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COMPTROLLER GENERAL OF THE UNITED STATES

Charles A. Bowsher

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Vacant

ACTING GENERAL COUNSEL

Harry R. Van Cleve

DEPUTY GENERAL COUNSEL

Harry R. Van Cleve

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Rollec H. Efros

Seymour Efros

Richard R. Pierson

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[B-206980]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Assigned to Government Quarters—Partial Allowance Entitlement—Single Quarters Assigned—Cost/Value Consideration

A service member who is single, without dependents, was assigned to a Government-leased apartment. While the apartment did not qualify as family quarters because of size, it still substantially exceeded the single member housing standards of the Air Force. In line with the purpose for which a basic allowance for quarters at the partial rate (37 U.S.C. 1009) is payable and the reasoning in 56 Comp. Gen. 894, since the member's housing here is of a significantly higher value than would normally be assigned him, the member is not entitled to a basic allowance for quarters at the partial rate while so assigned. 56 Comp. Gen. 894, expanded.

Matter of: Sergeant Luis C. Armendariz, USAF, November 4, 1982:

This action is in response to a request for a decision from the Accounting and Finance Officer, Travis Air Force Base, concerning the entitlement of Sergeant Luis C. Armendariz, USAF, to receive a basic allowance for quarters at the partial rate while occupying Government-leased quarters. This matter has been assigned control number DO-AF-1387 by the Department of Defense Military Pay and Allowance Committee.

The question asked is whether a basic allowance for quarters at the partial rate is payable to a single member when he is assigned to quarters which substantially exceed the minimum criteria for single-type housing but are not considered adequate by the service concerned for classification as family-type quarters because they include only one bedroom. In this circumstance we hold that basic allowance for quarters at the partial rate is not payable.

According to the submission, in January 1980 Sergeant Armendariz, who is single and is a military recruiter, was assigned to a Government-leased, one-bedroom apartment in Modesto, California. The authorized Air Force on-base quarters for a single sergeant would contain a minimum of 135 square feet, would probably consist of a room shared with another member, would have no kitchen facilities, and would have only a central latrine. The leased one-bedroom apartment has approximately 600 square feet of space and includes a bedroom, living room, kitchen and bathroom.

It is pointed out that while the leased apartment is much larger than is the typical quarters of a single member, it is not considered to be adequate by Air Force standards for accompanied personnel, since as a rule such personnel are not assigned to one-bedroom quarters.

It is also pointed out that the cost to the Government of leasing Sergeant Armendariz's apartment is $225 a month. If he had secured his own housing the maximum basic allowance for quarters which he could receive at that time and at that location would

have been $123.90. In view of the fact that the apartment cost the Government more than the basic allowance for quarters otherwise payable, doubt is expressed as to whether Sergeant Armendariz is entitled to the partial basic allowance for quarters.

Subsection 403(a) of title 37, United States Code, authorizes payment of a basic allowance for quarters, but subsections 403 (b) and (c) limit that entitlement to those who are not assigned adequate Government quarters and those not on field or sea duty.

Section 1009(c)(2) of title 37, United States Code (previously section 1009(d)), authorizes a partial basic allowance for quarters as follows:

> Under regulations prescribed by the President, whenever the President exercises his authority under paragraph (1) of this subsection to allocate the elements of compensation specified in subsection (a) of this section on a percentage basis other than an equal percentage basis, he may pay to each member without dependents who, under section 403 (b) or (c) of this title, is not entitled to receive a basic allowance for quarters, an amount equal to the difference between (1) the amount of such increase under paragraph (1) of this subsection in the amount of the basic allowance for quarters which, but for section 403 (b) or (c) of this title, such member would be entitled to receive, and (2) the amount by which such basic allowance for quarters would have been increased under subsection (b)(3) of this subsection if the President had not exercised such authority.

The legislative history of 37 U.S.C. 1009(d) shows that its purpose was to authorize payment of a partial rate basic allowance for quarters to members without dependents when they were not entitled to a regular basic allowance for quarters because they were assigned to single-type Government quarters. This was in recognition of the fact that the value of Government-furnished bachelor quarters, barracks, and quarters furnished in the field and at sea are of lesser value than the basic allowance for quarters the single member loses when he is required to occupy such quarters.

In 56 Comp. Gen. 894 (1977), question 3 related to whether a single member without dependents was entitled to the partial rate when assigned to family-type quarters. That question was answered in the negative. We pointed out that Congress enacted those provisions because the value of Government single quarters was substantially less than the value of family quarters. Thus, if a single member is assigned to family-type quarters he is not entitled to the partial rate since he is receiving the benefit of the higher value housing.

In the present case, while the Government-leased housing was not family-type housing, it was housing of a significantly higher value. Both the cost to the Government and accommodations provided were greater than that which would normally be authorized for single members without dependents. As we found in the case where a single member is assigned family-type quarters, the partial quarters allowance was not intended to apply to a member who is receiving the benefit of quarters substantially exceeding the value of ordinary bachelor quarters.

Therefore, while Sergeant Armendariz, as a single member, occupies an apartment rented by the Government for his use while on recruiting duty, he is not entitled to a basic allowance for quarters at the partial rate.

[B-207034]

Courts—Jurors—Fees—Military Personnel in State Courts—Pay Deduction

A military member on active duty receiving full pay and allowances served as a juror in a State court. He received $35 in fees for his jury duty. The member may not keep the fees because he was not in a leave status and he is therefore receiving additional compensation for performing his duties presumably during normal working hours.

Matter of: Sergeant Richard P. Stevenson, USAF, November 4, 1982:

Captain H. L. Bean, Accounting and Finance Officer, Mountain Home Air Force Base, Idaho, requests an advance decision as to whether a military member may keep fees received for serving as a juror in a State court while he was receiving full military pay and allowances. We conclude that a military member not in leave status may not receive compensation from a State court for the time during which he is on active duty and receiving full military pay and allowances.

This case was forwarded to us by the Air Force Accounting and Finance Center and has been assigned submission No. DO-AF-1388 by the Department of Defense Military Pay and Allowance Committee.

Sergeant Richard P. Stevenson, USAF, served as a juror in January, 1982, in a district court of the State of Idaho. For his services Sergeant Stevenson received $35 in fees and $0.80 in transportation expense. The Accounting and Finance Office subsequently withheld $35 from Sergeant Stevenson's pay and placed it in a suspense account until it is determined whether payment of the jury fees may be accepted by the member.

The Accounting and Finance Officer notes that in a publication of April 18, 1980, issued by the Air Force Accounting and Finance Center, it is indicated that jury fees could be retained by the member. However, the opinion was expressed by Judge Advocate personnel that the fees could not be retained.

The information we have indicates that Sergeant Stevenson was not in a leave status during the period he performed jury duty. We assume that the jury duty was performed during his normal duty hours. Thus, we have a situation in which the member, while receiving active duty pay and allowances, is excused from performing his normal duties to perform jury duty. The question is whether he may keep compensation paid by the court.

While no specific statute deals with this situation, we find that the case is controlled by the established principle that the earnings of an employee in excess of his regular compensation which are gained in the course of or in connection with his services belong to the employer. We have consistently held this rule to be applicable to Federal employees and members of the uniformed services. Amounts received in addition to pay for services as a military member are received for the United States and should be paid into the Treasury. B-200013, April 15, 1981; 49 Comp. Gen. 819 (1979); 37 *id.* 29 (1957).

In the absence of specific authority for retention of jury fees, members of the uniformed services who do perform jury duty and who are not in a leave status should turn the amounts received into the Treasury. This result is similar to the result in the case of civilian employees who are authorized court leave to perform jury duty (5 U.S.C. 6322) but have the jury fees (as distinguished from expenses) credited against the pay to which they are otherwise entitled (5 U.S.C. 5515). See 52 Comp. Gen. 325 (1972).

Accordingly, Sergeant Stevenson is not entitled to the amount withheld from his pay equal to the amount received for the jury duty. The voucher may not be paid and will be retained here.

[B-209345]

Contracts—Protests—Authority to Consider—Federal Reserve System—Member Bank Contracts

General Accounting Office (GAO) will not decide protest against contract award by Federal Reserve Bank, despite GAO audit authority, because GAO account settlement authority (the basis of GAO bid protest jurisdiction) does not extend to Federal Reserve System banks.

Matter of: Northern Courier Service, Inc., November 9, 1982:

Northern Courier Service, Inc., protests the award of a contract by the Federal Reserve Bank of Minneapolis.

Our bid protest jurisdiction is based on our authority to adjust and settle accounts and to certify balances in the accounts of accountable officers under Pub. L. No. 97-258, § 3526, 96 Stat. 964 (1982) (to be codified at 31 U.S.C. § 3526; formerly 31 U.S.C. §§ 71, 72 and 74 (1976)). This section, derived from the Dockery Act of 1894, sets forth the limits of our account settlement authority. We are authorized to settle the "public accounts" of Government agencies, departments, or independent establishments, as these terms are further defined by law, but the definitions explicitly exclude Government corporations or agencies subject to the Government Corporation Control Act. Pub. L. No. 97-358, § 3501, 96 Stat. 959 (1982) (to be codified at 31 U.S.C. § 3501; formerly 31 U.S.C. § 65a (1976)). In other words, unless a later enactment specifically subjects an entity not covered under the Dockery Act to our settlement authority, we do not have such authority.

The member banks of the Federal Reserve System clearly do not fit under the above-mentioned authorities. Section 9 of the Federal Reserve Act, 12 U.S.C. § 330 (1976), states:

> * * * Subject to the provisions of this chapter and to the regulations of the [Federal Reserve] board made pursuant thereto, any bank becoming a member of the Federal reserve system shall retain its full charter and statutory rights as a State bank or trust company, and may continue to exercise all corporate powers granted it by the State in which it was created * * *

As a State-chartered corporation, therefore, a Federal Reserve bank is entitled, like any other corporation, to sue and be sued, to conduct its ordinary house-keeping affairs as it sees fit and to make business decisions involving the expenditure of its own funds which are not subject to further review.

The protester cites, as grounds for the assumption of jurisdiction by GAO, a 1978 amendment to the Federal Banking Agency Audit Act, Pub. L. No. 97-258, § 714, 96 Stat. 890 (1982) (to be codifed at 31 U.S.C. § 714; formerly 31 U.S.C. § 67(e)(1)(b) (Supp. III 1979)). Under that amendment the Comptroller General is now required to *audit* the transactions of the "Federal Reserve Board, all Federal Reserve banks, and their branches and facilities." Paragraph (2) of that subsection provides that Federal Resreve banks, among others, are considered to be agencies *"for purposes of this subsection."* [Italic supplied.]

But audit authority is quite different from settlement authority, particularly with respect to the consequences of a finding that a financial transaction was improper. With account settlement authority, the Comptroller General can take exception to an improper transaction and hold the certifying officer or relevant official personally liable for the amount of money improperly expended. Moreover, his decisions on the expenditures for appropriated funds are binding on the executive branch. Under the new audit authority conferred by the 1978 amendment to the Federal Banking Agency Audit Act, the Comptroller General is required to report his findings to the Congress, but is not given the power to take exception to the accounts of the entities he audits.

In view of the above, we conclude that our account settlement authority does not extend to Federal Reserve System banks and, therefore, we have no authority to decide to protest against a contract award by such banks. See *Gamco Industries,* B-198145, March 28, 1980, 80-1 CPD 235.

The protest is dismissed.

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[B-206658]

Records—Retention—General Records Schedule 2—Time and Attendance—Three-Year Period Extension—Agency Requests *v.* Schedule Change

Federal Aviation Authority questions whether time and attendance (T&A) reports should be retained more than 3 years in order to adjudicate claims subject to 6-year statute of limitations. Without additional information, we would not recommend any change in the General Records Schedule 2 with regard to extending retention period for T&A reports from 3 to 6 years.

Records—Retention—Extension of Period—Claim Settlement Pending

Where claims have been filed by or against the Government, records must be retained without regard to record retention schedules until the claims are settled or the agency has received written approval from General Accounting Office. See 44 U.S.C. 3309.

Records—Recordkeeping Requirements—Fair Labor Standards Act—Claims Accruing Beyond 3 Years—Denial Propriety—Absence-of-Records Basis

Where an agency destroys T&A reports after 3 years, the agency may not then deny claims of more than 3 years on the basis of absence of official records. Claims are subject to a 6-year statute of limitation, and pertinent payroll information may be available on other records which are retained 56 years. Furthermore, the Fair Labor Standards Act (FLSA) requires that the employer keep accurate records, and, in the absence of such records, the employer will be liable if the employee meets his burden of proof. The Office of Personnel Management may wish to reconsider and impose a specific FLSA recordkeeping requirement on Federal agencies.

Matter of: Retention of Time and Attendance Records, November 10, 1982:

The issues in this decision are (1) whether time and attendance (T&A) reports should be retained 6 years instead of the present 3 years in order to adjudicate claims such as overtime under the Fair Labor Standards Act (FLSA), and (2) if such records are kept only 3 years, whether claims beyond 3 years may be denied due to the absence of official records. We hold that (1) T&A reports need not be kept more than 3 years except where claims have been filed, but that (2) claims beyond 3 years may not be dismissed because T&A reports are no longer available.

This decision is in reponse to a request from George B. Fineberg, Chief, Financial Systems Division, Office of Accounting, Federal Aviation Administration (FAA). The request states that according to the General Records Schedule 2 issued by the General Services Administration (GSA), T&A reports are to be destroyed after General Accounting Office (GAO) audit or 3 years, whichever is sooner. However, T&A reports are used in adjudicating claims such as retroactive entitlement to overtime under the FLSA, the FAA notes

that such information would be unavailable for claims extending beyond 3 years. See, for example, B-200112, December 21, 1981, involving retroactive coverage under the FLSA for certain FAA employees subject to a 6-year statute of limitations. Therefore, the FAA questions (1) whether T&A files should be destroyed in accordance with the GSA schedule without regard to claims which have or may be submitted for up to a 6-year period, and (2) if such records are destroyed, whether claims for more than 3 years may be denied because official files to adjudicate the claim are no longer available.

Under the provisions of 44 U.S.C. Chapter 31, Federal agencies shall maintain adequate records of its activities, and under the provisions of 44 U.S.C. Chapter 33, certain records shall be disposed of according to schedules agreed to by the Administrator of General Services. See 44 U.S.C. § 3303a (1976) and 41 C.F.R. Part 101, Subpart 101-11.4 (1981). The General Records Schedule 2 (Payrolling and Pay Administration Records) issued pursuant to 41 C.F.R. § 101-11.404-2 provides the disposition schedule for certain types of records common to many or all agencies including T&A report files (Standard Form 1130 or equivalent) which, under the Schedule, are to destroyed after GAO audit or when 3 years old, whichever is sooner.

These records disposition schedules are developed by the National Archives and Records Service (NARS) of GSA following consultation with GAO and other appropriate agencies (41 C.F.R. § 101-11.404-2(b)), and, in fact, the question of the retention of T&A reports for 6 years, instead of 3 years because of claims under the FLSA, has been the subject of recent inquiries by NARS to our Office in 1979 and 1981. In our responses to the 1979 inquiry from NARS, we recommended that it issue specific exemptions to those agencies which had requested a 6-year retention period for T&A reports, and that it monitor the experience to determine the usefulness of retaining T&A reports an additional 3 years. In 1981, NARS again requested extension of the T&A reports retention period to 6 years but without providing any information on the usefulness of T&A reports in adjudicating claims and the usefulness of the longer retention period. We advised NARS that without that additional information we could not determine whether T&A reports should be retained an additional 3 years.

In some situations T&A reports may not be determinative of an employee's entitlement to overtime under the FLSA in prior years since generally T&A reports will reflect only the regular and overtime hours for which the employee is being paid. Thus, if an employee claims overtime under the FLSA for hours of work not compensable under title 5, United States Code, such hours probably will not be reflected on prior T&A reports, and these reports would have limited usefulness in adjudicating these claims. Other considerations in determining whether to retain T&A reports an addi-

tional 3 years are the cost of storage and/or microfilming the T&A reports and whether the cost is justified in view of the questionable value of using such records in adjudicating claims.

As we advised NARS in 1979 and 1981, we have no objection to permitting agencies which request extensions to retain T&A reports for 6 years, but in the absence of additional information justifying the need for a permanent extension to 6 years, we would not recommend any change in the General Records Schedule 2 with regard to the retention of T&A reports at this time. If the FAA or any other agency wishes to experiment with a 6-year retention period, they should request an extension of time from NARS. See 41 C.F.R. § 101-11.406-8.

We should point out that the requirement to destroy T&A reports after 3 years pursuant to the schedule does not apply to situations where claims have been filed by or against the Government. Such records must be retained until the claims have been settled, unless written approval is received from our Office. 44 U.S.C. § 3309 (1976).

A second question posed by the FAA is, if T&A reports are retained only 3 years, may an agency reject a claim more than 3 years old on the basis that agency records are no longer available? For the reasons stated below, we hold that agencies may not treat claims in this manner.

First, if agencies are permitted to deny claims filed more than 3 years after the claim accrues based on the absence of official records, the effect will be to reduce the statute of limitations from 6 years to 3 years. See 31 U.S.C. § 71a (1976). In addition, agencies cannot argue that *no* records are available since the Individual Pay Card (Form 1127), which is kept 56 years, indicates earnings and deductions in dollar amounts on a pay period basis.

Finally, the Fair Labor Standards Act imposes on an employer the requirement to keep adequate records. 29 U.S.C. § 211(c) and 29 C.F.R. Part 516 (1981). The FLSA regulations issued by the Office of Personnel Management (5 C.F.R. Part 551 (1982)) do not impose upon Federal agencies any specific recordkeeping requirements, but our decisions have applied the burden of proof recognized in Federal courts where the employer has failed to meet his statutory duty to keep accurate records. See *Civilian Nurses,* 61 Comp. Gen. 174 (1981); 60 *id.* 523 (1981); *Christine D. Taliaferro,* B-199783, March 9, 1981. In those decisions we have held that where the employee presents acceptable evidence that he worked the overtime and was not compensated, the burden of proof shifts to the employer. Where the agency has failed to keep accurate records, the employee's claim must be paid. *Taliaferro, supra.*

We note that in the proposed regulations issued by OPM, agencies would have been required to keep "complete and accurate records of all hours worked by its employees" for a period of 6 years. 45 Fed. Reg. 49580, 49582, July 25, 1980. However, when the

final regulations were issued, this recordkeeping requirement was removed based, in part, on advice from our Office that the present records retention schedule was sufficient for our use in settling pay claims. 45 Fed. Reg. 85659, 85660, December 30, 1980. However, in view of our recent decisions, OPM may wish to reconsider and impose a specific recordkeeping requirement on Federal agencies. See also our report HRD-81-60, May 28, 1981, recommending statutory and administrative changes to strengthen employer recordkeeping in private sector FLSA cases.

[B-207967]

Transportation—Household Effects—What Constitutes—Bicycle/Utility Trailers

Employee who was transferred to a new duty station claims reimbursement for the cost of transporting a bicycle trailer to his new residence and for temporary storage of the trailer prior to shipment. The costs of transporting and storing a bicycle trailer are reimbursable by the Government since such a trailer may properly be categorized as "household goods," as defined in para. 2-1.4h of the Federal Travel Regulations (FTR). Moreover, the FTR does not specifically prohibit the shipment of a bicycle trailer as household goods.

Matter of: Guy T. Easter—Reimbursement For Shipment and Storage of Utility Trailer, November 16, 1982:

This decision is in response to a request from Mr. Larry C. Greer, Acting Regional Finance Officer with the Bureau of the Reclamation, United States Department of the Interior, in Denver, Colorado, concerning the propriety of reimbursing Mr. Guy T. Easter for the cost of moving and storing a utility trailer incident to his transfer. The issue presented is whether a bicycle trailer is included in the definition of "household goods" and therefore eligible to be transported at Government expense. For the reasons stated below, a bicycle trailer may be considered as household goods, as that term is defined in the applicable regulations. Therefore, the voucher submitted by Mr. Easter may be certified for payment if otherwise correct.

Mr. Easter, an employee of the Bureau of Reclamation, was transferred from Walla Walla, Washington, to Guernsey, Wyoming, effective March 11, 1982. Mr. Easter was authorized relocation expenses, including the cost of transporting his household goods from his home in Milton-Freewater, Oregon, to his new duty station in Guernsey. Mr. Easter arranged to have his household goods shipped to Guernsey by a commercial carrier on March 5, 1982. Among those household goods was a 3 foot by 3 foot trailer weighing 720 pounds, which has been alternately referred to as a "utility" trailer (by the Bureau of Reclamation) and a "bicycle" trailer (by Mr. Easter).

In processing Mr. Easter's travel and transportation voucher, the Bureau of Reclamation determined that the trailer in question was

not "household goods," as defined by the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), paragraph 2-1.4h. Therefore, the Bureau concluded that Mr. Easter should not have been reimbursed for the cost of transporting his trailer. Since Mr. Easter received a travel advance, the Bureau issued a Bill for Collection in the amount of $302.51 in an effort to recoup the cost of transporting the trailer.

Instead of paying the Bureau as directed on May 28, 1982, Mr. Easter submitted a reclaim voucher requesting that the Government reconsider its disallowance of the rejected portion of his claim. Mr. Easter's appeal was based on his classification of the trailer as a bicycle trailer, and his belief that "bicycles are a part of household goods and a bicycle trailer, the purpose of which is to haul the bicycles, should be covered under household goods."

Prior to making its determination, the Bureau has asked this Office to rule on the propriety of paying Mr. Easter's claim. We conclude that the reclaim voucher submitted by Mr. Easter may be certified for payment.

Section 5724 of Title 5, United States Code (1976), provides that an employee permanently transferred from one official duty station to another in the Government's interest is entitled to transportation (including temporary storage) of his household goods and personal effects at Government expense, or reimbursement therefor, subject to such conditions and limitations as the head of the agency concerned may prescribe. Some uncertainty has arisen concerning the types of goods for which transportation is authorized under section 5724, since the provision itself contains no definition of the term "household goods."

In an effort to clarify this matter, the General Services Administration provided a definition of "household goods" in the regulation it promulgated as part of the Federal Travel Regulations in order to implement section 5724. Paragraph 2-1.4h of the FTR defines household goods as personal property which may be transported legally in interstate commerce and which belongs to an employee and his immediate family at the time of shipment. Specifically, the provision states that the term "household goods" "includes household furnishings, equipment and appliances, furniture, clothing, books, and similar property. It does not include * * * such items as automobiles, station wagons, motorcycles and similar motor vehicles, airplanes, mobile homes, camper trailers, boats, birds, pets, livestock, cordwood [or] building materials * * *."

In this case, Mr. Easter states that his trailer should not be categorized along with cars, boats, mobile homes and camper trailers (and thus, should not be excluded from the category of "household hoods") since it is not motorized and by law does not require a license plate. (The agency disputes the latter claim, stating that a trailer license is indeed required in Wyoming.) Mr. Easter further maintains that since he uses his trailer to haul bicycles, which

should be classifed as "household goods," for recreational purposes, the trailer should be viewed as "household goods" as well. We agree.

We have previously stated that "household goods and personal effects" are general terms, not lending themselves to precise definition. The terms vary in scope depending upon the context in which they are used. It has been our view, however, that in ordinary and usual usage, they refer to particular kinds of personal property associated with the home and person. As generally understood, the term "household goods" refers to furniture and furnishings or equipment used in and about a place of residence for the comfort and accommodation of the members of a family. 53 Comp. Gen. 159 (1973); 52 *id.* 479 (1973).

We have held that certain items in the nature of personal recreation equipment may come within the definition of household goods. See *Henry L. Dupray,* B-191724, March 29, 1979, in which we allowed reimbursement for the shipment of an employee's portable swimming pool. Notwithstanding the lack of preciseness of the term, however, we note that various items which may be used by employees for recreational purposes, such as boats, airplanes, motorcycles and camper trailers, are specifically excluded from the scope of "household goods" under paragraph 2-1.4h of the FTR. See 44 Comp. Gen. 65 (1964). In this regard, we note that the applicable regulations contain no specific language which would prohibit shipment of a bicycle or utility trailer as household goods.

Although we have not issued a decision specifically addressing the transportation of bicycles, we believe that bicycles owned by an employee are the type of personal property so closely associated with his home and person as to come within the scope of the term "household goods." Furthermore, we believe that a trailer used by an employee to haul personal recreational equipment such as bicycles may also be defined as household goods, since the purpose of such a trailer is to facilitate the employee's use of his recreational equipment. The fact that a trailer may or may not be licensed is not necessarily relevant to such a determination. Rather, in categorizing an item, we must look primarily to the character of that particular good. In this case, we have found a sufficient connection between the employee's trailer and his residence and family to justify classification of the trailer as "household goods." In this regard, see also our decision B-154294, June 26, 1964, in which we allowed reimbursement for the shipment of an employee's luggage trailer.

Although Mr. Easter was authorized transportation of 11,000 pounds of household goods in connection with his transfer, he actually shipped only 5,860 pounds of furnishings to Guernsey, including the trailer in question. Since Mr. Easter's furnishings were thus well under the 11,000 pound limit, we have no objection to reimbursing him for shipment of the 720 pound bicycle trailer.

Accordingly, the voucher submitted by Mr. Easter may be certified for payment if otherwise correct.

[B-208016]

Mileage—Travel by Privately Owned Automobile—Between Residence and Terminal—To Closest Serviceable Airport—Reimbursement Limitation—Taxicab One-Way Fare

Employee was driven to and picked up from airport when he went on temporary duty travel. Airport used was 45 miles from employee's home and 33 miles from duty station. There was a closer airport in same town as duty station, but appropriate air carrier service was not available. Use of commercial bus to airport actually used had been found to be neither convenient nor cost effective by transportation officer. Fact that airport used was not the closest to duty station does not preclude reimbursement of round-trip mileage under Volume 2 of the Joint Travel Regulations, para. C4657, or under Federal Travel Regulations para. 1-4.2(c)(1), where airport used was nearest serviceable airport offering appropriate carrier service. Reimbursement is still limited to no more than one-way taxi fare. B-177562, May 21, 1973, is distinguished.

Matter of: Ralph Palmer—Mileage Between Home and Common Carrier Terminal, November 16, 1982:

The Finance and Accounting Officer, Pine Bluff Arsenal, Arkansas, requests an advance decision concerning an employee's claim to reimbursement for mileage for round-trip travel by a privately owned vehicle (POV) from the employee's home in Pine Bluff, Arkansas, to the air terminal in Little Rock, Arkansas, en route to Rock Island, Illinois, for temporary duty. The question is whether the full 90-mile round trip is reimbursable, in light of the fact that another airfield was located much closer, and other common carrier service was available to Little Rock. We hold that the claim is payable because the Little Rock airport is the nearest airport having the needed carrier service, and travel by POV was reasonable and advantageous to the Government.

The case was forwarded to us through the Per Diem, Travel and Transportation Allowance Committee, and was assigned PDTATAC Control No. 82-16.

Mr. Ralph Palmer, a civilian employee of the Pine Bluff Arsenal, was ordered to travel on temporary duty from his home in Pine Bluff, Arkansas, to Rock Island, Illinois, for a stay of 6 days. Mr. Palmer's wife drove him to the airport in Little Rock, and met him there on his return. The airport was 45 miles from Mr. Palmer's home and 33 miles from the Pine Bluff Arsenal.

The Comptroller of the Army is uncertain of the propriety of Mr. Palmer's claim in that there is an airfield in Pine Bluff, Arkansas, which is only 13 miles away from the Arsenal. The Army has interpreted our prior decisions as limiting round-trip POV travel to terminals which are close to the duty station, and which are serviced by local common carriers.

The Finance and Accounting Officer of the Pine Bluff Arsenal has determined that it is not cost effective to utilize the Pine Bluff air terminal due to limited flight availability. At the time of Mr. Palmer's travel, there was one daily flight available to Memphis, Tennessee, and one daily flight available to Little Rock. As for alternate ways to get to Little Rock, including all related costs the travel expenses would be: on commercial bus, $84.70 round trip; military taxi or sedan $79.68; and commercial taxi $103.50. The cost of two round trips by private vehicle from Mr. Palmer's residence to the Little Rock airport was $40.50. Clearly, POV travel, in this case, is advantageous to the Government.

Both the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR), and Volume 2 of the Joint Travel Regulations (2 JTR), permit reimbursement of mileage when a POV is used for travel to and from a terminal. Paragraph C4657 of 2 JTR, as it was stated at the time of Mr. Palmer's travel, provided:

1. *General.* When a privately owned automobile is used in lieu of a taxicab incident to the travel of an employee to or from a terminal, payment on a mileage basis is authorized at the rate of $.225 per mile * * *

2. *Reimbursement on a mileage basis.* Mileage for the use of a privately owned automobile will be payable to an employee for the distance the vehicle is actually driven incident to delivering the employee to or returning the employee from a terminal from which he departed and/or to which he returned from temporary duty * * * provided that the total payment does not exceed the cost of the related one way cab fares between the points involved. (Change 183, January 1, 1981.)

This paragraph is in accord with FTR para. 1-4.2(c)(1). Both provisions speak in terms of round-trip reimbursement, with no stated requirement that the terminal be a local terminal. These provisions standing alone would appear to authorize reimbursement for the round trips which were incident to the delivery and return of Mr. Palmer. B-146088, June 27, 1961. The only limitation imposed upon reimbursement is that it may not exceed one-way taxi fare. The fare to Little Rock would be $51.75, and Mr. Palmer's claim was for $40.50.

The Army paid half of the claim upon the theory that the trip to Little Rock was a "leg of the journey" en route to Rock Island. The decision was based on B-177562, May 21, 1973. That case concerned a civilian employee of Fort Hood who drove 124 miles round trip to the Austin, Texas, air terminal en route to Washington, D.C., for temporary duty. In sustaining the claim it was stated that:

* * * it does not appear that the Austin airport would be considered a terminal serving Fort Hood since there are common carrier terminals much nearer to that installation. In the circumstances travel from Fort Hood to Austin would be considered one leg of the authorized travel rather than travel to a terminal. We do not view the regulations concerning travel to terminals as applicable to travel between the point of origin and a distant terminal which serves an area other than the point of origin.

Several of our cases have attempted to define "local terminal." See 47 Comp. Gen. 469 (1968); 45 *id.* 840 (1966); 44 *id.* 445 (1965); 41 *id.* 588 (1962); 40 *id.* 7 (1960). These cases are instructive, but not controlling, as they do not address the provision at issue here. A

primary consideration in those cases was the presence or absence of local common carriers servicing the air terminal. The record here shows that, although there is commercial bus service between Pine Bluff and Little Rock, the local Transportation Officer has found it neither convenient nor cost effective to use such service. In *Earl Cleland,* B-201281, July 7, 1981, we upheld an agency in requiring the use of convenient commercial bus service, where the employee's home was 200 miles from the air terminal used.

In clarifying our position, it must first be noted that the local terminal limitation is not part of the regulations. The limitation is implied rather than expressed. The policy behind the limitation is the prevention of unnecessary use of distant terminals. An employee may have personal reasons for wishing to drive to a terminal in another area. Further, it was wasteful to ignore readily available service at a closer terminal, or to fail to use other convenient and serviceable common carrier service for a leg of a trip.

In the present case, no service was available to Rock Island, Illinois, from the Pine Bluff air terminal. It was necessary for Mr. Palmer to travel to Little Rock, which had the closest servicable air terminal. Our prior decision, B-177562, May 21, 1973, concerning travel from Fort Hood to Austin, is distinguishable in that other closer, servicable terminals were apparently available. Therefore, the rule to be applied is that round-trip POV travel will be reimbursed only when the local or nearest servicable terminal is utilized. The reimbursement is limited to the cost of one-way taxi fare to the authorized terminal. The rule does not limit the use of local common carrier terminals. The Government is not required to utilize the closest common carrier terminal of several that may be available in the same metropolitan area. However, nonlocal terminals utilized must be the nearest serviceable terminal to warrant reimbursement. If the nearest servicable terminal is so distant that another mode of transportation would clearly be more advantageous to the Government, the travel orders should prohibit reimbursement of round-trip POV travel to the distant terminal.

Accordingly, since Little Rock was the nearest servicable air terminal to Pine Bluff Arsenal, and Mr. Palmer's claim was less than the corresponding one-way taxi fare, the claim may be paid.

[B-207350]

Leases—Negotiation—Historic Building Preference—Conditions for Application—Omitted in Solicitation—Cost Consideration

Solicitation for lease of office space stating that preference will be given to space in historic buildings is deficient when it does not indicate how preference will be applied. However, protester cannot reasonably assume that preference is absolute and that an offer of historic space will be accepted over offer of non-historic space, regardless of price.

General Services Administration—Services for Other Agencies, etc.—Space Assignment—Including Leasing—Public Buildings Cooperative Use Act—Historic Building Preference

When applicable statute states that General Services Administration should acquire space in historic buildings when "feasible and prudent" compared with available alternatives, agency has not abused its discretion or violated statute in making award to firm offering non-historic space at substantially lower price.

Contracts—Negotiation—Offers or Proposals—Evaluation—Factors Not in Solicitation—Oral Disclosure During Negotiations

When offeror is orally informed of an agency's requirement during negotiation, notwithstanding its absence in solicitation, offeror is on notice of the requirement and General Accounting Office will deny protest based on failure to state it in the solicitation.

Contracts—Offer and Acceptance—Acceptance—What Constitutes Acceptance—Space Leasing—Inspection, etc. Not Acceptance

Inspection of offered space and/or request for alternate offer does not constitute an acceptance or implied lease by the Government. Acceptance of an offer must be clear and unconditioned.

Matter of: Southland Associates, November 17, 1982:

Southland Associates protests an award to First Federal Savings and Loan Association of Durham, North Carolina, for lease of office space to be occupied by the Internal Revenue Service. Southland alleges that the General Services Administration failed to give a required preference to its proposed site, which was listed in the National Register of Historic Places. We dismiss the protest in part and deny the remainder.

The GSA issued the solicitation, No. RNC81067, on August 14, 1981, requesting a minimum of 4,400 and a maximum of 4,532 square feet of modern, air conditioned office space and one outside parking space in the central business district of Durham. On December 4, GSA amended the solicitation to state that "preference will be given to offers of space in buildings listed in the National Register of Historic Places * * *." Southland submitted an offer of $7.45 per square foot per year for space on the basement level of the Kress Building, a Durham landmark listed in the National Register.

After inspecting the space, the IRS, which at that time was housed in the First Federal Building, advised GSA that it objected to moving to the Kress Building due to high relocation costs and access problems the space would cause for the physically handicapped. In addition, the IRS objected to the basement location because of the lack of windows, which it argued would adversely affect morale and worker productivity. The IRS stated that if GSA insisted on relocating it, above-grade space in the Kress Building

with adequate access should be considered. GSA concluded the basement space did not meet the minimum needs of the Government.

Southland was orally advised of GSA's determination and was requested to submit an offer for above-grade space. On March 12, 1982, Southland submitted an alternative offer of $9.70 per square foot for second floor space in the Kress Building. First Federal, however, offered a succeeding lease of $8.14 per square foot, with one parking space at $150, for an effective rate of $8.17 per square foot per year. The contracting officer consequently sought and obtained permission to waive the historic building preference, since the Government would save $23,728 over 5 years by entering into a succeeding lease with First Federal.

Grounds of Protest:

Southland alleges that GSA failed to apply the stated preference for space in an historic building and that such action was an abuse of GSA's discretion, violating applicable law and regulations. Southland also argues the solicitation did not clearly state that basement space would not meet the Government's requirements. Finally, Southland argues that the basement space offered was fully accessible, that windows are not vital to the mission of IRS, and that its offer of basement space at $7.45 a square foot was the most advantageous to the Government.

GSA's Leasing Policies:

The contracting officer's determination to continue to lease space in the First Federal Building was based on an internal memoradum in which GSA's Public Buildings Service attempted to reconcile seemingly inconsistent policies favoring (1) historic buildings and (2) succeeding leases, Section 102(a) of the Public Buildings Cooperative Use Act of 1976, 40 U.S.C. § 601a (1976), provides that GSA shall acquire and utilize space in buildings of historic significance unless use of such space would not prove "feasible and prudent" compared with available alternatives. The GSA handbook, "Requisition of Leasehold Interest in Real Property," June 22, 1981, also requires an historic site preference unless leasing space in such a building represents poor business judgment. However, GSA's policy on succeeding leases, established by memorandum of February 9, 1981, favors retaining agencies' locations when leases expire if their needs have not changed and if the rental rate is competitive with the local market.

Considering these two policies, the Commissioner of the Public Buildings Service, by memoradum of February 1, 1982, directed that a succeeding lease should be preferrred over an historic site offer unless acceptable space could be obtained in an historic building at a price more advantageous than that of an existing lessor. Relying on this memorandum, the contracting officer rejected

Southland's offer for second floor space, even through the Kress Building was an historic site.

GAO Analysis:

We believe GSA's amended solicitation was deficient in that it did not state how the historic building preference would be applied. We do not, however, believe that it was reasonable for Southland to assume that this was an absolute preference, and that an offer of space in the Kress Building would be accepted over any offer of space in a non-historic building, regardless of price. To the extent that it did so, it risked rejection of its offer.

The statute on which the preference is based requires acquisition of space in historic buildings to be feasible and prudent, compared with available alternatives. In view of the fact that Southland's offer of second floor space was $1.53 a square foot higher than that of First Federal—without considering relocation costs—we do not find that GSA abused its discretion or violated the statute in determining that it was neither feasible nor prudent to accept the offer of space in the Kress building.

For the future, however, we are recommending that GSA clearly indicate in its solicitations how the historic building preference will be applied, specifically referencing the Public Buildings Service memorandum interpreting the Cooperative Use Act to mean that space in an historic building should not be acquired when its price is greater than that of nonhistoric space. In addition, if relocation costs are to be considered in comparing an historic building with a succeeding lease, GSA should include an evaluation factor for these costs in its solicitations.

GSA concedes that the protested solicitation did not clearly state that basement space would not meet the Government's needs, and agrees that this requirement should have been reflected in an amendment. However, we consistently have held that when an offeror is informed of an agency's requirement during negotiations, notwithstanding its absence in a solicitation, the offeror is on notice of the requirement. Washington School of Psychiatry, B-192756, March 14, 1979, 79-1 CPD 178; *ADP Network Services, Inc.*, B-193817, March 7, 1979, 79-1 CPD 163. Southland was in fact informed of IRS's need for above-grade space during the negotiation period and was allowed to submit an alternative offer. We therefore cannot find the award improper on this basis.

Southland states that because GSA and IRS inspected the proposed site, and because it was requested to submit prices for space on the second floor of the Kress Building, it understood that its offer would be accepted by GSA and acted to its detriment upon this understanding. GSA's actions, however, did not constitute an acceptance or create an implied contract between Southland and GSA. The acceptance of a contractor's offer by the Government

must be clear and unconditioned. *Laurence Hall d/b/a/ Halcyon Days,* B-189697, February 1, 1978, 78-1 CPD 91.

Southland further argues that its offer of $7.45 a square foot for space in the basement of the Kress Building should have been accepted because it was the lowest submitted by a responsible offeror. However, since this was an offer to provide something other than what the Government required, the fact that Southland's price was lower than First Federal's is irrelevant. See *Q.S. Incorporated,* B-203503, May 4, 1982, 82-1 CPD 417.

Finally, Southland's challenge to IRS's requirements for windows and handicapped access is, in our opinion, untimely. We consider GSA's oral advice to Southland that the basement space was unacceptable to be the equivalent of an amendment to the solicitation. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1982), require protests regarding amendments to be filed before the next closing date for receipt of proposals. By analogy, Southland's protest should have been filed not later than the due date for its offer of second floor space. Since Southland did not challenge the requirements by that time, we dismiss this basis of protest.

The remainder of the protest is denied.

[B-200923]

Courts—Judges—Compensation—Increases—Comparability Pay Adjustment—Precluded Under Pub. L. 97-92

Question presented is entitlement of Federal judges to 4 percent comparability adjustment granted to General Schedule employees in Oct. 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. Since sec. 140, a provision in an appropriations act, constitutes permanent legislation, Federal judges are not entitled to a comparability increase on Oct. 1, 1982, in the absence of specific congressional authorization.

Matter of: Federal Judges—Applicability of October 1982 Pay Increase, November 23, 1982:

ISSUE

The issue presented is whether section 140 of Public Law 97-92 (28 U.S. Code 461 note) precludes a comparability adjustment of 4 percent on the salaries of Federal judges. We hold that since section 140 is permanent legislation and since it precludes pay increases for Federal judges unless specifically authorized by Act of Congress, Federal judges are not entitled to a comparability adjustment of 4 percent effective on October 1, 1982, in the absence of specific congressional authorization.

BACKGROUND

This decision is in response to a request from the Honorable William E. Foley, Director, Administrative Office of the United States Courts. The Administrative Office seeks reconsideration of our

letter of October 1, 1982, B-200923, to the Chairmen of the Senate and House Appropriations Committees in which we interpreted section 140 of Public Law 97-92 as permanent legislation precluding any comparability adjustment to the salaries of Federal judges unless the increases are specifically authorized by the Congress.

Pay Adjustments for Federal Judges

The salaries of Federal judges are subject to adjustments by two mechanisms. First, the Federal Salary Act of 1967, Public Law 90-206, Title II, 81 Stat. 624, provides for a quadrennial review of executive, legislative, and judicial salaries. See 2 U.S.C. §§ 351-361 (1976). Second, the Executive Salary Cost-of-Living Adjustment Act, Public Law 94-82, Title II, 89 Stat. 419 (1975), provides that salaries covered by the Federal Salary Act of 1967 will receive the same comparability adjustment on October 1 of each year as is made to the General Schedule under the provisions of 5 U.S.C. § 5305. See 5 U.S.C. § 5318 and 28 U.S.C. § 461.

Since 1976 the Congress has imposed a series of "caps" on executive, legislative, and judicial branch salaries by limiting the use of appropriated funds to pay the salaries of high-level executive, legislative, and judicial branch officials to the rate payable on September 30 of that year. However, with respect to Federal judges covered by Article III of the Constitution, certain of these pay caps have been held to have "diminished" their compensation which, by operation of Public Law 94-82, automatically increased each October 1 by the amount of comparability adjustment granted to the General Schedule. In *United States* v. *Will et al.*, 449 U.S. 200 (1980), the Supreme Court held that pay caps enacted on or after October 1 violated the compensation clause of Article III of the Constitution by purportedly repealing a pay increase that had already taken effect.

Thus, the Supreme Court overturned the pay caps enacted in 1976 and 1979 as to Federal judges, and, pursuant to the *Will* decision, the salaries of Federal judges were also increased in 1980 and 1981 for the same reason.

Section 140

Subsequent to the October 1981 pay increase, the Congress enacted Public Law 97-92, December 15, 1981, 95 Stat. 1183, a continuing appropriations act which provides in section 140 as follows:

> Sec. 140. Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: *Provided*, That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or any Justice of the Supreme Court.

Since the pay cap for 1982 is contained in Public Law 97-276, § 101(e), October 2, 1982, a measure enacted after October 1, Federal judges would receive the comparability adjustment of 4 percent pursuant to the *Will* decision except for the operation of section 140, quoted above. There has been no specific authorization by Congress of a pay increase for Federal judges this year.

Arguments of Administrative Office

The Administrative Office urges that we modify our interpretation of section 140 and rule that Federal judges are entitled to a 4 percent increase effective October 1, 1982. The Administrative Office argues that, in view of the presumption against permanent legislation contained in appropriations measures, the presumption against implied repeals of preexisting statutes, and the weight of the statutory cost-of-living adjustment mechanism contained in Public Law 94-82, Federal judges are entitled to this recent pay increase.

DISCUSSION

As we stated in our opinion letter of October 1, 1982, we have held that a provision contained in an annual appropriations act may not be construed to be permanent legislation unless the language or the nature of the provision makes it clear that such was the intent of the Congress. Usually when the word "hereafter" or other words indicating futurity are used, or when the provision is of a general character bearing no relation to the object of the appropriation, the provision may be construed to be permanent legislation. 36 Comp. Gen. 434, 436 (1956); 32 *id.* 11 (1952); 26 *id.* 354, 357 (1946); and 10 *id.* 120 (1930). Section 140 of Public Law 97-92, quoted above, contains such words of futurity, and the provision bears no direct relation to the object of the appropriations act in which it appeared, a continuing appropriations act for fiscal year 1982. Thus, we conclude that section 140 is permanent legislation.

The only legislative history we have discovered on this provision supports that interpretation. The provision was introduced for the stated purpose of precluding pay increases for Federal judges unless they are specifically authorized by Congress. Cong. Rec. S13373 (November 13, 1981) (statement of Sen. Dole).

Furthermore, an interpretation that section 140 is not permanent legislation would strip the section of any legal effect. Section 140 was included in a continuing resolution which was enacted on December 15, 1981, and which expired on September 30, 1982. The next applicable cost-of-living pay increase under existing law for Federal judges would be effective October 1, 1982, after the expiration of the continuing resolution. Thus, if section 140 were not held to be permanent legislation, the section would have no legal effect since it would have been enacted to prevent increases during a

period when no increases were authorized to be made. There exists a presumption against interpreting a statute in a way which renders it ineffective. *Federal Trade Commission* v. *Manager, Retail Credit Co.,* 515 F.2d 988, 994 (D.C. Cir. 1975).

In that regard, we are unable to agree with the view of the Administrative Office of the United States Courts that the inclusion of section 141 in House Resolution 370, which raised certain executive salaries, is sufficiently correlated to section 140 of that resolution so as to permit an interpretation different than expressed in this decision. Section 141 dealt exclusively with salaries of persons whose pay corresponds with the rate of basic pay for levels III, IV, and V of the Executive Schedule; we do not believe that Members of Congress voting on the continuing resolution needed any reassurance that section 141 did not also deal with salaries of Federal judges. Nor do we find the fact of the possibility of later enactment of a regular appropriation measure for the judiciary as persuasive in this matter.

As noted by the Administrative Office, our interpretation of section 140 constitutes an implied repeal of that portion of Public Law 94-82 providing annual comparability adjustments to Federal judges, and implied repeals are not favored by the courts, particularly when contained in appropriations acts. See *Will, supra,* and cases cited therein. However, it is well settled that Congress can amend substantive legislation by a provision in an appropriations act. *United States* v. *Dickerson,* 310 U.S. 554 (1940); *City of Los Angeles* v. *Adams,* 556 F.2d 40 (D.C. Cir. 1977); *Skoko* v. *Andrus,* 638 F.2d 1154 (9th Cir. 1979); *Bickford* v. *United States,* 656 F.2d 636 (Ct. Cl. 1981).

The Administrative Office has cited numerous cases in which the courts have overturned appropriations measures which would essentially override or repeal substantive legislation. *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153 (1978); *Environmental Defense Fund, Inc.* v. *Froehlke,* 473 F.2d 346, 353-354 (8th Cir. 1972); *Environmental Defense Fund* v. *Tennessee Valley Authority,* 468 F.2d 1164 (6th Cir. 1972). However, in each of these cases the courts addressed whether continuing appropriations for certain public works projects constituted a congressional decision to complete the projects despite the provisions of various environmental statutes. For example, in *TVA* v. *Hill,* the Supreme Court rules that expressions of the appropriations committees in committee reports could not be equated with statutes enacted by Congress, and a mere lump-sum appropriation providing continued funding for the project would not override the protection of the Endangered Species Act. 437 U.S. 153, 190-191.

The provision in question in this case, section 140 of Public Law 97-92, is specific in nature and by its express terms serves to bar future pay increases for Federal judges except as specifically authorized by Congress. We do not find that section 140 is similar or

analogous to appropriations measures which the courts have overruled in prior cases.

Finally, we note that our interpretation of section 140 has been adopted by the Executive Branch in publishing the pay schedules effective on or after October 1, 1982. Exec. Order No. 12387, October 8, 1982, 47 Fed. Reg. 44981, October 13, 1982.

Accordingly, we conclude that section 140 of Public Law 97-92 bars implementation of any pay increase for Federal judges as of October 1, 1982, in the absence of a specific authorization by Congress.

[B-205348]

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

The Office of Personnel Management (OPM) has found that certain air traffic control specialists who worked 8-hour shifts were not afforded lunch breaks. No lunch break was established and because of staffing shortages lunch breaks were either not taken or employees were frequently interrupted while eating by being called back to duty so that no *bona fide* lunch break existed. This Office accepts OPM's findings of fact unless clearly erroneous. Therefore, since the employees worked a 15-minute pre-shift briefing they are entitled to overtime compensation under the Fair Labor Standards Act, 29 U.S.C. 201 et seq., for hours worked in excess of 40 in a week as no offset for lunch breaks may be made.

Matter of: John L. Svercek, *et al.*—Bona Fide Meal Periods Under Fair Labor Standards Act, November 23, 1982:

Mr. Don E. Hansen, Chief, Fiscal Standards Branch, Financial Systems Division, Office of Accounting, Federal Aviation Administration (FAA), has requested our decision as to whether six FAA Air Traffic Control Specialists may be paid overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* (1976). For the reasons which follow we hold that the employees may be compensated for overtime work under FLSA insofar as their claims are not barred by 31 U.S.C. § 71a (1976).

BACKGROUND

Mr. Hansen has forwarded the claims of Messrs. John L. Svercek, George C. Spencer, Stanley G. Johnston, Joseph G. Keller, Wallace E. Hamel and Arthur W. DeAlfi for overtime compensation for attending pre-duty briefings prior to the beginning of their scheduled shifts at FAA's Binghamton, New York, facility. These claims had been investigated by the Office of Personnel Management's (OPM) New York Regional Office. Under 29 U.S.C. § 204(f) (1976), the Civil Service Commission, now OPM, is authorized to administer FLSA with respect to individuals employed by FAA.

After an investigation into the employee's claims, OPM's New York Regional Office issued compliance orders to the FAA finding

that the pre-duty briefings were compensable work periods under FLSA and requesting that FAA pay overtime compensation for such work were appropriate. The FAA now forwards a rebuttal of OPM's compliance orders and has asked us to review the matter.

The New York Regional Office of OPM found that during the period May 1, 1974 to July 1, 1976, FAA policy, as expressed in FAA Facility Operations Handbook 7230.1c, required that air traffic controllers report for a pre-duty briefing prior to the beginning of their scheduled shift. The FAA did not prescribe the length of the briefings but the briefings varied in length from 5 to 20 minutes. The employees here did not report to or depart from the facility at the same time, and they were permitted to depart prior to the scheduled end of the shift if they were properly relieved.

The OPM then found that an average of 15 minutes for the pre-shift briefings was a reasonable claim and that the time in these pre-shift briefings meets the FLSA definition of "work" that is suffered or permitted and which should have been compensated under the provisions of 29 U.S.C. § 207(a)(1).

In reaching its decision, OPM's New York Regional Office considered FAA's contention that time spent on lunch breaks should have been used to offset the compensable pre-shift work. The FAA submitted a memorandum from the current Chief of the Binghamton Tower stating that for the period September 1975, through July 1976, "[i]t was standard practice that all employees received approximately 30 minutes for lunch break." The FAA further contended that all of the employees spent their lunch breaks away from the work site in a cafeteria which was physically located in the same building but on a different floor and that, although the employees were on call while at lunch in the cafeteria, they were never actually recalled to the post of duty during a lunch break.

In response to the FAA's contentions, the employees asserted that they did not routinely have a lunch break because of staffing shortages during the day shift, which meant that there were not enough Controllers to relieve those on each position and that the nonsupervisory Controller often acted as Controller-in-Charge, and because the midnight shift was staffed by only one employee.

After reviewing the facts, the New York Regional Office of OPM found that the FAA had not adequately supported its contention that the employees were given and in fact took a *bona fide* meal period. The compliance order states that:

> * * * Under the FLSA for a bona fide meal period the employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily thirty minutes or more is long enough for a bona fide meal period, although a shorter period may be long enough under special conditions. An employee is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. However, it is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period. In this case, we note that the official policy of the FAA is that Air Traffic Controllers work a straight

eight hour tour of duty with no time off for a duty-free meal period. Although the employees may be relieved from their work positions, they are subject [to] callback. When contacted by this office, the Chief of the Binghamton Tower stated that his policy was to discourage the employees from eating at the work station, that this policy was never formally promulgated in writing, that he took no special measures to enforce it, that the length of the meal period was never definitely established but was approximately thirty minutes on the average but was sometimes more and sometimes less, that the employees remained subject to recall although this happened infrequently, that the Facility was short staffed during the period in question after his arrival in September of 1975, and that he could not speak to the policy in effect for the rest of the period (May, 1974, to September, 1975). *Since the meal period did not have a fixed length and since the employees remained subject to recall, the employees were not completely relieved from duty and the time does not constitute a bona fide meal period under the FLSA.* [Italic supplied.]

In challenging OPM's analysis, the FAA relies on the statement from the Chief of the Binghampton Tower that "[i]t was standard practice that all employees received approximately 30 minutes for lunch break." The Chief also stated that his policy was to discourage employees from eating at the work station and that although the employees did remain subject to recall during the meal periods, they were actually recalled quite infrequently. FAA also takes issue with the principle enumerated in the above-quoted compliance order which we have underscored. Rather, FAA relies on our decision *Raymond A. Allen, et al.,* B-188687, September 21, 1977, (modified at *Raymond A. Allen, et al.,* B-188687, May 10, 1978), in which we held that where an agency can establish that an employee was afforded a lunch break away from his post, the mere fact that the employee was on call and not permitted to leave the building or premises will not defeat a setoff for the lunch breaks unless the employee demonstrates that the break was substantially reduced by responding to calls. The FAA states:

It was our agency's position that the line of reasoning demonstrated in this CG decision whereby breaktime must be substantially reduced by actually responding to calls, was applicable in these cases. This differs significantly from the line of reasoning demonstrated by OPM in their compliance orders where they state that the employees were not completely relieved from duty since they remained subject to recall.

The FAA notes that *Raymond A. Allen,* above, involved employees claiming overtime under 5 U.S.C. § 5542 and not FLSA. Since, however, FAA was unaware of any decision under FLSA addressing the concept of offsetting compensable pre-shift overtime work by meal breaktime, FAA concluded that the above title 5 concept was applicable here.

OPM'S COMMENTS

In view of OPM's responsibility to administer FLSA we requested a report on the compliance order and FAA's question on the validity of the order from OPM's General Counsel. We were particularly interested in the General Counsel's views on the validity of the compliance order's statement that since the meal period did not have a fixed length, and since the employees remain subject to recall, the employees were not completely relieved from duty, and

that time does not constitute a *bona fide* meal period under the FLSA.

The General Counsel reported that the above statement incompletely recapitulated the discussion preceding it as it did not reflect the finding that the employees did not routinely have a lunch break because of staffing shortages. He states that when the employees had no lunch break, they of course, were not recalled, thus partially explaining the infrequency of recalls to duty. He explained further that:

> * * * in addition to the absence of certainty with respect to whether there would be a lunch break, there was no certainty of when it could be taken, or for how long. The perception of the employees that the lunch time was uncertain and not to be regarded as free time was reinforced by the fact that they are scheduled to work a straight eight-hour tour of duty with no time off for a duty-free meal period. This fact, along with the lack of definiteness as to the establishment or promulgation of the meal period policy, suggests that neither the agency nor the employees regarded the lunch break as bona fide; it was not recognized in the scheduling of work; nor in any agency writing.
>
> * * * [Moreover] there were additional facts which support the findings but which are not reflected in the report.* * * the "lunch breaks,"—on the sporadic and infrequent occasions that they were taken—were not gererally taken at the "cafeteria [in reality the airport coffee shop] located away from the work-site." There was rarely opportunity for doing so. Rather, the meals, when not taken at the work-site itself, were taken in the "ready room" (also called the "hot plate" or "radar range" room), right near the work-site, so that the employee could resume his duties at a moment's notice.* * * the "lunch periods," so called, were so subject to desultory interruption that they did not even amount to "rest periods," which FAA recognizes to be "work time."
>
> The agency "policy" of discouraging the eating of meals at the work-site was not enforced by those who made the policy, simply because it was rare that there was anyone to relieve the employee so that he could go any appreciable distance from the work-site.
>
> * * * * * * *
>
> There was no suggestion or pretense that the "lunch break" was "free time," and the characterization of it as such, * * * was "very much an afterthought on the part of FAA." * * * as a result of a compliance order dated July 11, 1980, the agency paid, under identical circumstances, overtime compensation to another employee, [omitted], and raised no question whatever about free meal periods.

In view of the above recitation of the facts, it seems clear that OPM did not reach its decision that the lunch periods were work solely because the breaks did not have a fixed length and because the employees were subject to recall. Rather the cumulative evidence that no lunch breaks in fact existed and the employees actually worked through their "breaks" stimulated OPM's decision.

FAA'S POSITION

The FAA does not appear to object to the finding that the pre-duty briefings were compensable hours of work under FLSA but rather FAA contends that the employees did regularly take meal periods which should offset the pre-duty work time performed by the employees. The question, therefore, is whether the employees did in fact have *bona fide* lunch breaks which are not compensable hours of work and which would serve to offset the work done in the pre-duty briefings.

OPINION

We note initially that Federal agencies must compute an employee's overtime benefits under both FLSA and Title 5 of the United States Code and the employee is to be paid according to the computation most beneficial to the employee. 54 Comp. Gen. 371 (1974). Title 5 concepts do not govern the method of computing entitlements under FLSA. *Paul G. Abendroth, et al.,* 60 Comp. Gen. 90 (1980). Therefore, to the extent that our decision *Raymond A. Allen* prescribes rules of entitlement to overtime compensation under Title 5, such rules are not to be applied to questions of entitlement to overtime compensation under FLSA.

The courts have held that under FLSA, the essential consideration as to whether a meal period is *bona fide* is whether the employees are in fact completely relieved from work for the purpose of eating regularly scheduled meals[1] and whether the mealtime is free and uninterrupted.[2]

We have held that we will not disturb OPM's findings of fact on FLSA claims unless clearly erroneous and the burden of proof lies with the party challenging the findings. *Paul Spurr,* 60 Comp. Gen. 354 (1981). Considering OPM's further explanation of the facts in this case, 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, we accept OPM's finding that the employees did not have *bona fide* lunch breaks and were therefore performing compensable work during their supposed lunch breaks.

Since these employees did not have *bona fide* meal periods which would allow an offset, we agree with OPM that these employees are entitled to overtime compensation under FLSA for hours worked in excess of 40 in a week when the employees were engaged in pre-shift briefings.

We note, however, that these claims are partially barred by the Barring Act, 31 U.S.C. § 71a (now § 3702), which precludes our Office from considering a claim not received here within 6 years after the date such claim first accrued. 57 Comp. Gen. 441 (1978). Mr. Svercek's claim was first received in this Office on October 1, 1981, the claims of Messrs. Spencer, Keller, Hamel and DeAlfi were received on August 27, 1981, and Mr. Johnston's claim was received on October 21, 1980. Accordingly, payments may be made to the above claimants as to the portion of their claims not barred by 31 U.S.C. § 71a.

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[1] *Blain* v. *General Electric Co.,* 371 F. Supp. 857 (W. D. Ky. 1971)
[2] *Fox* v. *Summit King Mines, Ltd.* 143 F. 2d 926 (9th Cir. 1944)

[B-207527]

Subsistence—Per Diem—"Lodgings-Plus" Basis—Computation—Average Cost of Lodgings—Annual Leave Effect

An employee rented a house for a month while on temporary duty, rather than obtaining lodgings on a daily basis. He went on annual leave for 1 day during the period but continued to occupy the rented lodgings that night. The employee's average cost of lodging for the purpose of per diem computation on a lodgings-plus basis is to be determined by prorating the total rental cost over the 30 days of temporary duty, excluding the day of annual leave, if the agency determines the employee acted prudently in obtaining the lodgings for a month and the cost to the Government does not exceed the cost of suitable lodging at a daily rate.

Matter of: Jesus Soto, Jr.—Per Diem—Computation of Average Cost of Lodgings—Annual Leave, November 29, 1982:

This decision is in response to a request from Ms. Betty Gillham, an authorized certifying officer of the Bonneville Power Administration (BPA), Department of Energy, for advice as to the proper method of determining the average cost of lodging when computing per diem by the lodgings-plus method when an employee goes on annual leave at a temporary duty site.

Jesus Soto, Jr., an employee of BPA in Vancouver, Washington, was assigned to temporary duty in Madras, Oregon, for the month of March 1982. He rented a house for the month at a cost the BPA has informed us did not exceed the cost of renting a suitable motel or hotel at a daily rate. Mr. Soto took 1 day of annual leave "in the field" during this period and the BPA stated it appeared he stayed that evening in the house he had rented. In computing Mr. Soto's average cost of lodging, the BPA prorated the rental cost over 31 days instead of the 30 days used by Mr. Soto. He was therefore reimbursed an amount equal to 30 days of per diem at $42 per day, rather than 30 days at $43, to which he claims entitlement. The BPA has asked if the method of computation used was correct or whether to omit from the computation of average lodging cost the night when Mr. Soto was in an annual leave status at the temporary duty site and was not in a per diem status.

The BPA prorated the rental cost over 31 days, including the day of annual leave, because Mr. Soto occupied the house on that evening. The BPA determined that Mr. Soto's occupancy of the house mandated the inclusion of that day in the computations based on our decision in *James K. Gibbs*, 57 Comp. Gen. 821 (1978). In that decision we held that where an employee on temporary duty rents lodgings by the week or month rather than by the day, but occupies the accommodations for a lesser period because he voluntarily returns home on weekends, the average cost of lodging may be derived by prorating the rental cost over the number of nights the accommodations are actually occupied. This decision reversed prior decisions where we held that in the weekend return situation, the

average cost of lodging had to be derived by dividing the rental cost by the entire number of days in the rental period.

In addition to the *James K. Gibbs* decision, we have permitted the proration of the monthly or weekly rental cost over the nights of actual occupancy rather than the entire rental period where the employee acted reasonably or prudently in renting lodging by the month. In one case we used the lesser number where the employee knew he would be on temporary assignment for less than the rental period (22 days), but the monthly rental was less than the amount the employee would have been required to pay based on the daily rental rate. *Willard R. Gillette,* B-183341, May 13, 1975.

We do not believe that Mr. Soto's occupancy of his rented lodging on the day he was in a non-per diem status requires inclusion of that day in the computation of his average cost of lodging. Paragraph 1-7.3c(1)(a) of the Federal Travel Regulations, FPMR 101-7 (May 1973), provides that in determining the average cost of lodging an agency should "divide the total amount paid for lodgings during the period covered by the voucher by the number of nights for which lodgings were or would have been required while away from the official station."

We believe that inherent in the phrase "for which lodgings were or would have been required" is the concept that the lodgings are required in connection with the temporary duty. Therefore, since Mr. Soto did not perform official business on the day he was on annual leave, his lodgings for that night were not incident to his temporary duty.

Therefore, we conclude that where an employee, such as Mr. Soto, is on annual leave during a temporary duty assignment that day (or days) of annual leave is not to be included in the computation of the average cost of lodging. As in *James K. Gibbs*, and *Willard R. Gillette,* however, we feel this method of computation should be contingent upon a determination that (1) the employee acted prudently in obtaining lodgings for a longer period than a day, and (2) the cost to the Government does not exceed that which would have been incurred had the employee obtained suitable lodgings at the daily rate.

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