investigate, etc.)

CONTRACTORS
Responsibility
Determination
Review by GAO
Affirmative finding accepted
Compliant that agency improperly found offeror to be responsible without first conducting preaward survey is not for consideration since preaward survey is not legal prerequisite to affirmative determination of responsibility and such determinations are not reviewed by GAO except in situations not applicable to this case. 474

CONTRACTS
Architect, engineering, etc. services
Procurement practices
Brooks Bill applicability
Procurement not restricted to A-E firms
Administrative determination
General Accounting Office will not question a contracting agency's determination to secure services through competitive bidding procedures rather than through the procedures prescibed in the Brooks Act for the selection of architectural or engineering firms unless the protester demonstrates that the agency clearly intended to circumvent the Act 297
Awards
Small business concerns. (*See* CONTRACTS, Small business concerns, Awards)
Brooks Bill applicability. (*See* CONTRACTS, Architect, engineering, etc. services)
Buy American Act. (*See* BUY AMERICAN ACT)

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Default
Reprocurement
Defaulted contractor
Not entitled to award
Full price already paid under defaulted contract
Where a defaulted contractor has been paid the full contract price under the defaulted contract, it is not entitled to award of the repurchase contract because it is not permitted to be paid more than the original contract price. Award of the repurchase contract would be tantamount to modification of the original contract without consideration flowing to the Government 469
Implied
Payment basis. (*See* **PAYMENTS, Quantum meruit/valebant basis, Absence, etc. of contract, Government acceptance of goods/services**)
Payments
Assignment
Assignee's right to payment
First *v.* second assignee
First assignee's (computer leasing company/financing institution) claim for sums paid to second assignee (also computer leasing company/financing institution) under modification of the same contract is denied because (1) the first assignee has only a qualified interest in the assigned payment, commensurate with the amount of equipment which it financed, and (2) it appears that the first assignee has received all payments it is entitled to for the equipment which it financed. Therefore, first assignee has no basis for its claim 368
Quantum meruit/valebant basis. (*See* **PAYMENTS, Quantun meruit/valebant basis**)
Set-off. (*See* **SET-OFF, Contract payments**)
Surety of defaulted contractor
"Unexpended contract balance"
Calculation of balance
Mistaken overpayment to contractor included
Under surety law surety has election to pay Government's excess cost of completing contract or undertaking to finish the job himself. Under latter election, surety, upon successful completion, is entitled to his costs, up to the unexpended balance of the contract. In considering amount of unexpended balance available to pay performance bond surety his costs for completion of a defaulted National Institutes of Health contract, Government must consider contract balance to include amount of the Government's previous mistaken overpayment to the contractor 498
Protests
Authority to consider
Service Contract Act matters. (*See* **GENERAL ACCOUNTING OFFICE, Jurisdiction, Labor stipulations, Service Contract Act of 1965**)

CONTRACTS—Continued Page

Protests—Continued

Authority to consider

United States-Saudi Arabia Joint Commission on Economic Cooperation procurements

The GAO is not authorized to settle and adjust the dollar account used to hold Saudi Arabian monies covering Joint Commission project costs, and thus, will not entertain bid protests of Joint Commission procurements where, as in all Joint Commission projects except one, no United States funds are involved at any stage of the procurement. The holding in *Mandex, Inc.*, B-204415, Oct. 13, 1981 is affirmed. Foreign Military Sales procurements are distinguished..... 410

Contracting officer's affirmative responsibility determination. (*See* **CONTRACTORS, Responsibility, Determination)**

General Accounting Office procedures

Timeliness of protest

Date basis of protest made known to protester

Two grounds of protest against application of Buy American Act evaluation factor are timely when filed within 10 working days of when the protester learns of basis of protest. Final ground of protest is untimely filed but will be considered under significant issue exception to Bid Protest Procedures..... 345

Significant issue exception

For application

General Accounting Office will consider protest challenging requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions since significant issue is involved. B-204037, Dec. 14, 1981 is amplified 426

Interested party requirement

Small business set-asides

Protester rejected as other than small business under 100-percent small business set-aside procurement contending it was improperly rejected is interested party under General Accounting Office Bid Protest Procedures because if protest is sustained the protester would be eligible for award 458

Quantum meruit/valebant

Payment basis. (*See* **PAYMENTS, Quantum meruit/valebant basis)**

Responsibility of contractors

Determination. (*See* **CONTRACTORS, Responsibility, Determination)**

Small business concerns

Awards

Responsibility determination

Nonresponsibility finding

Certificate of Compentency denial on recent procurement—resubmission to SBA not required

Under limited circumstances, a recent denial by the Small Business Administration (SBA) for a certificate of competency may be used by a contracting officer as SBA confirmation of another finding of nonresponsibility..... 469

CONTRACTS—Continued Page

Small business concerns—Continued

Awards—Continued

Self-certification

Indication of error

Contracting officer's duty to investigate, etc.

While contracting officer and Small Business Administration considered timely size protest contained insufficient detail, contracting officer should have pursued matter on his own initiative under Defense Acquisition Regulation 1-703(b)(2) where data submitted by proposed awardee in bid indicated $5 million size standard may be exceeded 300

Set-asides

Qualifications of small businesses

Business entity organized for profit requirement

To qualify as a small business concern a concern must be a business entity organized for profit. The contracting officer acted reasonably in rejecting bid in which bidder represents that it is a nonprofit organization, thus indicating that bidder is other than a small business concern and ineligible for award under a small business set-aside 458

COURTS

Judges

Compensation

Increases

Comparability pay adjustment

Specific Congressional authorization requirement

Question presented is entitlement of Federal judges to 4 percent comparability increase under sec. 129 of Pub. L. 97-377, Dec. 21, 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. We conclude that the language of sec. 129(b) of Pub. L. 97-377, combined with specific intent evidenced in the legislative history, constitutes the specific congressional authorization for a pay increase for Federal judges.... 358

Judgments, decrees, etc.

Res judicata

Subsequent claims

An employee seeks a Comptroller General decision on his entitlement to salary retention. The General Accounting Office (GAO) adheres to the doctrine of *res judicata* to the effect that the valid judgment of a court on a matter is a bar to a subsequent action on that same matter before the GAO. 47 Comp. Gen. 573. Since in *William C. Ragland* v. *Internal Revenue Service,* Appeal No. 55-81 (C.A.F.C. November 1, 1982), it was previously decided that the employee was not entitled to saved pay benefits, the GAO will not consider his claims for salary retention 399

Magistrates

Authority

Withdrawal from court registry funds

Upon consent of all the parties, a magistrate may be specially designated to make final determinations of the district court in all civil matters. 28 U.S.C. 636(c), as amended in 1979. Therefore, in those

COURTS—Continued Page
Magistrates—Continued
Authority—Continued
Withdrawal from court registry funds—Continued
cases, a magistrate may also be legally authorized to order withdrawal of money from the court registry 404

DEBT COLLECTIONS
By Government employees requirement
Collection of fees owed the United States is an inherent governmental function which may be performed only by Federal employees. 339
Collection by non-employees
System for protection of Government
Feasibility questionable
General Accounting Office questions the feasibility of developing a system of alternative controls to protect the Government against loss in the event that volunteers collect Government monies 339

DEFENSE DEPARTMENT
Appropriations. (*See* APPROPRIATIONS, Defense Department)

ECONOMIC DEVELOPMENT ADMINISTRATION (*See* COMMERCE DEPARTMENT, Economic Development Administration)

FUNDS
Recovered overcharges
Distribution
Department of Energy
In distributing funds under consent orders with alleged violators of petroleum price and allocation regulations, Dept. of Energy must attempt to return funds to those actually injured by overcharges. Where this is not possible, Energy must use mandatory procedure established by 10 C.F.R. 205.280 *et seq.*, which creates mechanisms for injured parties to claim refunds. Distribution of consent order funds by oil companies is not permissible without restitutionary nexus because Energy lacks authority to do indirectly what it cannot do directly. In-kind deposit of oil in Strategic Petroleum Reserve by oil companies is not permissible because it lacks restitutionary nexus and is not otherwise authorized 379
Distribution of consent order funds to states by oil companies or Dept. of Energy is permissible only if states are required to use funds exclusively for energy-related purposes with restitutionary nexus to nature of overcharges, for benefit of class of consumers overcharged, and according to plans approved by Energy. Any funds not able to be distributed by oil companies in appropriate restitutionary manner must revert to Energy for disposition under procedure in 10 C.F.R. 205.280 *et seq.* If no consumers or classes of consumers can be identified by administrative procedure, and no restitutionary nexus for payments to states can be found, only remaining authorized distribution is deposit of funds in miscellaneous receipts account of Treasury. 379

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GENERAL ACCOUNTING OFFICE
Audits
Authority
Foreign Assistance Act activities
Pursuant to the Budget and Accounting Act, 1921, as amended, 31 U.S.C. 712, 716(a) (formerly 31 U.S.C. 53(a)), and the Legislative Reorganization Act of 1970, as amended, 31 U.S.C. 716(b) (formerly 31 U.S.C. 1154(a)), the General Accounting Office (GAO) is authorized to conduct comprehensive audits of activities under sec. 607(a) of the Foreign Assistance Act, as amended, 22 U.S.C. 2357(a), where Federal agencies directly participate in carrying out international agreements, such as those of the United States-Saudi Arabia Joint Commission on Economic Cooperation. Our audit authority extends to Joint Commission procurements and contracts even though the funding is wholly provided by Saudi Arabia 410
Jurisdiction
Contracts
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions. (*See* CONTRACTORS, Responsibility Determination, Review by GAO)
Labor stipulations
Service Contract Act of 1965
Invitation for bids terms
Ambiguities. (*See* BIDS, Invitation for bids, Ambiguous, Service Contract Act provisions)
Military records. (*See* MILITARY PERSONNEL, Record correction)
Subcontracts
Protest against award of subcontract on behalf of Government by Department of Energy prime contractor is appropriate for General Accounting Office review under standards of *Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Nonunion protester, whose bid prime contractor did not open, is interested party, in particular circumstances, for purposes of protesting requirement for subcontractors to have union agreement notwithstanding that protester withdrew its bid. B-204037, Dec. 14, 1981, is amplified 428

HEALTH AND HUMAN SERVICES DEPARTMENT
Regulations
Procurement practices
Contractual preference to Indian organizations
Legality of preference
Provision in solicitation issued by Department of Health and Human Services which gives preference to Indian organizations or Indian-owned economic organizations by requiring negotiation and award solely with Indian organizations if one or more are within competitive range is improper, since there is no legal basis for such a preference 353

HUSBAND AND WIFE
Dependents
Quarters allowance. (*See* QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ))

INDIAN AFFAIRS Page
Contracting with Government
Preference to Indian concerns
Health and Human Services Department. (*See* HEALTH AND HUMAN SERVICES DEPARTMENT, Regulations, Procurement practices, Contractual preference to Indian organizations)

INSANE AND INCOMPETENT
Military personnel
Dependents
Annuity election for dependents
Survivor Benefit Plan. (*See* PAY, Retired, Survivor Benefit Plan, Mentally incapacitated beneficiaries)

INSURANCE
Household effects transported. (*See* TRANSPORTATION, Household effects, Insurance)

JUDGES (*See* COURTS, Judges)

LEAVES OF ABSENCE
Traveltime
Excess
Annual leave charge
Where employee, who traveled by privately owned vehicle as a matter of preference and took additional time away from his official duties, is to be reimbursed at the constructive cost of rail transportation, the employee's annual leave may be charged for the work hours involved in the trip exceeding those hours which would have been required had he used rail transportation 393

LEGISLATION
Recommended by GAO
Presidential inaugural ceremonies
Participation by Federal agencies
Extent and types of participation
The Presidential Inaugural Ceremonies Act, now largely codified at 36 U.S.C. 721–730, is the primary legislation dealing with Presidential inaugurations. It authorizes Department of Defense (DOD) to provide limited assistance, primarily safety and medical in nature, to the Presidential Inaugural Committee (PIC), but even in these instances, the statute requires the PIC to indemnify the Government against losses. DOD itself recognizes that much of its extensive participation in Presidential inaugural activities is fundamentally a matter of custom rather than being rooted in legal authority. Nevertheless, Presidential inaugurations are highly symbolic national events and DOD support was provided with the knowledge and approval of many members of the Congress over a period of years. General Accounting Office recommends that the Congress provide specific legislative guidance on the extent and types of support and partici-

LEGISLATION—Continued Page
Recommended by GAO—Continued
Presidential inaugural ceremonies—Continued
Participation by Federal agencies—Continued
Extent and types of participation—Continued
pation in inaugural activities which Federal agencies are authorized to provide 323

MEDICAL TREATMENT
Officers and employees
Travel expenses
Limitations
Administrative discretion
An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed 294

MILEAGE
Travel by privately owned automobile
In lieu of Government vehicle
Reimbursement
Employee, who was a member of an agency review team and authorized to perform temporary duty travel in a group by Government-owned van, received permission to travel by privately owned vehicle as an exercise of personnal preference. Since the agency did approve his privately owned vehicle use, and since the regulations do not authorize proration of reimbursement where Government vehicle is used anyway, employee may be reimbursed mileage at 7.5 cent rate authorized by Federal Travel Regulations para. 1-4.4c 321

MILITARY PERSONNEL
Dependents
Annuity election
Survivor Benefit Plan. (*See* PAY, Retired, Survivors Benefit Plan)
Incompetents
Beneficiary eligibility
Survivor Benefit Plan. (*See* PAY, Retired, Survivor Benefit Plan, Beneficiary payments, Mentally incapacitated beneficiaries)
Per diem. (*See* SUBSISTENCE, Per diem, Military personnel)
Quarters allowance. (*See* QUARTERS ALLOWANCE)
Record correction
General Accounting Office jurisdiction
Corrections of military records made pursuant to actions by boards for correction of military records under 10 U.S.C. 1552 are final and conclusive on all officers of the United States, except when procured by fraud. Thus, the Comptroller General does not have jurisdiction to review correction board actions in individual cases but must apply

MILITARY PERSONNEL—Continued Page
Record correction—Continued
General Accounting Office jurisdiction—Continued
the pertinent laws and regulations to the facts as shown by the corrected records to determine the amounts payable as a result of the corrections 406
Retired pay. (*See* PAY, Retired)
Subsistence
Per diem. (*See* SUBSISTENCE, Per diem, Military personnel)
Survivor Benefit Plan. (*See* PAY, Retired, Survivor Benefit Plan)
Temporary duty
Per diem. (*See* SUBSISTENCE, Per diem, Military personnel, Temporary duty)
Transportation
Household effects. (*See* TRANSPORTATION, Household effects, Military personnel)
Travel expenses. (*See* TRAVEL EXPENSES, Military personnel)

MOBILE HOMES
Transportation
Civilian personnel. (*See* TRANSPORTATION, Household effects, House trailer shipments, etc.)
Military personnel. (*See* TRANSPORTATION, Household effects, Military personnel, Trailer shipment)

OFFICERS AND EMPLOYEES
Health services. (*See* MEDICAL TREATMENT, Officers and employees)
Leaves of absence. (*See* LEAVES OF ABSENCE)
Mileage. (*See* MILEAGE)
Overtime. (*See* COMPENSATION, Overtime)
Quarters allowance
Transferred employees. (*See* OFFICERS AND EMPLOYEES, Transfers, Temporary quarters)
Severance pay. (*See* COMPENSATION, Severance pay)
Transfers
House trailers, mobile homes, etc. (*See* TRANSPORTATION, Household effects, House trailer shipments, etc.)
Household effects, transportation. (*See* TRANSPORTATION, Household effects)
Leases
Unexpired lease expense
Reimbursement
Governed by terms of lease
To settle lease which did not contain termination clause, transferred employee paid rent for unexpired 4½ month term of lease. Employee is entitled to full amount of lease settlement expenses paid in avoidance of potentially greater liability. Reimbursement is not diminished by agency's finding that it is customary for landlord to refund rent when he has relet premises during unexpired term of lease since reimbursement is governed by terms of lease and not what is customary in locality 319

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Real estate expenses
Finance charges
Reimbursement prohibition
Veterans Administration funding fee
The Veterans Administration (VA) questions whether the VA funding fee, consisting of one-half of 1 percent of the amount of a loan guaranteed or insured by the VA, required under the Omnibus Budget Reconciliation Act of 1982, is reimbursable under para. 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended. We hold that that funding fee is not reimbursable under FTR para. 2-6.2d because the fee constitutes a finance charge under Regulation Z (12 C.F.R. 226.4 (1982)) 456
Former residence utilized as a downpayment
Transferred employee traded a former residence as downpayment on purchase of residence at new official station. He seeks reimbursement of $163 premium paid for title insurance on property traded as a downpayment. Title insurance is generally reimbursable to a seller under the provisions of FTR para. 2-6.2c. However, since employee did not obtain the title insurance on his residence at his old duty station at time of transfer but on a former residence, he is not entitled to reimbursement of the fee paid for title insurance under "total financial package" concept enunciated in *Arthur J. Kerns,* 60 Comp. Gen. 650 (1981), and subsequent similar decisions. 426
Temporary quarters
Subsistence expenses
Computation of allowable amount
A transferred employee reclaims $25 per day for temporary quarters while residing with friends at new duty station. Agency disallowed amount claimed as unreasonable in view of lack of documentation to substantiate basis for the $25 or to establish that host family did incur extra expenses. Under Federal Travel Regs. para. 2-5.4c, agency provided a formula under which maximum reimbursement was $375 for 10-day period in question. Since employee has been reimbursed $343.22 for meal subsistence expenses, maximum available for lodging is $31.78 for 10-day period. Therefore, agency requirement for substantiation of $25 per day does not appear to be germane. Employee need only support lodging expense of friends for $31.78 for 10-day period. We find amount reasonable based upon use of host's utilities, cleaning services and linens. 401
Travel expenses. (*See* TRAVEL EXPENSES)

PAY
Retired
Computation
Alternate method
Public Law 94-106 effect
An Army officer, after completing over 30 years of active service, who could have retired with retired pay unconditionally resigned from the military in 1961. Subsequently, the Army Board for Correction of Military Records corrected the officer's record to show that he retired in Feb. 1982. His situation falls within the provisions of 10

PAY—Continued Page
Retired—Continued
Computation—Continued
Alternate method—Continued
Public Law 94–106 effect—Continued
U.S.C. 1401a(f) for the computation of his retired pay since he initially retired in 1982 and initially became entitled to retired pay at that time. However, under that section the 1972 basic pay rates (which would be most advantageous to him) in computing his retired pay may not be used because he was not a member of the Army in 1972. Thus, he could not have retired then and had no grade or basic pay rate for use in computing retired pay 406
Foreign employment
Congressional consent
Pub. L. 95–105
Applicability
Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of Federal officers or employees by a foreign government without the consent of Congress in Art. I, sec. 9, cl. 8 of the Constitution and the approvals required by section 509 of Public Law 95–105 (37 U.S.C. 801 note) in order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government 432
Survivor Benefit Plan
Beneficiary payments
Mentally incapacitated beneficiaries
Effect of incapacity on payments
Survivor Benefit Plan annuity payments in the case of an adult beneficiary known to be suffering from mental illness, but not adjudged incompetent, may be made directly to the beneficiary if by psychiatric opinion the beneficiary is considered sufficiently competent to manage the amounts due and to use the annuity properly for personal maintenance. Otherwise, the amounts due should remain unpaid and credited on account until a guardian authorized to receive payment is appointed by a court. 44 Comp. Gen. 551 is modified in part 302
Suspension and reinstatement
Mentally incapacitiated beneficiaries' employment
A deceased military officer's daughter, considered eligible for a Survivor Benefit Plan annuity on the basis of mental illness making her incapable of self-support, then recovered from her illiness to the extent that she was able to support herself for 6 months through gainful employment. She subsequently suffered a relapse requiring rehospitalization. The annuity may properly be suspended during the 6-month period of employment. It may be reinstated during the following period when she was again incapable of self-support because of the original disabling condition, since the applicable laws governing military survivor annuity plans do not preclude reinstatement in appropriate circumstances. 44 Comp. Gen. 551 is modified in part 302

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Children
Dependency status
Mental incapacity during school year

Under the Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, eligible beneficiaries include a deceased service member's "dependent child," a term defined by statute as including one who is incapable of supporting himself because of mental or physical incapacity incurred before his twenty-second birthday while pursuing a full-time course of study. Given this definition, a military officer's daughter who suffered a mental breakdown at the age of 19 during the summer vacation following the successful completion of her first year of college, and who was thus rendered incapable of self-support, may properly be considered a "dependent child" eligible for an annuity under the Plan. 44 Comp. Gen. 551 is modified in part..... 302

Spouse
Social Security offset
Computation

Computation of setoffs from Survivor Benefit Plan annuities which are required to be made in an amount equal to the retiree's social security benefit based solely on military service must take into account the reduction in social security benefits when the retiree received benefits before reaching age 65. Thus, where a widow's social security benefit is reduced because of the reduction in the retiree's benefit, the services may not calculate the offset against the Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment..... 471

PAYMENTS
Quantum, meruit/valebant basis
Absence, etc. of contract
Government acceptance of goods/services

When goods are furnished or services rendered to the Government, but the contract provision under which performance occurred is void, the Government is obliged to pay the reasonable value of the goods or services under an implied contract..... 337

Voluntary
No basis for valid claim
Exception
Public necessity
Payment in Government's interest

Government employee who uses personal funds to procure goods or services for official use may be reimbursed if underlying expenditure itself is authorized, failure to act would have resulted in disruption of relevant program or activity, and transaction satisfies criterial for either ratification or *quantum meruit*, applied as if contractor had

PAYMENTS—Continued Page
Voluntary—Continued
No basis for valid claim—Continued
Exception—Continued
Public necessity—Continued
Payment in Government's interest—Continued
not yet been paid. While General Accounting Office emphasizes that use of personal funds should be discouraged and retains general prohibition against reimbursing "voluntary creditors," these guidelines will be followed in future. Applying this approach, National Guard Officer, who used personal funds to buy food for subordinates during weekend training exercise when requisite paperwork was not completed in time to follow normal purchasing procedures, may be reimbursed. 4 Comp. Dec. 409 and 2 Comp. Gen. 581 are modified. This decision was later distinguished by 62 Comp. Gen, ——— (B-209965, July 26, 1983 419

PRESIDENT
Inaugural ceremonies
Inaugural balls
Status
Private gatherings
Presidential inaugural balls are basically private gatherings or parties not generally available to the community, whose proceeds go to the private, non-Government PIC. They are neither official civil ceremonies nor official Federal Government functions under the DOD's community relations regulations (32 C.F.R. Parts 237 and 238). Therefore, DOD's appropriated funds are not available to cover the costs of participation by any of its employees or members 323

PUBLIC HEALTH SERVICE
Commissioned personnel
Separation
Subsequent appointment to civilian position
Relocation expense reimbursement and allowances
A Commissioned Officer in the Public Health Service (PHS) was separated from the officer corps and recruited to fill a manpower shortage position in the Veterans Administration. Employee seeks reimbursement of real estate expenses occasioned by sale of his old residence in Maryland and purchase of new residence in California. Reimbursement is denied because as a commissioned officer in the PHS, employee was a member of a uniformed service whose pay and allowances are prescribed by Title 37 of U.S. Code, which does not provide for such reimbursement. Consequently, claimant was not embraced by reimbursement provisions of sections 5721-5733 of Title 5, applicable to civilian employees of Government only. Thus, purported transfer was a separation from uniformed service followed by subsequent new appointment, and there is no authority for reimbursement of real estate expenses for new appointees 462

QUARTERS
Temporary
Incident to employee transfers. (*See* OFFICERS AND EMPLOYEES, Transfers, Temporary quarters)

Page

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Dependents
Husband and wife both members of armed services
A member of the uniformed services who is separated from his or her spouse, who is also a member, and who has legal custody of one or more of their children on whose behalf the spouse contributes no support, is entitled to a basic allowance for quarters at the with-dependents rate, regardless of the spouse's entitlement, provided that the dependents on account of whom the increased allowance is paid do not reside in Government quarters. 315
With dependent rate
Child support payments by divorced member
Both parents service members
Dual payment prohibition for common dependents
Where two married Air Force members with common dependents subsequently divorce, only one member may receive basic allowance for quarters based on the children as dependents, unless the class of common dependents is divided by separation agreement or court order. The member paying child support, which is stated to be on behalf of one child but is sufficient to qualify for entitlement under the applicable regulation, is entitled to the basic allowance for quarters at the with dependents rate while the member having custody of the children receives the allowance at the without dependents rate. ... 350
Eligibility
Separation of husband and wife
Legal sufficiency of separation agreement
A properly executed separation agreement generally is legally sufficient as a statement of the parties' marital separation and resulting legal obligations, for the purpose of determining entitlement to a basic allowance for quarters, even though the agreement was not issued or sanctioned by a court. However, a member's entitlement to basic allowance for quarters based on child support obligation created by a separation agreement should be reassessed following court action since the court is not bound by the agreement in awarding custody 315

RECORDS
Correction
Military personnel. (*See* MILITARY PERSONNEL, Record correction)

RELEASES
Proper release or acquittance
Survivor Benefit Plan annuitant
Mentally incapacitated adult
It is necessary that a good acquittance be obtained when payments are made to persons under Federal law. When amounts due a minor are involved, a good acquittance results through payment to the minor's natural guardian without formal court appointment, provided that the laws of the State of domicile authorize that procedures as a means of obtaining acquittance. However, payments may not be made to one claiming to act as natural guardian and custodian of a

RELEASES—Continued Page
Proper release or acquittance—Continued
Survivor Benefit Plan annuitant—Continued
Mentally incapacitated adult—Continued
payee, when the payee is in fact an adult suffering from mental illness. 44 Comp. Gen. 551 is modified in part. 302

SET-OFF
Contract payments
Recovery of overpayments
Procuring agency should attempt to recover payments that are in excess of the fair and reasonable value of services rendered under illegal contract provision. This can be done by setting off overpayments against any other amounts due the contractor, and may be done any time up to 10 years in appropriate circumstances. 337

STATUTORY CONSTRUCTION
Prospective effect of acts
Section 145 of Pub. L. 97-377, Dec. 21, 1982, which amends 5 U.S.C. 5546a(a) to provide that certain instructors at the Federal Aviation Academy are entitled to premium pay, is effective from the date of enactment and is not retroactive to Aug. 3, 1981, as were the original provisions of 5 U.S.C. 5546a(a) added by subsec. 151(a) of Pub. L. 97-276. The general rule is that an amendatory statute is applied prospectively only unless a retroactive construction is required by express language or by necessary implication. Neither the express language nor the legislative history supports the view that the amendment made by sec. 145 is retroactively effective. 396

SUBSISTENCE
Per diem
Military personnel
Temporary duty
Appropriation limitations
Exceptions
The holding in 60 Comp. Gen. 181 regarding the limitation on use of appropriated funds to pay per diem or actual expenses where an agency contracts with a commercial concern for lodgings or meals applies to members of the uniformed services as well as to civilian employees of the Government. However, because 60 Comp. Gen. 181 was addressed specifically to the per diem entitlement of civilian employees under 5 U.S.C. 5702, the Comptroller General will not object to per diem or subsistence expense payments already made to military members that exceed the applicable statutory or regulatory maximums as the result of an agency's having contracted for lodgings or meals. 60 Comp. Gen. 181 is extended. 308

SURVIVOR BENEFIT PLAN (*See* PAY, Retired, Survivor Benefit Plan)

TRANSPORTATION
Air carriers
Foreign
American carrier availability. (*See* TRAVEL EXPENSES, Air travel, Fly America Act)

TRANSPORTATION—Continued Page

Household effects

Actual expenses

Allowance basis

Cost comparison

Timeliness of comparison

Employee who made his own arrangements and shipped his own household goods on Oct. 1, 1981, should not have his entitlement limited to the low-cost available carrier on the basis of a GSA rate comparison made 2 months after-the-fact. GSA regulations require that cost comparisons be made as far in advance of the moving date as possible, and that employees be counseled as to their responsibilities for excess cost if they choose to move their own household goods. However, cost of insurance must be recouped 375

Commutation

Actual expenses *v.* commuted rate

Administrative determination

Employee of Dept. of Energy made his own arrangements and shipped his household goods on Oct. 1, 1981, under travel orders which stated that the "method of reimbursing household goods costs to be determined." Agency obtained a cost comparison from General Services Administration (GSA) after-the-fact in Dec. 1981, and reimbursed employee for his actual expenses rather than the higher commuted rate. Under GSA regulation effective Dec. 30, 1980, agency's action was proper since its determination was consistent with the purpose of the new regulation; to limit reimbursement to cost that would have been incurred by the Government if the shipment had been made in one lot from one origin to one destination by the available low-cost carrier on a Government Bill of Lading. Decisions of this Office allowing commuted rate prior to effective date of GSA regulation will no longer be followed 375

House trailer shipments, etc.

Purchase costs

Employee may be reimbursed, in connection with the purchase of a sailboat to be occupied as a residence upon transfer of station, those expenses which would be reimbursed in connection with the purchase of a residence on land. Expenses necessary for the operation of utilities and of launching the boat may be reimbursed as miscellaneous expenses under FTR para. 2-3.1b. 289

Reimbursement

Ownership at time of transportation requirement

Although it is held that a boat may qualify as a mobile dwelling under 5 U.S.C. 5724(b), an employee who purchased a sailboat to be occupied as his residence incident to permanent change of station is not entitled to freight charges in transporting the boat from the place of construction to the delivery site where it was launched since the employee was not the owner of the boat at the time it was transported 289

Military personnel

Trailer shipment

Residence use requirement

Transferred member of the Air Force may be reimbursed the cost of transporting the houseboat he uses as his dwelling under 37 U.S.C.

TRANSPORTATION—Continued Page
Household effects—Continued
Military personnel—Continued
Trailer shipment—Continued
Residence use requirement—Continued
409, which permits the transportation at Government expenses of a mobile home dwelling, because it is determined that a boat may qualify as a "mobile home dwelling" under the law. 48 Comp. Gen. 147 is overruled and regulations issued to implement that decision need not be applied so as to exclude payment for tranporting boats which are used as residences. 292

TRAVEL EXPENSES
Air travel
Fly America Act
Employee's liability
Travel by noncertificated air carriers
Involuntary re-routing
En route home from temporary duty overseas an employee indirectly routed his travel to take annual leave in Dublin and scheduled his return flight from Shannon to the United States on a U.S. air carrier. Upon arrival in Shannon the employee was informed that his scheduled flight had been discontinued and the carrier scheduled the employee's transoceanic travel on a foreign air carrier. Since there were no alternative schedules at that point under which the employee could have traveled on U.S. air carriers available under the Comptroller General's "Guidelines for Implementation of the Fly America Act" for the transoceanic portion of his travel, there need be no penalty for the use of a foreign air carrier. 496
Constructive travel costs
Computation
Because of medical condition affecting employee's eardrums, he was unable to travel by air to a temporary duty station. Instead of traveling by train, he chose to travel by privately owned vehicle, with reimbursement limited to constructive cost of travel by common carrier. Since travel by air was not available to employee, the "appropriate" common carrier transportation under FTR para. 1-4.3 was rail transportation, and the constructive cost of rail rather than air transportation is thus applicable. 393
Medical treatment. (*See* MEDICAL TREATMENT, Officers and employees, Travel expenses)
Military personnel
Per diem. (*See* SUBSISTENCE, Per diem, Military personnel)
Subsistence
Per diem. (*See* SUBSISTENCE, Per diem, Military personnel)
Temporary duty
Per diem. (*See* SUBSISTENCE, Per diem, Military personnel, Temporary duty)
Vehicles
Use of privately owned
Mileage reimbursement claim. (*See* MILEAGE, Travel by privately owned automobile)

Page

VEHICLES
Government
Home to work transportation
Government employee
Misuse of vehicles
Liability of employees
Because so many agencies have relied on apparent acquiescence by the Congress during the appropriations process when funds for passenger vehicles were appropriated without imposing any limits on an agency's discretion to determine the scope of "official business," and because dicta in GAO's own decisions may have contributed to the impression that use of cars for home-to-work transportation was a matter of agency discretion, GAO does not think it appropriate to seek recovery for past misuse of vehicles, (except for those few agencies whose use of vehicles was restricted by specific Congressional enactments). This decision is intended to apply prospectively only. Moreover, GAO will not question such continued use of vehicles to transport heads of non-cabinet agencies and the respective seconds-in-command of both cabinet and non-cabinet agencies until the close of this Congress 438
Prohibition
GAO disagrees with the legal determinations of officials of the Departments of State and Defense that it is proper under 31 U.S.C. 1344(b) for agency officials and employees (other than the Secretaries of those departments, the Secretaries of the Army, Navy, and Air Force, and those person who have been properly appointed or have properly succeeded to the heads of Foreign Service posts) to receive transportation between their home and places of employment using Government vehicles and drivers. GAO construes 31 U.S.C. 1344(b) to generally prohibit the provision of such transportation to agency officials and employees unless there is specific statutory authority to do so 438
Exemptions
GAO disagrees with the Legal Advisor of the Department of State and the General Counsel of the Defense Department who have interpreted the phrase "heads of executive departments," contained in 31 U.S.C. 1344(b)(2), to be synonymous with the phrase "principal officers of executive departments." Congress has statutorily defined the "heads" of the executive departments referred to in 31 U.S.C. 1344(b)(2) (including the Departments of State and Defense) to be the Secretaries of those departments 438
GAO disagrees with the State Department's Legal Advisor and the General Counsel of the Defense Department who have construed the phrase "principal diplomatic and consular officials," contained in 31 U.S.C. 1344(b)(3), to include those high ranking officials whose duties require frequent official contact on a diplomatic level with high ranking officials of foreign governments. GAO construes 31 U.S.C. 1344(b)(3) to only include those persons who have been properly appointed, or have properly succeeded, to head a foreign diplomatic, consular, or other Foreign Service post, as an ambassador, minister, chargé d'affaires, or other similar principal diplomatic of consular official 438

VEHICLES—Continued Page
Government—Continued
Offical use determination
Administrative discretion
The State Department's reliance on the GAO decision in 54 Comp. Gen. 855 (1975) to support the proposition that the use of Government vehicles for home-to-work transportation of Government officials and employees lies solely within the administrative discretion of the head of the agency was based on some overly broad dicta in that and several previous decisions. Read in context, GAO decisions, including the one cited by the State Department's Legal Advisor, only authorize the exercise of administrative discretion to provide home-to-work transportation for Government officials and employees on a temporary basis when (1) there is a clear and present danger to Government employees or an emergency threatens the performance of vital Government functions, or (2) such transportation is incident to otherwise authorized use of the vehicles involved 438

VOLUNTARY SERVICES
Personal funds in interest of Government. (*See* PAYMENTS, Voluntary)

WORDS AND PHRASES
"Dependent child"
Survivor Benefit Plan
Under the Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, eligible beneficiaries include a deceased service member's "dependent child," a term defined by statute as including one who is incapable of supporting himself because of mental or physical incapacity incurred before his twenty-second birthday while pursuing a full-time course of study. Given this definition, a military officer's daughter who suffered a mental breakdown at the age of 19 during the summer vacation following the successful completion of her first year of college, and who was thus rendered incapable of self-support, may properly be considered a "dependent child" eligible for an annuity under the Plan. 44 Comp. Gen. 551 is modified in part 302
"Fitness for duty" medical examination
An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed 294
"Heads of executive departments"
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WORDS AND PHRASES—Continued Page

"Heads of executive departments"—Continued
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Home to work transportation
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"Principal diplomatic and consular officials"
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"Total financial package"
Transferred employee traded a former residence as downpayment on purchase of residence at new official station. He seeks reimbursement of $163 premium paid for title insurance on property traded as a downpayment. Title insurance is generally reimbursable to a seller under the provisions of FTR para. 2-6.2c. However, since employee did not obtain the title insurance on his residence at his old duty station at time of transfer but on a former residence, he is not entitled to reimbursement of the fee paid for title insurance under "total financial package" concept enunciated in *Arthur J. Kerns,* 60 Comp. Gen. 650 (1981), and subsequent similar decisions 426

Veterans Administration funding fee
The Veterans Administration (VA) questions whether the VA funding fee, consisting of one-half of 1 percent of the amount of a loan guaranteed or insured by the VA, required under the Omnibus Budget Reconciliation Act of 1982, is reimbursable under para. 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended. We hold that the funding fee is not reimbursable under FTR para. 2-6.2d because the fee constitutes a finance charge under Regulation Z (12 C.F.R. 226.4 (1982)) 456

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