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Notice

Effective October 1, 1987, a revised vocabulary has been used to index Comptroller General decisions and other legal documents. The new vocabulary used three types of headings—class headings, topical headings, and subject headings—to construct index entries which represent the subject matter of the documents. An explanation of the revised vocabulary is provided in the GAO Legal Thesaurus. Copies of the Thesaurus are available from the GAO Document Distribution Center, Room 1000, 441 G Street, N.W. 20548, or by calling (202) 275-6241.

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Preface

This pamphlet is one in a series of monthly pamphlets which will be consolidated on an annual basis and entitled *Decisions of the Comptroller General of the United States.* The annual volumes have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. Decisions are rendered to heads of departments and establishments and to disbursing and certifying officers pursuant to 31 U.S.C. 3529 (formerly 31 U.S.C. 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S.C. 3702 (formerly 31 U.S.C. 71). In addition, decisions, on the validity of contract awards pursuant to the Competition In Contracting Act (31 U.S.C. 3554(e)(2) (Supp. III) (1985), are rendered to interested parties.

The decisions included in this pamphlet are presented in full text. Criteria applied in selecting decisions for publication include whether the decision represents the first time certain issues are considered by the Comptroller General when the issues are likely to be of widespread interest to the government or the private sector; whether the decision modifies, clarifies, or overrules the findings of prior published decisions; and whether the decision otherwise deals with a significant issue of continuing interest on which there has been no published decision for a period of years.

All decisions contained in this pamphlet are available in advance through the circulation of individual decision copies. Each pamphlet includes an index-digest and citation tables. The annual bound volume includes a cumulative index-digest and citation tables.

To further assist in the research of matters coming within the jurisdiction of the General Accounting Office, ten consolidated indexes to the published volumes have been compiled to date, the first being entitled "Index to the Published Decisions of the Accounting Officers of the United States, 1894-1929," the second and subsequent indexes being entitled "Index of the Published Decision of the Comptroller" and "Index Digest—Published Decisions of the Comptroller General of the United States," respectively. The second volume covered the period from July 1, 1929, through June 30, 1940. Subsequent volumes have been published at five-year intervals, the commencing date being October 1 (since 1976) to correspond with the fiscal year of the federal government.

Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 64 Comp. Gen. 10 (1978). Decisions of the Comptroller General which do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

Procurement law decisions issued since January 1, 1974, and Civilian Personnel Law decisions whether or not included in these pamphlets, are also available from commercial computer timesharing services.

To further assist in research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

Table of Decision Numbers

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B-208637.2, August 1, 1988

Appropriations/Financial Management

Judgment Payments
■ Attorney Fees
■■ Fiscal-Year Appropriation
■■■ Availability

Section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act, Pub. L. No. 100-202, 101 Stat. at 1329-129, does not preclude the Nuclear Regulatory Commission (NRC) from using fiscal year 1988 funds to pay a court award of attorneys' fees and expenses under the Equal Access to Justice Act resulting from a party's successful challenge to an NRC rule. The party involved was not an intervenor and section 502 only applies to intervenors.

Appropriations/Financial Management

Judgment Payments
■ Attorney Fees
■■ Fiscal-Year Appropriation
■■■ Availability

Section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act, Pub. L. No. 100-202, 101 Stat. at 1329-129, does not preclude the Nuclear Regulatory Commission from using prior year appropriations to pay an award for attorneys' fees and expenses under the Equal Access to Justice Act made in fiscal year 1988 to the extent that such appropriations are available. The restriction in section 502, as amended for fiscal year 1988, would only apply to fiscal year 1988 appropriations and not prior year appropriations.

Appropriations/Financial Management

Appropriation Availability
■ Claim Settlement
■■ Fiscal-Year Appropriation
■■■ Availability

For purposes of determining the availability of fiscal year 1987 funds to pay Equal Access to Justice Act awards for attorneys' fees and expenses that, by virtue of the restriction in section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act, Pub. L. No. 100-202, 101 Stat. 1329-129, could not be paid from fiscal year 1988 funds, the Nuclear Regulatory Commission (NRC) should subtract its total obligations incurred since the effective date of its fiscal year 1987 appropriations act from the amount of the fiscal year 1987 appropriation. If the amount of funds obligated is less than the amount of the 1987 appropriation, the NRC should consider the difference as the amount of the fiscal 1987 appropriation still available for obligation to pay the award. Conversely, the NRC should consider itself as operating on fiscal year 1988 funds if the obligated amount is greater than the fiscal year 1987 appropriation.

Appropriation Availability
■ Claim Settlement
■ ■ Deobligated Balances
■ ■ ■ Availability

The Nuclear Regulatory Commission can use available deobligated fiscal year 1987 funds to pay an award of attorneys' fees and expenses under the Equal Access to Justice Act that could not be paid from fiscal year 1988 funds by virtue of a restriction contained in its fiscal year 1988 appropriations act since deobligated no-year appropriations are available for obligation on the same basis as if they were unobligated balances of no-year appropriations.

Matter of: Whether the Nuclear Regulatory Commission May Pay Attorneys' Fees and Costs

The Nuclear Regulatory Commission (NRC) asks several questions about its authority to pay court awarded attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504; 28 U.S.C. § 2412.

Specifically the NRC asks (1) whether the language of section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act (Appropriations Act), Pub. L. No. 100-202, 100 Stat. 1329-129 (December 22, 1987), precludes the NRC from using fiscal year 1988 funds to pay a court award of attorneys' fees and expenses under the EAJA to the Union of Concerned Scientists (UCS), a party which challenged an NRC rule in court; (2) whether the language of section 502 of the fiscal year 1988 Appropriations Act precludes the NRC from using appropriated funds from previous fiscal years to pay the award described in "(1)"; and (3) if section 502 does not preclude the NRC from using previous fiscal year funds to pay the described award, how the availability of these funds is to be determined. Since this matter is currently in court, the NRC asks for expedited consideration of these issues.[1]

For the reasons given below, we conclude that (1) section 502 does not preclude payment of the award to the UCS since the UCS was not an intervenor in the proceeding in which the award was made; (2) as a general matter the restriction that was added to section 502 of the fiscal year 1988 Appropriations Act does not preclude the NRC from using appropriated funds from previous fiscal years to pay EAJA awards in court proceedings involving appeals of agency administrative decisions; and (3) the availability of prior year funds is to be determined consistent with our guidance in 62 Comp. Gen. 692, 696. This guidance also is

[1] The matter is before the United States Court of Appeals for the District of Columbia. *Union of Concerned Scientists v. NRC*, No. 85-1757 (D.C. Cir.). On April 18, 1988, the NRC filed a petition for rehearing and a suggestion for a rehearing *en banc*. Consistent with our policy to refrain from commenting on matters in litigation unless requested to do so by a court, 63 Comp. Gen. 98, 99 (1983), the Union of Concerned Scientists, in essence, asks that we not comment on the questions the NRC has presented to us. We have decided to give the NRC the advice requested for three reasons. First, since we had previously issued a decision to the NRC on a similar matter, 62 Comp. Gen. 692 (1983), we feel a responsibility to provide additional assistance in determining its applicability in this case; second, the NRC informed the court that it had asked for our opinion on the appropriation issue; and third, the particular issues the NRC raises have not been addressed by the court, nor has the NRC directly raised these issues in its petition for rehearing.

applicable to deobligated prior year funds that become available for reprogramming and reobligation in fiscal year 1988.

Background

Section 161 of the Atomic Energy Act, 42 U.S.C. § 2201, authorizes the NRC to establish rules and regulations governing the possession and use of nuclear materials. In September 1983, the NRC published an advance notice of proposed rulemaking inviting public comment on draft backfitting rules.[2] The term, "backfitting," refers generally to NRC actions that require modification of the design, equipment, or operating procedures of nuclear power reactors previously licensed for construction or operation. Some 14 months later, the NRC published a proposed version of the rule. 49 Fed. Reg. 47,034 (Nov. 30, 1984).

NRC regulations require the NRC to afford interested persons an opportunity to participate in rulemaking proceedings through the submission of statements, information, opinions and arguments. 10 C.F.R. § 2.805. The UCS was one of the groups which chose to comment on the backfitting rule. Although the same regulation also authorizes the NRC to hold informal hearings in rulemaking proceedings, NRC informs us that no such hearings were held on the amended backfitting rule.

After publication of the final backfitting rule, the UCS filed a petition for review of the rule in the United States Court of Appeals for the District of Columbia Circuit.[3] *Union of Concerned Scientists v. NRC,* 824 F.2d 108, 112-13 (D.C. Cir. 1987). The court eventually determined that the rule was invalid and under the EAJA awarded the UCS, as the prevailing party, $60,513.35 in attorneys' fees and costs. *Union of Concerned Scientists v. NRC,* No. 85-1757 (D.C. Cir. filed Mar. 4, 1988).

The EAJA provides that parties to adversary adjudications before agencies or to court actions against the United States, who meet certain net worth and other requirements, are entitled to awards of fees and expenses if the party is a "prevailing party" and the position of the United States was not substantially justified. 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(B). The EAJA also provides that awards "shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise." *Id.* § 504(d); § 2412(d)(4).

The NRC receives a yearly lump-sum appropriation. These are the appropriations used to pay EAJA awards. Moreover, these appropriations have been no-year monies for many years; that is, they are available until expended. *E.g.,* Pub. L. No. 96-367, 94 Stat. 1331, 1344-1345 (Oct. 1, 1980).

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[2] The NRC promulgated its first backfitting rule in 1970. Subsequent criticism led to its amending the rule. *Union of Concerned Scientists v. NRC,* 824 F.2d 108, 110 (D.C. Cir. 1987).

[3] In April 1986, the UCS filed a separate petition for review challenging a chapter of an NRC Manual which relates to the rule. By order of June 20, 1986, the court consolidated the two petitions. 824 F.2d at 113.

The NRC maintains that the UCS was an intervenor and, as such, is barred from payment by section 502 of the 1988 Appropriations Act, Pub. L. No. 100-202, 101 Stat. at 1329-129, the appropriations act under which the NRC receives its appropriations. Section 502 was first added to the general provisions of the Energy and Water Development Appropriations Act for fiscal year 1981. Pub. L. No. 96-367, 94 Stat. 1331, 1345. The provision stated:

> None of the funds of this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act.

This provision remained the same through fiscal year 1987.

In 1983, this Office determined that the NRC was precluded from using appropriated funds to pay EAJA awards of fees or expenses for those intervening in adjudicatory or regulatory proceedings conducted by the NRC. 62 Comp. Gen. 692 (1983). The United States Court of Appeals for the District of Columbia Circuit reached the same result in a similar case. *Business and Professional People for the Public Interest v. NRC,* 793 F.2d 1366 (D.C. Cir. 1986). Both decisions were based on the language in section 502.

Subsequent to the *Business and Professional People* decision, the Federal Energy Regulatory Commission (FERC), which receives funding under the same appropriations act as the NRC, argued before the same court that the quoted language in section 502 precluded it from paying an award of attorneys' fees stemming from court litigation, in contrast to agency proceedings. In *Electrical District No. 1 v. FERC,* 813 F.2d 1246 (D.C. Cir. 1987), the court rejected this argument, in essence holding that the section 502 prohibition applied only to agency proceedings funded under the appropriations act of which section 502 was a part. Since the judicial proceeding brought by the plaintiff was not funded from the FERC appropriations act, the prohibition in section 502 did not apply. *Id.* at 1247-48.

Soon after the *Electrical District* decision, the Congress amended section 502. The fiscal year 1988 Energy and Water Development Appropriations Act added a sentence making it clear that the section 502 bar also applied to judicial proceedings stemming from appeals of administrative decisions to the federal courts. H.R. Rep. No. 162, 100th Cong., 1st Sess. 133 (1987). The new sentence states:

> This prohibition bars payment to a party intervening in an administrative proceeding for expenses incurred in appealing an administrative decision to the courts. Pub. L. No. 100-202, 101 Stat. at 1329-129.

The NRC is concerned that the United States Court of Appeals has erred in making an EAJA award to the UCS, which NRC considers to be an intervenor. It relies primarily on section 502 as amended in 1988. The NRC raises questions both about the specific award to the UCS and about the general applicability of the 1988 amendment to section 502. We will answer these questions seriatim below and include the NRC's position as part of the discussion of each question.

Legal Discussion

1. Whether the language of section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act precludes the NRC from using fiscal year 1988 funds to pay a court award of attorneys' fees and expenses resulting from the UCS' challenge to an NRC rule.

The NRC suggests that the answer to this question depends upon whether the UCS is considered a party appealing an administrative decision to the courts resulting from its intervention in an NRC administrative proceeding. The NRC suggests that rulemaking commenters such as the UCS are intervenors for purposes of section 502's prohibitions. The NRC contends that the *Webster's* dictionary definition of "intervene" as "to become a party to an action or other legal proceeding begun by others for the protection of an alleged interest" encompasses commenters on rulemaking such as the UCS. The NRC also reasons by analogy to section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2339(a), which affords party intervenor status to persons requesting a hearing in any proceeding under the Atomic Energy Act "for the granting, suspending, revoking, or amending of any license or construction permit . . . and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees. . . ."

We disagree that the UCS was a party intervening in an administrative proceeding it appealed to the courts. The word intervenor is a term of art in law to describe "a person who voluntarily interposes in an action or other proceeding." *Black's Law Dictionary* (5th Ed. 1979). Intervention has been judicially defined as the admission of a person not an original party into the proceeding by which the person becomes a party for the protection of some right or interest alleged to be affected by the proceeding. *In re Willacy County Water Control Improvement Dist. No. 1,* 36 F. Supp. 36, 40 (S.D. Tex. 1940).

In this instance, the UCS was not a party intervening in an agency proceeding but merely was a party commenting on the backfitting rule, consistent with NRC procedures on "Rulemaking." 10 C.F.R. § 2.805. We do not view rule commenters as being involved in an agency proceeding in which they can be characterized as intervening parties. The rulemaking procedures do not characterize rule commenters as intervenors nor do they provide for formal hearings.[4] These procedures contrast with NRC regulations on "Rules of General Applicability" for adjudications and hearings, 10 C.F.R. § 2.700 *et seq.,* which specifically allow for participation through intervention in the adjudications and hearings covered by the rule. As the original party that initiated the lawsuit, it also is evident that the UCS is not an intervenor in the action in the United States Court of Appeals for the District of Columbia Circuit.

We recognize that the amendment to section 502 was intended to cover appeals of agency regulatory as well as adjudicatory decisions to the courts, and agree that parties intervening in regulatory proceedings that appeal those decisions to

[4] Although the NRC may convene informal hearings for rule commenters, 10 C.F.R. § 2.805(b), none were held in this instance.

the courts would be covered by the amendment to section 502. Although we agree that rulemaking is one kind of regulatory proceeding, as is enforcement of regulations and licensing, it does not follow that this makes rule commenters parties intervening in agency regulatory proceedings such that the section 502 prohibition would apply. To do so would require a construction of the term "intervene" far beyond its usual meaning in law. It also would further limit payment of EAJA awards without any clear intention from the Congress that this was intended.

We do not think that the Atomic Energy Act provision relied on by the NRC is a persuasive analogy. That provision, like the NRC regulations on adjudicatory proceedings and hearings, contemplates a formal hearing process rather than a procedure for merely commenting on agency rules.

Since we do not think the UCS was a party appealing the decision in an agency administrative proceeding in which it was an intervenor, section 502 of the fiscal year 1988 Appropriations Act is not applicable, and does not bar the NRC from paying the award of attorneys' fees and costs to the UCS.

2. Whether the language of section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act precludes the NRC from using appropriated funds from previous fiscal years to pay the UCS award.

The NRC suggests that the wording of the amendment to section 502 seems to say that the Congress intended that sentence to be a definitive description of what the prohibition in the first sentence means in the context of awards of expenses for litigation relating to agency administrative actions. Thus, for any fiscal year in which section 502 was applicable, its prohibition, as stated in fiscal year 1988, would cover not only parties intervening in agency regulatory or adjudicatory proceedings but also parties intervening in administrative proceedings at the agency level in which administrative decisions were appealed to the courts.

Furthermore, the NRC suggests that because the amending sentence of section 502 does not contain the qualifier "[n]one of the funds of this Act" found in the first sentence, it should be read as a total bar to use of any appropriated funds to pay intervenor litigation expenses, whether from fiscal year 1988 funds or prior year funds rather than only a bar to the appropriations provided by the fiscal year 1988 Appropriations Act.

As we have said, since we do not view the UCS as an intervenor, the prohibition in section 502 included in the NRC appropriations acts from 1981-88 would not apply. As the appropriations used to pay EAJA awards are no-year monies, it is clear that previous years' funds if available may be used to pay the award.

Notwithstanding this conclusion, we understand the NRC question to be more general. That is, assuming an EAJA award may not be paid with fiscal year 1988 funds because of the 1988 amendment to section 502, may previous years' funds be used to pay the award? Consistent with 62 Comp. Gen. 692 (1983), we conclude that the language of section 502, as stated in the 1988 Appropriations

Act, does not preclude the NRC from using appropriated funds from previous fiscal years to pay awards to intervenors in fiscal 1988.

In 62 Comp. Gen. 692, we concluded that funds restricted by section 502 could not be used to satisfy an EAJA award in an agency adversary adjudication regardless of whether part of the proceeding was conducted in a fiscal year in which section 502 was not applicable. We also found, however, that appropriations not limited by section 502, that is, no-year NRC monies appropriated before section 502 first was enacted, could be used to pay intervenor awards to the extent those funds were still available. Specifically we said:

> The fact that the Commission issues an award during a restricted fiscal year does not prevent its being paid out of a previous fiscal year's appropriation so long as part of the proceeding giving rise to the award was funded by an unrestricted appropriation. *Id.* at 696.

We think the same principle would apply to the additional restriction added to section 502 in the 1988 Energy and Water Development Appropriations Act, Pub. L. No. 100-202, 101 Stat. 1329-129. The new restriction regarding appeals to the courts of administrative decisions would not apply to monies previously appropriated. Awards made in 1988 could be paid from previous years' monies to the extent they still are available.

We disagree with the NRC's suggestion that the amendment was intended to extend to prior year funds. Neither the language of the amendment nor its legislative history shows that the amendment was intended to apply to fiscal years other than that in which the amendment was contained, that is fiscal year 1988. Furthermore, it is a general principle of statutory construction that a law generally will not be construed to operate retroactively unless it clearly indicates that it is to be so applied. 2 Sutherland, *Statutory Construction* § 41.04 (4th ed. 1986).

We also disagree that because the phrase "None of the funds of this Act" is used in the first sentence of section 502, but not the amendment, the amendment should not be so limited and should extend to prior year funds. Again, neither the language of the amendment nor its legislative history indicates this intention. In any event, as a matter of syntax, we think the better construction is that the first two words of the amendment—"This prohibition"—refers back to the first sentence and, thus, by reference, incorporates the limitation "None of the funds of this Act."

3. If the language of section 502 as provided in the fiscal year 1988 Energy and Water Development Appropriations Act does not preclude the NRC from using previous fiscal year funds to pay awards to intervenors in judicial proceedings, how is the availability of these funds to be determined?

The NRC quotes from our guidance in 62 Comp. Gen. at 696 about how prior years' funds, appropriated without the section 502 prohibition, were to be used to pay awards in a fiscal year for which section 502 applied. We said:

> For the purposes of determining the availability of funds to make awards of the type in question, the Commission should consider that it obligates its funds in the order in which they are appropriated. Under this approach, the Commission should subtract its total obligations since the effective

date of the earlier appropriation from the amount of that appropriation. If the amount of funds obligated is less than the amount of the unrestricted appropriation, then the Commission should consider the difference as the amount of the unrestricted appropriation still available for obligation to pay the award. The award may be satisfied up to the amount of the difference. Conversely, the Commission should consider itself as operating on restricted funds if the obligated amount is greater than the unrestricted appropriation and the award should not be made.

The NRC understands the quoted language to mean that, for example, in determining the availability of fiscal year 1987 funds to satisfy an EAJA award, it should look at all obligations made from the effective date of the fiscal year 1987 Appropriations Act up to the date of the court award and if these obligations exceed the amount of fiscal year 1987 appropriated funds, then there are no appropriated funds available to pay the award. The NRC also understands our guidance to mean that if funds obligated during fiscal year 1987 or any earlier fiscal year are later deobligated and otherwise become available for reprogramming and reobligation in fiscal year 1988, they nonetheless may not be considered pre-fiscal year 1988 funds available to pay a fee award. In this regard, the NRC points out that the House Appropriations Committee has established procedures specifying that utilization of unobligated carry-over funds to fund other than prior year commitments is considered a reprogramming action that must be submitted for Committee approval.

In part, the NRC correctly interprets 62 Comp. Gen. at 696 regarding use of fiscal year 1987 appropriations to pay awards made in fiscal year 1988. If the amount of total obligations since the effective date of the fiscal year 1987 appropriations exceeds the amount of funds provided in fiscal year 1987, then no fiscal year 1987 monies would be available to pay awards made in fiscal year 1988. If, however, the amount of monies appropriated in fiscal year 1987 exceeds total obligations, then, to the extent of the excess, those monies can be used to pay EAJA awards. These monies would not be subject to the fiscal 1988 amendment to section 502.

We disagree, however, that deobligated prior year monies would not be available to pay such awards. We have held that deobligated no-year funds are available for obligation on the same basis as if they were unobligated balances of no-year appropriations. B-200519, Nov. 28, 1980; 40 Comp. Gen. 694, 697 (1961). Accordingly, the guidance we provided in 62 Comp. Gen. at 696 also would apply to any such balances.

We see no inconsistency with the House Appropriations Committee's reprogramming procedures. The required notification and approval process describes the relationship between the NRC and the Committee concerning reprogramming. It does not directly speak to the availability of the funds.

B-228818, August 4, 1988

Military Personnel

Pay
■ Survivor Benefits
■■ Annuities
■■■ Eligibility
■■■■ Former Spouses

Army officer, having validly divorced his first wife in 1946, married again in 1960. When he then married a third wife in 1972 without dissolving his second marriage, his third wife was not legally married to him and therefore did not qualify as the beneficiary of his Survivor Benefit Plan (SBP) annuity. Since the second wife was legally married to the retired officer at the time of his death, she is his widow and is the proper beneficiary of the SBP annuity in spite of the third ceremonial marriage.

Matter of: Lieutenant Colonel John Tiernan Sharkey, USAR (Retired) (Deceased)—Conflicting Claims for Survivor Benefit Plan Annuity

This decision is in response to a request by the Army Finance and Accounting Center that we determine whether Ms. Maria Aurelia Mocanu Sharkey or Ms. Carmen Gorostiza Sharkey[1] is the proper beneficiary of the Survivor Benefit Plan (SBP) annuity provided by the late Lieutenant Colonel John Tiernan Sharkey, a retired officer of the Army Reserve. We determine that Ms. Maria Aurelia Mocanu Sharkey is the proper beneficiary. However, we also conclude that a waiver of collection should be granted for the SBP annuity paid to Ms. Carmen Gorostiza Sharkey before the Army suspended payments to her.

Background

Colonel Sharkey divorced his first wife, Elizabeth Ruth Sharkey, in 1946. On February 8, 1960, he married Ms. Maria Aurelia Mocanu Sharkey in a civil ceremony in Gibraltar. There is no evidence to show that this marriage was ever terminated by divorce or annulment. On February 21, 1972, he entered into a ceremonial marriage with Ms. Carmen Gorostiza Sharkey in London, England. He began to receive military retired pay from the Army after he reached 60 years of age on October 24, 1979. He died on June 6, 1984, and the Army then established an SBP annuity account for Ms. Carmen Gorostiza Sharkey. However, on July 25, 1985, the Army received a letter with supporting documentation from Ms. Maria Aurelia Mocanu Sharkey who claimed that she was the eligible widow and beneficiary for the purpose of the SBP annuity. The Army then suspended payments to Ms. Carmen Gorostiza Sharkey and forwarded the record to our Office for a final determination.

[1] Slight variations in the spelling of these names appear in the record.

Analysis and Conclusion

Provisions of law governing the SBP program are contained in sections 1447-1455 of title 10, United States Code. Subsection 1448(a) provides that the Plan applies to a person who is married or has a dependent child at the time he becomes entitled to retired or retainer pay unless he elects not to participate before the first day for which he becomes eligible for that pay. Thus, SBP spouse coverage commences automatically when a married individual becomes entitled to retired or retainer pay, unless the individual affirmatively elects not to participate in the SBP program.

Under the provisions of 10 U.S.C. § 1331, which applies to Reserve service personnel, a person is entitled to retired pay upon application to the Secretary of the military department for such pay, if he is at least 60 years of age, has performed at least 20 years of service computed under the provisions of 10 U.S.C. § 1332 and met the other requirements of that section. We have expressed the view that SBP coverage for a married reservist's lawful spouse commences automatically at the time he applies for retired pay at age 60 under 10 U.S.C. § 1448(a) in the absence of a contrary election.[2]

In addition, we have repeatedly and consistently held that where a service member marries a subsequent "wife" without dissolving his prior marriage(s), the subsequent "wife" is not legally married to him and does not qualify as the beneficiary of his SBP annuity. Since the prior wife was legally married to him at the time of his death, she is his "widow" and is the proper beneficiary of the SBP annuity in spite of the subsequent ceremonial marriage. *See Chief Petty Officer Robert W. McEachern (Retired) (Deceased),* B-229157, Jan. 11, 1988; *Chief Petty Officer Howard E. Moore, USN, Retired (Deceased),* B-194469, May 14, 1979; *Staff Sergeant Roger A. Cline, USA (Retired) (Deceased),* 57 Comp. Gen. 426 (1978).

In the present case, we find that the evidence presented establishes that Colonel Sharkey contracted a legitimate marriage with Ms. Maria Aurelia Mocanu Sharkey on February 8, 1960, and that this marriage was not terminated by divorce or annulment prior to his death in 1984. It is consequently our view that she automatically was covered by the SBP as his lawful wife when he became entitled to retired pay at age 60 in 1979, and that she then became entitled to an SBP annuity as his widow 5 years later when he died.

As to the conflicting claim of Ms. Carmen Gorostiza Sharkey, we find that the record establishes that she married Colonel Sharkey in good faith and without knowledge of his other marriage. Nevertheless, her marriage to Colonel Sharkey was bigamous and invalid, and consequently she cannot qualify for an annuity as his widow under the SBP law.

[2] *See* 53 Comp. Gen. 832 (1974). Under 10 U.S.C. § 1448(a) reservists may participate in the SBP program upon completing 20 years' satisfactory service for Reserve retirement purposes. Reservists who elect not to become SBP program participants at that time remain eligible for automatic SBP coverage when they later become entitled to retired pay at age 60.

Accordingly, we find that Ms. Maria Aurelia Mocanu Sharkey is the proper beneficiary of the SBP annuity at issue. In view of the circumstances of this case and pursuant to 10 U.S.C. § 1453, we also conclude that collection should be waived of the amount of the SBP annuity paid to Ms. Carmen Gorostiza Sharkey before the Army suspended payments to her. *Compare Kathryn H. Vandergrift,* 55 Comp. Gen. 1238 (1976).

B-231504, August 4, 1988

Procurement

Contract Formation Principles
■ Contract Awards
■■ Offers
■■■ Acceptance

Allegation that a valid contract exists between the protester and the contracting agency is without merit where the agency made award contingent upon the inclusion of the protester's safety proposal into the resulting contract, and the protester refused to agree to this new contingency.

Procurement

Bid Protests
■ Non-Prejudicial Allegation
■■ GAO Review

Protester is not prejudiced by contracting agency's failure to formally amend a solicitation to require the submission of a safety proposal where the only available and appropriate remedy would be to cancel and reissue the solicitation with the requirement for a safety proposal, the very requirement the protester objects to.

Matter of: Minuteman Aviation, Inc.

Minuteman Aviation, Inc. protests the rejection of its bid by the Forest Service, Department of Agriculture, under invitation for bids (IFB) No. R1-04-88-31 for helicopter services for administrative and/or fire activity use.

We deny the protest.

The IFB, issued March 28, 1988, contemplated multiple awards and requested prices for helicopter services on a "flight rate per hour" basis. Any awardee under the IFB is to provide, on a "call-when-needed" basis, helicopters for use in the Forest Service Northern Region, primarily in conjunction with forest fire suppression. The contractor is not required to perform unless it is "willing and able," and the Forest Service reserves the right to order helicopters from various "call-when-needed" contractors based on cost and other factors. Additionally, the agency is not obligated to order helicopter services under the proposed contracts when other "government contract helicopters are reasonably available." For safety purposes, and for determining each bidder's responsibility, the IFB required bidders to provide information for the previous 36 months con-

cerning the number of hours flown, number of accidents and their causes, and the corrective action taken to eliminate the same kind of accident.

Bids were received and evaluated. On May 11, 1988, the contracting officer signed the contract the agency proposed to award to Minuteman, as well as a cover letter which stated that a safety proposal, dated March 25, 1988, and amended April 15, submitted by Minuteman in response to negotiations involving other contracts, was "incorporated by reference into the contract in its entirety." (The safety proposal had not been a requirement of the IFB).[1] On the same day, the contracting officer advised Minuteman by telephone that award was contingent upon the inclusion of the safety proposal. The following day, May 12, the contracting officer hand-delivered the contract, with the cover letter, to the protester. Minuteman, previously aware of the new safety condition from the telephone conversation with the contracting officer, objected to the inclusion of the safety proposal, and the meeting with the contracting officer concluded without a resolution of this issue. The contracting officer subsequently advised the protester by letter dated May 13, that no contract would be awarded to Minuteman. Four of six other bidders received awards.

First, Minuteman contends that it submitted a bid that complied in every respect with the terms of the solicitation, that the contracting officer executed the contract documents, and that consequently a valid contract exists effective May 11. It is the agency's position that no contract exists and that the additional condition imposed on Minuteman was necessary for safety reasons.

The protester's argument that the Forest Service awarded it a contract on May 11 by the contracting officer's execution of the contract documents is without merit. It is a fundamental rule that the act necessary to bind the government is its acceptance of an offer, and the acceptance must be clear, unequivocal, and unconditional. *Mil-Base Industry,* B-218015, Apr. 12, 1985, 85-1 CPD ¶ 421. Further, the solicitation provided that only a written award or acceptance "mailed or otherwise furnished" to the bidder (as opposed to mere execution of the contract documents) would "result in a binding contract." Here, the executed contract, with the cover letter imposing the additional condition, was furnished to the protester, which had knowledge of the new condition, on May 12, and the protester never agreed to the new condition. While it is clear that the Forest Service initially planned to make an award to Minuteman, it is also clear that the Forest Service acceptance depended on the inclusion of the safety proposal and that Minuteman was aware that the Forest Service never intended to award a contract without inclusion of the safety proposal, which Minuteman rejected. Thus, there was never an agreement as to a material term. Consequently, we find that no contract was ever entered into between the Forest Service and Minuteman.

[1] The Forest Service reports that within the preceding 36 months timeframe, Minuteman has had four accidents resulting in seven deaths. The safety proposal in question directly addressed various operations within the Minuteman organization designed to obligate the firm to improve the safety performance of its operation. The Forest Service also reports that safety proposals were not required from other bidders since no other bidder had more than one accident within the preceding 36 months.

Minuteman next contends that since its bid complied with all the terms of the IFB, it has been wrongfully deprived of a contract for which it competed and won. We do not agree. While we recognize that the Forest Service should have amended the solicitation to include the requirement for the submission of a safety proposal, we find that its failure to do so did not prejudice the protester given the nature of the requirement, *i.e.,* to ensure the safe operation of helicopters. This is because the only appropriate remedy would be cancellation (which would be justified in view of the critical safety concerns) and reissuance of the solicitation with the safety proposal requirement, the very requirement the protester flatly refuses to comply with. In this regard, the protester does not allege that the safety proposal would have had any effect on its price. We further find that the Forest Service actions did not prejudice other bidders, since none had more than one accident during the relevant time period. Under the circumstances, we do not feel the Forest Service actions were unreasonable and since Minuteman was aware of the agency's position and had an opportunity to comply or suggest an alternative method to eliminate a correctable deficiency, we find that it was not prejudiced.

Finally, it is Minuteman's position that the government's attempt to incorporate the safety proposal in the resulting contract is improper and is tantamount to a constructive or *de facto* nonresponsibility determination that should have been referred to the Small Business Administration (SBA) for a Certificate of Competency. "Responsibility" relates to a potential contractor's ability to meet certain general standards set forth in Federal Acquisition Regulation § 9.104-1 (FAC 84-18) as well as any special standards set forth in a solicitation. The failure of the Forest Service to award a contract to Minuteman because of its refusal to incorporate the safety proposal was not, in our view, a responsibility determination. The facts are clear that the Forest Service was ready to award a contract to Minuteman and wanted to obtain Minuteman's promise and obligation, through the incorporation of the safety proposal, to improve its safety performance and standards. Thus, it was not Minuteman's responsibility, but its contractual obligations which were at issue.

The protest is denied.

B-230644, August 8, 1988

Civilian Personnel

Leaves of Absence

■ Leave Substitution

■■ Eligibility

After separation from his employment with the government, a former employee seeks to have a portion of his period of leave without pay (LWOP) converted to sick leave because he was not previously informed that sick leave might be available to him while he held outside employment. We hold that sick leave may not be substituted retroactively after separation in the absence of a *bona fide* error or violation of a regulation governing the employee's separation.

Matter of: Marion R. Clark—Retroactive Substitution of Sick Leave for Leave Without Pay

This decision is in response to a request by Mr. Charles R. Coffee, Acting Chief, Accounting and Finance Division, Office of the Comptroller, Defense Logistics Agency (DLA), for an advance decision concerning substitution of sick leave for leave without pay (LWOP) for Mr. Marion R. Clark, a former employee of DLA in Memphis, Tennessee. For the reasons that follow, we hold that substitution of the sick leave for Mr. Clark is not authorized.

Background

Mr. Clark was on sick leave from November 1985 until May 1986 due to hypertension from job stress. In May 1986, Mr. Clark secured employment with a private sector computer firm. Therefore, he requested LWOP effective May 12, 1986, while he pursued an application with the Office of Personnel Management (OPM) for disability retirement. His request for disability retirement was unsuccessful, and the agency proposed his separation on grounds of disability on September 11, 1986. He did not reply to the proposed separation, and he was separated effective November 14, 1986. Subsequently, he received $35,261.63 in severance pay payments.

At the time Mr. Clark was placed on LWOP in May 1986, he had 502 hours of sick leave remaining in his account. The agency argues that Mr. Clark was not aware that under agency regulations, DLAR 1424.1, D, 4h, Absence and Leave, sick leave may be granted when an employee engages in outside employment if the nature of the disability clearly makes it evident that the employee is still incapacitated for the regular job even though the employee can engage in other employment. Thus, the agency argues that Mr. Clark might have used his 502 hours of sick leave. According to Mr. Clark, he was advised to request LWOP and he was not told of the possibility of his taking sick leave. He now requests substitution of the 502 hours of sick leave for LWOP during the 6-month period he was placed on LWOP.

Opinion

In our decisions concerning the substitution of leave after an employee has been separated from federal service, we have allowed such substitution only in cases of administrative error. B-142281, May 26, 1960; B-130418, Feb. 28, 1957. However, where no administrative error has been made and the employee seeks substitution because his previous choice was not judicious, we have held that substitution may not be allowed. *See Jack D. Ellison,* B-180436, Feb. 13, 1975.[1]

[1] An exception to this rule may be made for an employee who seeks by leave substitution to be compensated for all of the accumulated annual leave in the year of retirement. *Lindsey v. United States,* 214 Ct. Cl. 574 (1977). This is not the case in Mr. Clark's situation.

Specifically, we have held that there is no statutory authority to reimburse an employee for sick leave not granted prior to separation from service nor is there any authority to restore an employee to the rolls of an agency for the purpose of granting such leave unless there was a *bona fide* error or violation of a valid regulation in effecting the separation. *Corie Sue Freeman,* B-199477, May 3, 1982.

In the present case, Mr. Clark argues that he was advised to take LWOP and was not told about the possibility of continuing to use his sick leave. However, we fail to see any error committed by the agency in this case. When Mr. Clark advised the agency he had found employment outside the federal service, there would appear to be no basis to continue him in a paid leave status. Under the circumstances, it was entirely appropriate to grant LWOP to Mr. Clark while he pursued his request for disability retirement. When OPM concluded that Mr. Clark did not qualify for disability retirement, the agency was obligated to separate the employee from federal service.

While we have doubts concerning the DLA regulation which allows an employee to remain on sick leave while engaged in outside employment, we note that Mr. Clark did not comply with the terms of the regulation which specify that before an employee engages in outside employment, the employee must notify the leave approving official of the nature of the employment and furnish acceptable evidence of the continuing incapacitation for duty.

Accordingly, we conclude that the agency may not retroactively substitute 502 hours of sick leave for Mr. Clark.

B-230788, August 8, 1988

Civilian Personnel

Relocation
■ Temporary Quarters
■ ■ Actual Subsistence Expenses
■ ■ ■ Eligibility
■ ■ ■ ■ Extension

A transferred employee purchased a yet-to-be constructed residence which was not scheduled for completion until a date beyond the 60-day period of temporary quarters for subsistence expenses (TQSE). The agency denied his request for an additional 15 days TQSE. Paragraph 2-5.2 of the Federal Travel Regulations permits an agency to grant an extension of time for TQSE purposes, but only if events arise during the initial TQSE period to cause permanent quarters occupancy delays and if the events are beyond the employee's control. Since there were no such delaying events in this case, the claim is denied.

Matter of: Paul E. Storer—Temporary Quarters Subsistence Expense—Extension Period Limitation

This decision is in response to a request from an authorized certifying officer, Federal Bureau of Investigation (FBI), Department of Justice, concerning the

entitlement of an FBI employee to be reimbursed temporary quarters subsistence expense (TQSE) for more than 60 days. We conclude that he may not be reimbursed for the following reasons.

Background

Mr. Paul E. Storer, an employee of the FBI, was transferred effective March 23, 1987. While on a househunting trip on March 5, 1987, he purchased a yet-to-be constructed residence at his new duty station with construction scheduled to be completed on or before June 30, 1987.

On March 23, 1987, Mr. Storer reported for duty at his new station and thereafter began his initial 60-day TQSE period. He settled on his new residence on June 9, 1987, approximately 15 days after his initial period of TQSE terminated. Following settlement, he requested an extension of his TQSE period for the additional 15 days. His request was administratively disallowed, and he now appeals that disallowance.

Ruling

The regulations governing TQSE, which were in effect during the period of the claim and authorized by 5 U.S.C. § 5724(a)(3) (1982), are contained in Chapter 2, Part 5 of the Federal Travel Regulations (FTR), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1987), as amended by Supp. 10, Mar. 13, 1984.

Paragraph 2-5.2 of those amended regulations, which sets forth the conditions and limitations for TQSE eligibility, provides in part:

(a)(2) *Additional time in certain cases.* . . . Extensions of the temporary quarters may be authorized only in situations where there is a demonstrated need for additional time in temporary quarters due to circumstances which have occurred during the initial 60-day period of temporary quarters occupancy and which are determined to be beyond the employee's control and acceptable to the agency.

Thus, under the regulations, in order for an employee to receive an extension of the initial 60-day period, the event or events over which he has no control must arise during the initial 60-day TQSE period. *See Arthur P. Meister,* B-224884, Sept. 23, 1987, which also involved an FBI employee whose new house was not scheduled for completion until after the first 60 days of TQSE.

In the present case, no such event occurred which caused Mr. Storer's period of temporary quarters to have to be extended. When he contracted to purchase a yet-to-be constructed residence on March 5, 1987, he was informed then that construction would be completed as late as June 30, 1987. Thus, when he began his initial period of TQSE on or about March 23, 1987, he knew that the residence completion date and settlement were not likely to occur within 60 days. Accordingly, since there were no events which arose during the initial 60-day period which delayed permanent residence occupancy, there is no basis to allow Mr. Storer's claim and the agency disallowance is sustained. *Meister, supra.*

B-229295, August 10, 1988

Military Personnel

Pay
■ Death Gratuities
■■ Eligibility
■■■ Children

Military Personnel

Pay
■ Death Gratuities
■■ Eligibility
■■■ Former Spouses

Military Personnel

Pay
■ Death Gratuities
■■ Eligibility
■■■ Stepchildren

A woman's claim for a death gratuity as the widow of a deceased service member is denied since she never obtained a divorce from her first husband and legally was not a surviving spouse. Also, her alternative claim for the death gratuity to be paid to her children as the stepchildren of the deceased is denied since her invalid marriage to the deceased precludes her children from having become the deceased's stepchildren.

Matter of: Private Calvin A. Allen, USA, Deceased—Death Gratuity—Invalid Marriage

This decision is in response to an appeal on behalf of Margaret A. Allen and her children from our Claims Group's settlement of August 28, 1987. The Claims Group denied her claim for a death gratuity as the widow of Private Calvin A. Allen, a deceased member of the Army and the alternative claim of her children for a death gratuity as the stepchildren of the deceased. Since Margaret A. Allen was never divorced from her first husband she is not the widow of the deceased, and her children are not his stepchildren. Accordingly, Mr. Allen's mother is the rightful recipient of the death gratuity under 10 U.S.C. § 1477. Therefore, we uphold the Claims Group's denial of both Mrs. Allen's claim and the claim of the children.

The record indicates that Calvin A. Allen and Margaret Nalani Fogas were married in New York on January 5, 1983. Margaret A. Allen (apparently the former Ms. Fogas) admits that she married Ruben Parker prior to her marriage to Mr. Allen, and has no evidence of a legal divorce from Mr. Parker. Moreover, she states her belief that they had not been divorced. At the time of her marriage to Mr. Allen she had four children, who thereafter resided with them. Mr. Allen died of unknown causes on January 25, 1987. Mrs. Allen claims that she should receive the death gratuity as a surviving spouse. In the alternative, she claims that her children should receive the gratuity as stepchildren of Mr. Allen.

Under the provisions of 10 U.S.C. § 1477, the death gratuity of a deceased service member is paid to living survivors in the order set forth in subsection (a). In pertinent part, the order of precedence is (1) surviving spouse, (2) children, (3) designated parents, brothers, or sisters, and (4) parents. Subsection (b) prescribes that "children" applies to "stepchildren who were a part of the decedent's household at the time of his death." 10 U.S.C. § 1477(b)(3). Unless a claimant is one of the class of individuals entitled to the gratuity under the statute, there is no basis to pay him or her.

In regard to Mrs. Allen's claim, it has been held that "a person who has contracted a valid marriage does not have the capacity to contract a subsequent marriage while the first marriage remains undissolved by death or divorce." *Chief Petty Officer Robert W. McEachern (Retired) (Deceased),* B-229157, Jan. 11, 1988. Any subsequent marriage has no legal effect. *Chief Petty Officer Howard E. Moore, USN (Retired) (Deceased),* B-194469, May 14, 1979. Therefore, in view of the lack of the dissolution of her previous marriage to Mr. Parker, Mrs. Allen's marriage to Mr. Allen is a nullity. She is not a surviving spouse under 10 U.S.C. § 1477 and is not eligible to receive the death gratuity.

Turning to the claims of the stepchildren, we find that the absence of a legal marriage between Margaret A. Allen and the deceased necessarily precludes the children from consideration as "stepchildren." The relationship of stepparent and stepchild does not arise until a valid marriage takes place between the stepparent and the parent of the children. *See* 25 Comp. Gen. 725, 727 (1946). *See also Hayley v. Browns of Bellport,* 360 N.Y.S. 2d 103 (1974). Thus, without a legal marriage between the parties, the children of Mrs. Margaret A. Allen are not the stepchildren of Mr. Allen.

Accordingly, we uphold the Claims Group's settlement and authorize payment of the death gratuity to Mr. Allen's mother, who is the person highest on the list of survivors as set forth in 10 U.S.C. § 1477.

B-230840, August 18, 1988

Civilian Personnel

Compensation

■ Rates

■■ Determination

■■■ Highest Previous Rate Rule

An employee who previously held a position as an intermittent employee is not eligible for highest previous rate consideration upon reemployment under 5 C.F.R. § 531.203(c) (1987), since the highest previous rate rule is based upon a regularly scheduled tour of duty and intermittent employment by definition does not involve a regularly scheduled tour of duty. Moreover, in this case the employee was properly classified as an intermittent employee inasmuch as the employee independently scheduled her work and the days and hours worked fluctuated each pay period.

Matter of: Helen M. Jew—Highest Previous Rate Rule—Intermittent Employment

Ms. Helen M. Jew has appealed the determination by our Claims Group (Z-2865303, dated Dec. 28, 1987) denying her claim for a retroactive step increase and backpay since the highest previous rate rule in 5 C.F.R. § 531.203 (1987) applies only to full-time and part-time employees and not to intermittent employees. For the reasons stated below, we sustain the Claims Group's determination.

Background

Ms. Jew was an intermittent employee grade GS-12, step 1, Equal Employment Specialist with the Department of the Navy (Navy) from March 2, 1986 through January 5, 1987, when she was separated as part of a reduction-in-force. Subsequently, Ms. Jew was reemployed by the Equal Employment Opportunity Commission (EEOC) on April 6, 1987, and she was placed in grade GS-11, step 4. If the EEOC had applied the highest previous rate rule contained in 5 C.F.R. § 531.203(c) (1987), under which a reemployed employee's rate of pay may be set at the highest previous rate earned on a regular tour of duty, Ms. Jew would have been placed in grade GS-11, step 7. The EEOC declined to apply this rule based on the agency's position that intermittent employment by definition is not a "regular tour of duty" as defined by 5 C.F.R. § 531.203(d)(1).

Ms. Jew requested our review of EEOC's decision not to apply the highest previous rate rule in setting her rate of pay. Her position is that since she had worked 39 hours each week for the 10 months that she was employed by the Navy, she was qualified to receive her highest previous rate. She requested that the higher rate be made retroactive to April 6, 1987.

By letter dated December 22, 1987, our Claims Group denied Ms. Jew's request for a retroactive step increase and backpay based on a determination that a "regular tour of duty" for purposes of the highest previous rate rule in 5 C.F.R. § 531.203(d)(1) applies only to full-time and part-time employees and not to intermittent employees.

Ms. Jew now seeks reconsideration of our Claims Group determination, reiterating her belief that her tour of duty with the Navy constituted a regular tour of duty for purposes of the highest previous rate rule since, for the 10-month period, she had a "weekly tour of duty" of 39 hours per week. She also noted that she was promoted to a grade GS-12, step 1 at EEOC on October 25, 1987, and on December 23, 1987, she was granted a step increase to step 2 of grade GS-12. Ms. Jew questioned why the EEOC would consider her 10-month period as a grade GS-12 at Navy for purposes of determining time-in-grade for step increases but did not credit that period when determining her starting salary rate in April 1987.

We requested and received comments from the Naval Civilian Personnel Center, Walnut Creek, California, and that report states that when Ms. Jew was

selected for her position with the Navy, she was given the option to elect either a temporary part-time or intermittent position. Ms. Jew elected to be an intermittent employee. The report further states that Ms. Jew's schedule of work was such that her hours and days of work fluctuated every pay period not to exceed 39 hours. The report noted that, as an investigator of discrimination complaints, Ms. Jew independently scheduled her work each pay period based on the caseload.

We also requested and received comments from the District Director, San Francisco District Office, EEOC, and that report states that the waiting period for Ms. Jew's within-grade step increase to grade GS-12, step 2, did in fact include the time-in-grade Ms. Jew had previously acquired while working on an intermittent appointment at Navy as a grade GS-12, step 1. However, the report points out that the within-grade approval is not related to the highest previous rate issue since the deciding factors for a within-grade increase are satisfactory performance and time-in-grade at the GS-level, whereas the highest previous rate issue revolves around her having served on an intermittent appointment which, by definition, is not a regularly scheduled tour of duty.

Opinion

Under the provisions of 5 U.S.C. § 5334(a) (1982) and 5 C.F.R. § 531.203(c) and (d) (1987), an employee who is reemployed, reassigned, promoted or demoted, or whose type of appointment is changed may be paid at the highest rate of the grade which does not exceed the employee's highest previous rate. This is referred to as the highest previous rate rule. *Carma A. Thomas,* B-212833, June 4, 1984. Our decisions have consistently held that it is within the agency's discretion to fix the initial salary rate at the minimum salary of the grade to which appointed and that an employee has no vested right upon transfer or reemployment to receive the highest salary rate previously paid to the employee. *See* Barbara J. Cox, 65 Comp. Gen. 517 (1986), and cases cited therein.

The highest previous rate is based on a regular tour of duty at that rate under an appointment not limited to 90 days or less, or for the continuous period of not less than 90 days under one or more appointments without a break in service. 5 C.F.R. § 531.203(d). "Tour of duty" is defined in 5 C.F.R. § 610.102(h) as the hours of a day (a daily tour of duty) and the days of the week (a weekly tour of duty) that constitute an employee's regularly scheduled administrative workweek. "Regularly scheduled" work is defined in 5 C.F.R. § 610.102(g) as work that is scheduled in advance of an administrative workweek.

"Intermittent employment" is defined in the Federal Personnel Manual, ch. 340, § 4-1a (Inst. 321, April 3, 1985) as follows:

> . . . 'intermittent employment' means nonfull-time employment in which employees serve under an excepted or competitive service appointment in tenure group I or II *without a regularly scheduled tour of duty.* . . . 'Regularly scheduled' and 'tour of duty' have the meaning given those terms in 5 C.F.R. 610.102. [Italic supplied.]

As the underscored language indicates, intermittent employment by definition would not constitute the "regular tour of duty" required by the highest previous rate rule.

The leave authority contained in 5 U.S.C. § 6301(2)(B) (II) (1982), which requires that an employee work "a regular tour of duty during the administrative workweek" to be entitled to leave benefits, is analogous to the language in 5 C.F.R. § 531.203(d) pertaining to the highest previous rate rule. In 31 Comp. Gen. 581 (1952), we interpreted the leave provision as contemplating "a definite and certain time, day and/or hour of any day, during the workweek when the employee regularly will be required to perform duty." Unless a specific time is established in advance during an administrative workweek when an employee is regularly required to perform duty, the employee cannot earn leave.

Regarding Ms. Jew's contention that she in fact worked a regular schedule, FPM, Ch. 340, § 4-1c provides as follows:

c. Changing an intermittent to part time. When an agency schedules an intermittent employee, in advance of the pay period, to work at some time during each administrative week *for more than two consecutive pay periods,* the agency is required to change the employee's work schedule from intermittent to part time. . . . The employee would then be entitled to the benefits appropriate to the work schedule and appointment . . . . [Italic supplied.]

Under this provision, Ms. Jew believes she was eligible for such a conversion from intermittent to part-time at the Navy based upon her work schedule. She would then be eligible at the EEOC for highest previous rate consideration.

We have specifically recognized that the mere designation of an employee's appointment as "intermittent" is not conclusive. We will look to the nature of the actual work performed and not the official job description in determining whether an employee has a regular tour of duty. For example, in *Kenneth L. Nash,* 57 Comp. Gen. 82 (1977), we held that an Immigration and Naturalization Service inspector whose position was designated "intermittent" was nonetheless entitled to annual leave benefits as a part-time employee having an established regular tour of duty where he was routinely issued a form scheduling his work at specific times and dates for each of the two workweeks of the next pay period.

However, in *James P. Wendel,* B-206035, Apr. 26, 1982, we held that a Department of the Army civilian employee appointed as a commissary store worker on an intermittent basis may not be retroactively granted a regular part-time appointment in the absence of evidence establishing that he worked a prescheduled, continuous, regular tour of duty. The employee in *Wendel* did not produce evidence sufficient to counter the administrative determination that he was not provided specific duty hours in advance, and the listing of hours worked showed that the daily hours of work he was required to perform varied each week.

Similarly, in *Copp Collins,* 58 Comp. Gen. 167 (1978), we ruled that an expert appointed on an intermittent basis was not entitled to leave even though he was compensated for 80 hours per pay period for substantially the full term of his

employment, since his working hours in large part were determined by the demands of the particular tasks on which he was working, were within his discretion, and he was not required in advance to report at a definite and certain time within each workweek. *See also Dr. David Pass*, B-194021, Feb. 11, 1980; *John W. Mantrau*, B-191915, Sept. 29, 1978.

The record before us does not clearly establish that Ms. Jew served a regular tour of duty scheduled in advance under which she was required to perform duty at a definite time during an administrative workweek. Although the work schedules in the record indicate that she generally worked 39 hours a week, the actual days and hours worked varied each pay period. Further, Ms. Jew was responsible for setting her schedule based on her caseload and the hours she worked each week were largely within her discretion. Since Ms. Jew has not produced evidence sufficient to counter the administrative determination that she was not provided specific duty hours in advance, we cannot authorize a retroactive change in status on the basis of her claimed continuous regular tour of duty.

Regarding Ms. Jew's question concerning her within-grade increase, we agree with EEOC's response that the criteria for a within-grade increase and for highest previous rate rule consideration are different.

Accordingly, on the basis of the record before us, we must sustain the action of our Claims Group in denying Ms. Jew's claim.

B-231208, August 18, 1988

Appropriations/Financial Management

Claims Against Government

■ **Witness Fees**

■ ■ **Experts/Consultants**

An employee of the Department of Energy (DOE) requested payment for expert witness fees incurred due to a cancellation by the agency of the original hearing date. The payment of the witness fees by DOE may not be allowed in the absence of specific statutory authority.

Matter of: Department of Energy—Claim for Expert Witness Expenses

This decision is in response to a request by an authorized certifying officer of the Department of Energy (DOE) for an advance decision on the legality of certifying for payment an employee's claim for reimbursement of witness expenses caused by the postponement of a hearing, through no fault of the employee's, which had been scheduled under title 10 of the Code of Federal Regulations, Part 710. We hold that the claim must be denied because of the absence of specific statutory authority to pay such expenses.

Background

The report from DOE indicates that the employee requested an administrative hearing under title 10 of the Code of Federal Regulations (CFR), Part 710 to consider evidence concerning the eligibility of the employee for continued DOE "access authorization" (security clearance).

The hearing was scheduled to take place on February 26, 1988. Due to the sudden unavailability of DOE's expert witness because of a serious family illness, the hearing was canceled at DOE's request 24 hours before the hearing date and rescheduled for a later time.

Because of the short notice to the employee, the employee's witness, a clinical psychologist, was unable to reschedule other patients to fill the 3-hour time slot that he had set aside for testifying. Consequently, the witness charged the employee for the entire 3 hours even though he did not testify on February 26. The employee requests reimbursement for this fee of $225.

Under section 710.25(d) of title 10 CFR, an individual requesting a hearing is responsible for producing and paying his or her own witnesses. It is understood by DOE, and by the employee, that he is responsible for the cost of his witness's time during the actual hearing. However, the Chief Counsel of the Pittsburgh Naval Reactors Office suggests the possibility of reimbursement to the employee for the extra fee caused by the DOE-requested cancellation on very short notice, based on equitable considerations. The Chief Counsel regards it "as a necessary expense to the agency, incurred in connection with DOE maintaining its personnel security program."

Discussion

Generally we have held that under the "American Rule," the hiring of an outside attorney to represent an employee is a private matter between the attorney and the client and that reimbursement of attorney fees may not be allowed in the absence of express statutory authority. *Nuclear Regulatory Commission,* B-194507, Aug. 20, 1979, and decisions cited therein. This principle also applies to expert witness fees and expenses. *Id.* We know of no statute that specifically authorizes reimbursement of such witness fees. There is no provision for payment of witness fees or attorney fees in DOE's organic legislation. 42 U.S.C. §§ 7101-7375. Therefore, there is no contractual obligation for DOE to pay an employee's witness expenses in this type of proceeding.

Moreover, an employee must take the risk that from time to time, it may be necessary for the government to postpone or otherwise delay a hearing for a reasonable cause. However, the government cannot be held responsible for any added costs such delay or postponement may occasion. *Cf.* 9 Comp. Gen. 79 (1929) (subpoenaed witness whose place of residence was in the same city as canceled hearing not entitled to fees, notwithstanding the fact that she may have received the subpoena while on a visit to another city and returned home earlier than intended).

As mentioned above, the Chief Counsel suggests that financial relief can be made on equitable grounds, since the hearing was canceled for the benefit of DOE. We noted in 57 Comp. Gen. 856, 861 (1978) that principles of fairness are not sufficient to overcome the general rule that the employment and compensation of an attorney is a matter between the client and the attorney, absent some statutory provision or agreement based upon a statutory provision. The same reasoning applies to expert witness fees. Even though in this instance the hearing was canceled for the convenience of the Department, the actions of DOE do not appear to have been arbitrary and capricious nor do they appear to have been an effort to circumvent the hearing process for the employee.

In conclusion, we find no basis upon which DOE may allow reimbursement for the expert's fees and expenses resulting from the canceled hearing.

B-231716, August 18, 1988

Appropriations/Financial Management

Claims Against Government

■ Claim Settlement

■■ Missing/Interned Persons

■■■ Applicability

A claim made under the Missing Persons Act, 5 U.S.C. §§ 5561-5570 (Supp. IV 1986), may be paid since the employing agency made a determination of death, which is supported by the findings of a court of competent jurisdiction, and such finding is conclusive on all other agencies.

Matter of: Estate of Ms. Sharon Z. McCully—Missing Persons Act

The Regional Counsel, Internal Revenue Service, Southwest Region, Dallas, Texas, has appealed a Claims Group Settlement (Z-2865366, Feb. 18, 1988) which denied a claim by the estate of Ms. Sharon Z. McCully under the Missing Persons Act 5 U.S.C. §§ 5561-5570 (Supp. IV 1986), on the basis that the claim was too doubtful. Our Claims Group's determination is overruled since the agency made a determination of death which is supported by the findings of a court of competent jurisdiction, and such finding is conclusive on all other agencies.

Background

Ms. Sharon Z. McCully was employed by the Internal Revenue Service (IRS), Austin Service Center, Austin, Texas, when she disappeared on December 9, 1984. She has not been seen or heard from since.

Ms. McCully's husband requested payment of the $524.80 amount that remains outstanding and was owed to her for salary, annual leave, and retirement funds. However, the IRS Office of Fiscal Operations declined payment since a death certificate was not issued, and the IRS forwarded the claim to our Claims Group for adjudication under procedures pertaining to the settlement of accounts for

deceased civilian employees, 4 C.F.R. part 33 (1988). Our Claims Group denied the claim on the basis that the matter was too doubtful since a death certificate had not been issued, Ms. McCully has not been missing for 7 years, and she has not been declared legally dead.

The IRS Regional Counsel disagrees with this determination by our Claims Group since Mr. McCully was granted Letters of Administration by the Travis County Court, Texas, on July 14, 1986. This order of the court establishes Mr. McCully as administrator of his wife's estate, and entitles him to receipt of any funds on her behalf. Further, Texas probate law grants the court jurisdiction to determine the fact, time and place of death upon application for the grant of letters of administration upon the estate of a person believed to be dead, even if there is no direct evidence of death, so long as there is circumstantial evidence present to the satisfaction of the court. *See* Tex. Stat. Ann. § 72 (probate). The Texas court made such a determination in this case.

Opinion

When an employee has been in a missing status almost 12 months and no official report of his or her death has been received the head of the agency must have the case reviewed and may make a finding of death. 5 U.S.C. § 5565(a)(2) (1982). When the head of the agency concerned makes a determination as to death or finding of death, such determination is conclusive on all other agencies of the United States. 5 U.S.C. §§ 5566(a)(1), 5566(h) (1982). This Office and the courts have upheld this conclusive determination by the agency in cases involving similar statutory authority pertaining to military members, 37 U.S.C § 556 (1982). *See* B-157343, Aug. 17, 1965; *Ward v. United States,* 646 F.2d 474 (Ct. Cl. 1981); *In re Jacobsen's Estate,* 143 N.Y.S. 2d 432 (N.Y. Surr. 1955). *See also Fugate v. Department of the Interior,* 19 M.S.P.R. 506 (1984).

The IRS made a finding regarding the death of Ms. McCully on May 26, 1987, when the IRS Regional Commissioner sent a memorandum to the Director, Austin Service Center, advising that Ms. McCully was presumed dead and her accounts should be settled. Letters of administration had been granted to Mr. McCully on July 14, 1986, by a court of competent jurisdiction which predicated the grant on the basis that Ms. McCully was dead. Thus, the IRS had sufficient basis to likewise make a valid determination.

Accordingly, the claim may be paid on the basis of the determination of death made by the agency.

B-228860, B-229281, August 19, 1988

Military Personnel

Relocation

■ Variable Housing Allowances

■■ Eligibility

■■■ Amount Determination

A service member married a woman who owned a house with a first and second mortgage on it, and it became their family residence. She had been previously married, and she had taken the second mortgage to pay her former husband an amount due him in their community property settlement whereby she retained the house after their divorce. The regulation defining monthly housing costs for purposes of computing a uniformed service member's variable housing allowance (VHA) excludes the cost of a second mortgage taken for other than repairing, renovating or enlarging a residence since VHA is an allowance to help a member pay for housing in a high-cost area, not to satisfy a community property settlement. Neither may the second mortgage in these circumstances be considered a mortgage taken for the initial purchase of a residence.

Military Personnel

Relocation

■ Variable Housing Allowances

■■ Eligibility

■■■ Amount Determination

The definition of monthly housing costs for purposes of computing a variable housing allowance (VHA) may not include a cost for the interest or other return on investment a service member loses for the money he puts down upon purchasing his residence (a so-called "opportunity cost"). In promulgating the VHA regulations, the services chose not to include opportunity costs, and it was within their latitude under the law to do so.

Matter of: Variable Housing Allowance—Allowable Expenses for Offset

This case concerns two separate but related requests for advance decisions forwarded to us by the Per Diem, Travel and Transportation Allowance Committee regarding whether certain expenses may be included in the member's housing costs in computing variable housing allowances (VHA) authorized members of the uniformed services to help defray their housing costs in high cost areas in the United States.[1] The first case, submitted by the Marine Corps, asks whether the cost of a second mortgage for which the proceeds are used to satisfy a community property settlement may be included in computing a member's monthly housing cost. The second case, submitted by the Air Force, asks whether an "opportunity cost," that is loss of interest or other investment income for personal funds used in the downpayment on a house so as to reduce the amount of or render unnecessary a mortgage, may be included in a member's monthly housing cost. For the reasons explained below, neither the second mortgage taken to

[1] One case was submitted by the Disbursing Officer, Marine Corps Base, Camp Pendleton, California, and was assigned PDTATAC Control No. 87-16. The other case was submitted by the Director of Accounting and Finance, Headquarters Electronic Systems Division (AFSC), Hanscom Air Force Base, Massachusetts, and was assigned PDTATAC Control No. 87-20.

pay a community property settlement nor the opportunity cost is an expense applicable to determining a member's VHA.

Background

Presently, VHA is authorized by 37 U.S.C. § 403a (Supp. III 1985). Pursuant to the authority granted by 37 U.S.C. § 403a(e), implementing regulations are prescribed in Volume 1 of the Joint Federal Travel Regulations (1 JFTR). Under section 403a(a)(1) of title 37, a member of a uniformed service who is entitled to a basic allowance for quarters (BAQ) is also entitled to a VHA if he or she is "assigned to duty in an area of the United States which is a high housing cost area with respect to that member." Subsection 403a(c)(1) prescribes the monthly amount of the VHA for a member with respect to an area as:

> . . . the difference between (A) the median monthly cost of housing in that area for members of the uniformed services serving in the same pay grade and with the same dependency status as that member, and (B) 80 percent of the median monthly cost of housing in the United States for members of the uniformed services serving in the same pay grade and with the same dependency status as that member.

In late 1985 an amendment was made to the law to require that a member's monthly VHA be reduced by one-half of the amount, if any, by which the total of the member's prescribed VHA and BAQ exceeds the member's "monthly housing costs." 37 U.S.C. § 403a(c)(6)(A) as added by Public Law 99-145, § 602(c)(2), 99 Stat. 637 (Nov. 8, 1985). This was the first time that a member's personal and individual housing costs became directly relevant in determining his or her VHA; the greater the member's includable housing costs, the less of a reduction in VHA is required.

To implement this reduction provision, the term "monthly housing costs" had to be defined by the services since no definition was provided by the statute. Consequently, the regulations were amended so that for a member owning his or her home, the allowable housing expenses for purposes of the VHA offset were determined to be periodic mortgage payments, hazard and liability insurance, real estate taxes, and a standard utility maintenance expense. 1 JFTR, para. U8001-F. Furthermore, the regulations specify that allowable mortgage payments are limited to:

> 1. mortgages used in connection with the initial purchase of a residence;
>
> 2. mortgages used to refinance an existing mortgage which was used to purchase a residence (i.e., the existing mortgage is paid off with proceeds from the new mortgage) to the extent that the new mortgage payments do not exceed the old mortgage payment;
>
> 3. real estate equity loans (e.g., a second mortgage) to the extent used to repair, renovate, or enlarge a residence (does not include loans used to furnish or decorate a home, or loans for personal reasons) . . . .

A. The Second Mortgage

In the Marine Corps submission, the military member concerned married a woman who had been divorced from her previous husband. Under her divorce decree, among other things, she retained the house she and her previous husband had owned but was required to pay her husband $27,000 for his share of their community property, primarily the house. She assumed the first mortgage and then took a second mortgage to obtain the funds to pay her ex-husband the $27,000. The member states that when he married his wife, he moved into the house and assumed the total of both mortgages as a responsibility of providing housing for his family.

Apparently, when the member originally applied for a VHA, he listed both mortgages as constituting housing expenses, and the computation of his VHA included these expenses from March 1 to September 10, 1986. Subsequently, he changed duty stations, and he was advised that the cost of his second mortgage was not a valid expense for purposes of a VHA. He was told that under the Joint Federal Travel Regulations, U8001-3, second mortgages are not allowable expenses unless they are used to repair, renovate, or enlarge a residence. The Marine Corps disbursing officer considered the second mortgage to have been obtained for personal reasons, to satisfy a court decree.

The member, however, suggests that the correct analysis is that both mortgages on the residence were used to purchase it since his wife assumed the first and took the second merely to obtain full ownership of the house.

In this situation the mortgage primarily was taken for the purpose of effecting a community property settlement, which later apparently resulted in providing the member and his family with a residence. Accordingly, we cannot agree with the service member that it was a mortgage "used in connection with the initial purchase of a residence," as provided in 1 JFTR, para. U8001-F-1. Neither does it fall within any of the other definitions in the regulations of allowable mortgages. Therefore, we agree with the Marine Corps that use of the expense of this second mortgage is not allowable, and recoupment action should be taken for the overpayment made to the member between March 1 and September 10, 1987.

B. The Opportunity Cost

In the Air Force submission, a member who chose to pay cash when purchasing his home is seeking to have his so-called "opportunity cost" included as a housing expense. His opportunity cost is the interest or return on investment he loses each month on the money he paid for his house rather than take a mortgage and invest that money otherwise. As the submission points out, the method in which a member chooses to finance affects his housing costs and his

rate of VHA. Thus, the member who puts down less money has a larger mortgage and more housing expenses resulting in less reduction in the VHA.

The Per Diem, Travel and Transportation Allowance Committee has commented on the issue in this matter. The Committee indicates that when the regulations were promulgated, including opportunity costs was considered. At that time the Committee decided to accept the recommendation of an advisory panel to not include an opportunity cost as a housing expense. It was noted that there are many variations between full financing and no financing of a home, and decisions as to financing are personal ones dependent upon many factors peculiar to each case. Thus, including opportunity costs would present an "administrative nightmare."

In addition, we note that it cannot be stated unequivocally that merely because a member chooses to invest more money in a residence, he necessarily suffers a detriment or opportunity cost. It may well be that in certain instances over the long run, the member who chooses to put more money down on a residence will receive a greater return on his investment than the member who invested otherwise.

In any event we have recognized that the services have some administrative latitude in implementing the VHA statute. *See* B-224133, Dec. 22, 1987, 67 Comp. Gen. 145. They chose not to include opportunity costs as an includable housing expense, which was within their latitude to do. Accordingly, the Air Force member in the present case is not entitled to have those costs included in computing his VHA.

B-229926.2, August 19, 1988

Procurement

Competitive Negotiation

■ Requests for Proposals

■■ Government Estimates

■■■ Wage Rates

Protest challenging as too low the wage rates (of employee classes not covered by wage rate determination) used in government's cost estimate and, thus, the propriety of the cost realism analysis based on that estimate, is without merit where record indicates that, although protester utilized higher-skilled employees in its proposal than agency utilized in developing estimate, agency's use of lower-skilled employees in estimate was not inconsistent with solicitation requirements.

Matter of: Sterling Services, Inc.

Sterling Services, Inc., formerly W.B.&A., Inc., protests the wage rates forming the basis of the government cost estimate utilized in the evaluation of proposals under request for proposals (RFP) DACW01-87-R-0056, issued by the Army Corps of Engineers (Corps) for operation and maintenance of government-owned facilities at Lake Sidney Lanier, Georgia. The protester argues that the Corps

underestimated labor costs by misclassifying employee classes not covered by the wage rate determination included in the solicitation, resulting in an unrealistic and unreasonable cost estimate to which proposals were compared.

We deny the protest in part and dismiss it in part.

The RFP, a total set-aside for small businesses, contemplated a 1-year (plus two option years) cost-plus-award-fee contract for janitorial, facility maintenance, and other services. Offerors were to submit separate technical, management, and cost proposals, with cost to be evaluated (not scored) for completeness, reasonableness, and realism. The cost realism analysis was to determine the extent to which offered costs were comparable to the undisclosed government estimate. Award was to be made to the responsible offeror whose offer was rated most advantageous to the government, technical, management, cost, and other factors considered.

Pursuant to the Service Contract Act of 1965, 41 U.S.C. § 351 (1982), applicable here, the RFP as originally issued was accompanied by two Department of Labor (DOL) wage determinations (Nos. 87-281 and 87-289), establishing the minimum wages and fringe benefits for some classes of employees needed for performance of the contract. (DOL later concluded that one of the determinations, No. 87-281, was inapplicable, and deleted it). The RFP included the standards for "conforming" the wages of the employee classes omitted from the wage determination; generally, the contractor must establish wages that are reasonably related to those of workers in listed classifications with the same knowledge and skill levels. 29 C.F.R. § 4.6(b)(2) (1987). In preparing the government estimate for use in the cost evaluation, the Corps matched the omitted employee classes with wage determination classifications, much the same as the conforming process, to assure that the estimate would reflect the wages the contractor likely would pay.

Five proposals were received and evaluated. Discussions were conducted and best and final offers were received on December 2, 1987. Upon completion of evaluations, Trim-Flite, Inc., was determined to be the successful offeror. Subsequently, on February 25, we dismissed a W.B.&A. protest (B-229926), also challenging the government estimate used in the evaluation, because the Corps agreed to reevaluate offerors' proposed costs using a revised estimate (the Corps determined that the deleted wage rate determination had erroneously been relied upon in its estimate). Subsequently, the Corps made other revisions to the estimate following an agency-level protest by W.B.&A. and there were also reevaluations of proposals by the Corps due to deficiencies not at issue here. After completion of a third evaluation, Trim-Flite again was determined to be the successful offeror, and all offerors were so informed. W.B.&A. still was not satisfied with the revisions to the estimate, however, and filed the protest at hand on April 18.

While W.B.&A.'s April protest was pending, a fourth evaluation of proposals were completed and Ferguson-Williams, Inc., was determined to be the success-

ful offeror.[1] Award was made on June 30, after the agency made the required finding that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for the decision by our Office on W.B.&A.'s protest. *See* 31 U.S.C. § 3553(d)(2)(A)(ii) (Supp. IV 1986).[2]

Essentially, W.B.&A. alleges that the Corps, in developing its cost estimate, improperly set wages too low for employee classes omitted from the wage rate determination, resulting in a low total government estimate, which formed the basis of an improper cost realism evaluation. According to W.B.&A., the Corps set the wages of higher-skilled employee classes lower than the wages of lower-skilled employee classes, in effect reversing the relationship between supervisors and laborers as it existed under W.B.&A.'s incumbent contract. The protester, the incumbent, maintains that use of the low estimate caused its own cost to be evaluated as unduly high, and that the firm thus was penalized for accurately assessing costs.

As an example, W.B.&A. argues that the agency unreasonably classified refuse truck drivers under the "truck driver (light)" category of the wage rate determination, with a rate of $5.17 an hour, compared to the "laborer" rate of $8.46. The protester argues that the refuse truck driver, the crew leader under its incumbent contract, should be classified at a higher wage rate than the laborers collecting the refuse, since the crew leader supervises and drives the truck in addition to acting as a laborer. Similarly, W.B.&A. argues that grass cutting tractor operators, classified by the government as "truck drivers (medium)," at $7.62 an hour, should earn more than the laborers because tractor operators are a more highly skilled employee class, contract, supervising laborers. The procuring agency's judgment as to the methods used in estimating costs are given great weight by our Office. *Institute for Advanced Safety Studies—Request for Reconsideration,* B-221330.2, July 25, 1986, 86-2 CPD ¶ 110. We will not second-guess an agency's cost determination unless it is unreasonably based. *TRS Design & Consulting Services,* B-218668, Aug. 14, 1985, 85-2 CPD ¶ 168. While W.B.&A. disagrees with the Corps as to the skill levels necessary for completion of the RFP requirements and as to what constitutes reasonable labor costs, the protester has not shown that the skill levels and wages on which the estimate was based are inconsistent with the RFP requirements, or unreasonable.

First, in the area of refuse truck drivers, contrary to the protester's position, the RFP did not require the designation of the refuse truck drivers as crew leaders who also would collect refuse and supervise other laborers collecting refuse. Indeed, the RFP did not specify any job classifications or the composition of job crews but, rather, merely set forth performance requirements, leaving it to the offerors to determine the labor composition necessary to complete the required tasks. While the protester may consider it more efficient to designate

[1] This reevaluation resulted after an agency-level protest and the determination by the contracting officer that the third evaluation was not consistent with the RFP. The agency then convened a new evaluation team, not composed of any members from Lake Sidney Lanier, and conducted the reevaluation.

[2] W.B.&A. (as Sterling Services, Inc.) protested the award to Ferguson-Williams on July 13 (B-229926.5). This protest currently is being developed and will be resolved in a separate decision.

truck drivers as crew leaders, at a higher skill level than laborers, the RFP did not require such a relationship, and the government estimate was based on wages for these drivers not encompassing the added duties.[3]

Further, we find no merit to an additional argument by W.B.&A. that a refuse truck driver is not contemplated under the occupational definition of "truck driver" in the *Service Contract Act Directory of Occupations,* which includes those who drive a truck to transport materials or workers between various types of establishments and may also load or unload the truck, make minor mechanical repairs, and keep the truck in good working order. In our view, the refuse truck driving under the cleaning function of the RFP is not clearly equivalent to over-the-road or sales route driving (which are expressly excluded from the definition), as W.B.&A. suggests but, rather, is more akin to the short-haul trips between establishments within the government-owned facilities included in the definition. Accordingly, we have no reason to question the agency's classification of the refuse truck driver as a truck driver for purposes of determining labor costs for the government estimate.

The RFP also does not mandate supervisory responsibilities for operators of the grass cutting tractors, and we find no other basis for concluding that the tractor operators are more highly skilled than laborers such that the Corps should have set their wages at a higher rate in the estimate. The Corps determined that, based on similar jobs in the government and private sector, a tractor operator generally would be expected to earn a wage similar to that of the occupational definition of a medium truck driver, and thus anticipated that the contractor ultimately would conform the tractor operator wages to this classification. We find no basis for questioning the agency's judgment in this regard. We note, moreover, that under the grass mowing function the government estimate included the separate job classification "leaders," earning $9 an hour; it thus appears that the agency did provide for the cost of supervision in its estimate.

W.B.&A. cites in support of its position the fact that the employees in the challenged classifications are being paid higher wage rates than those used in the government estimate during the performance of the work in-house (the Corps began in-house performance after expiration of W.B.&A.'s incumbent contract pending a new award). The Corps was performing the work only on a stop-gap basis, however, not pursuant to the specific requirements of the RFP. Moreover, the record indicates that temporary emergency hires were being used under a different scope of work to keep the recreational areas open to the public, and that their wage-grade classifications differed from the Service Contract Act classifications. Thus, the Corps' approach to in-house performance is irrelevant to W.B.&A.'s protest.

We conclude that the classifications the Corps used to determine the proper wages for unlisted employees to include in its estimate were reasonable, in that

[3] Although the protester argues that the refuse truck drivers were classified in the government estimate as light truck drivers earning $5.17 an hour, it appears from the government estimate that these drivers actually were classified, under the cleaning function, as medium truck drivers earning $7.62 an hour.

they likely reflected the wages at which the contractor will arrive through the conforming process. Use of these classifications and wages thus provides no basis for questioning the cost realism analysis.[4]

Finally, W.B.&A. claims it is entitled to recover the costs of filing and pursuing its protest as well as its proposal preparation costs. Since we find W.B.&A.'s protest to be without merit, there is no basis upon which to find an entitlement to recovery of these costs. 4 C.F.R. § 21.6(d).

The protest is denied in part and dismissed in part.

B-226823, August 22, 1988

Civilian Personnel

Relocation
■ Temporary Quarters
■■ Actual Subsistence Expenses
■■■ Reimbursement
■■■■ Eligibility

A transferred employee was authorized and reimbursed for temporary quarters subsistence expenses for 60 days, but the agency questions whether the quarters were temporary based upon the duration of the lease (6 months), the movement of household goods into the residence, the type of quarters (single family dwelling), the lack of clear and definite intent to seek permanent quarters, and the length of time the employee occupied the dwelling (1-1/2 years). We hold that the record supports a determination that, at the time he moved into the dwelling, the employee only intended to occupy it on a temporary basis. He attempted to negotiate a shorter-term lease, he made substantial efforts to locate a permanent residence, he moved his household goods into the residence but did not unpack most of them, and, later, he was uncertain as to whether to purchase a residence since he might be transferred again to another city. Under these circumstances, we conclude that the payment of temporary quarters was proper.

Matter of: Carl A. Zulick—Temporary Quarters Subsistence Expenses

This decision is in response to a request by Mr. Jerry K. Yarborough, Authorized Certifying Officer, Bureau of Land Management (BLM), United States Department of the Interior, for a decision as to the propriety of paying temporary quarters subsistence expenses to Mr. Carl A. Zulick, an employee of BLM, incident to a permanent change of official station.[1] For the reasons stated later in this decision, we hold that the reimbursement of temporary quarters to Mr. Zulick was proper and in accordance with the applicable law and regulations.

[4] W.B.&A. has protested that discussions were inadequate, but as this issue was fully detailed for the first time in its comments on the agency report and conference, and thus was not fully developed in the record, we will consider this issue fully in deciding the firm's pending protest (B-229926.5).

[1] Mr. Zulick is represented by Mr. James A. Ferguson, Jr., President, Local 1945, National Federation of Federal Employees.

Background

In late 1984, Mr. Zulick transferred from Meeker, Colorado, to Denver, Colorado, and he was authorized reimbursement of temporary quarters expenses as part of his relocation expense reimbursement. Mr. Zulick signed a 6-month lease on a single family dwelling at 11730 West Atlantic Avenue, Lakewood, Colorado, and he moved into the house on November 26, 1984. His household goods were delivered to the dwelling on the following day.

Mr. Zulick submitted a claim for reimbursement of temporary quarters for a period of 60 days covering the period from November 26, 1984, through February 10, 1985, and BLM paid the claim in the amount of $2,625. However, the agency obtained additional information concerning the facts surrounding Mr. Zulick's occupancy of this dwelling and seeks repayment of the amount reimbursed to Mr. Zulick for temporary quarters on the grounds that these quarters were permanent rather than temporary in nature.

The agency states that even though Mr. Zulick reports that he was looking for permanent quarters while he occupied this house, he continued to reside at that address after the initial 60-day period had expired. The agency contends that under the applicable provisions of the Federal Travel Regulations and decisions rendered by this Office, these quarters were permanent based upon the following factors: (1) the duration of the lease (6 months); (2) the movement of household effects into the dwelling; (3) the type of quarters occupied (a single family dwelling); (4) the lack of a clear and definitive intent by the employee to seek permanent quarters; and (5) the length of time he occupied these quarters (1-1/2 years). Mr. Zulick purchased a residence in Lakewood, Colorado, in March 1987.

In response to the contentions by BLM, Mr. Zulick states that prior to his transfer, agency officials informed him that he could be reimbursed for expenses incurred while occupying temporary quarters even if he lived in a single family dwelling. Mr. Zulick contends that the agency did not inform him of any limitations on his entitlement until he submitted his travel voucher for payment. He says that it was his intent to occupy this house only until he could locate a suitable single family residence. He argues that his search for a permanent residence was delayed when he reported for duty at Denver due to 4 weeks of travel on business. Mr. Zulick states that he executed a 6-month lease, which he considered to be a short-term lease, and he states that he attempted to negotiate a month-to-month lease but was unable to do so. The information concerning the negotiation of his lease was confirmed in a letter from Mr. Zulick's former landlord.

With respect to the movement of his household effects into the house, Mr. Zulick states that due to the type and nature of his belongings, *i.e.,* beehives, large indoor trees, beekeeping and hobby supplies, a large freezer filled with wild game, combustible materials, a boat, firearms, and drafting and mechanical tools, he moved them into the dwelling rather than place them in temporary storage. Mr. Zulick reports that most of his belongings were never unpacked while he lived in this house.

As to the type of temporary quarters occupied, Mr. Zulick argues that paragraph 2-5.2d of the Federal Travel Regulations defines temporary quarters as "any lodging obtained from private or commercial sources to be occupied temporarily . . . ." He states that this includes not only a motel room or an apartment but also an unattached dwelling in a suburban neighborhood. In regard to an expression of his intent to seek a permanent residence, Mr. Zulick reports that he employed realtors to assist him in locating a permanent, single family residence suitable for his needs, and this information is confirmed by a letter from a real estate agent. The employee also reports that, at the time his eligibility for reimbursement of temporary quarters "was up," BLM was studying moving his place of employment to Fort Collins, Colorado. He states that this discouraged his attempts to purchase a home but, even then, he continued to seek new quarters pending the final outcome. Mr. Zulick states that he was acting cautiously since he had lost $17,000 on his previous home because he moved when his former office was reorganized.

Opinion

The payment of temporary quarters subsistence expenses is governed by the provisions of 5 U.S.C. § 5724a(a)(3) (1982) and the implementing regulations contained in chapter 2, part 5, of the Federal Travel Regulations (FTR), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1984). Paragraph 2-5.2c of the FTR (Supp. 10, Nov. 14, 1983) provides that the term "temporary quarters" refers to lodging obtained from private or commercial sources for the purpose of temporary occupancy after vacating the residence occupied when the transfer was authorized. In making this determination, the agency should consider such factors as the duration of the lease, the movement of household effects into the quarters, the type of quarters, expressions of intent, attempts to secure a permanent dwelling, and the length of time the employee occupies the quarters. *See Charles J. Wilson,* B-187622, June 13, 1977. *See also* FTR para. 2-5.2c.

This Office has consistently held that a determination as to what constitutes temporary quarters is not susceptible of any precise definition, and such a determination must be based upon the facts and circumstances involved in each case. The threshold determination as to whether the quarters were initially temporary in nature is based on the intent of the employee at the time he or she moves into the dwelling. *Charles L. Avery,* B-179870, Sept. 26, 1974.

As to the duration of the lease, we have held that the execution of a 1-year lease on a dwelling at the employee's new duty station is a clear indication that the employee intends to occupy the rented quarters on other than a temporary basis. *Johnny M. Jones,* 63 Comp. Gen. 531 (1984), *affirmed on reconsideration,* B-215228, Apr. 12, 1985; *Richard W. Coon,* B-194880, Jan. 9, 1980. In this case, Mr. Zulick negotiated a 6-month lease and later rented the house on a month-to-month basis. While we have held that the execution of a 1-year lease on a dwelling by the employee at his or her new duty station is a clear indication that the employee intends to occupy the rented quarters on other than a tempo-

rary basis, generally, the execution of a 6-month lease is considered to be short-term and, therefore, is not a clear indication that the quarters were permanent in nature. *See Saundra J. Samuels*, B-226015, April 25, 1988. *See also Wilson, supra.* We therefore conclude that such actions do not demonstrate an intent on his part to occupy the Atlantic Avenue property on a permanent basis.

With respect to the movement of household effects into the dwelling, we have held that such action is not, by itself, determinative of whether the quarters were temporary or permanent. *See Wilson, supra.* Here, Mr. Zulick explains that due to the type and nature of his household goods, he moved his personal belongings into the Atlantic Avenue dwelling rather than place them in temporary storage. He states that most of his belongings were never unpacked during the period he lived in the house. We conclude that, under the circumstances, the movement of Mr. Zulick's household effects into the residence does not, standing alone, warrant the conclusion that he intended the dwelling to be his permanent residence at the time he initially occupied the dwelling. *Wilson, supra.*

In regard to the type of quarters occupied by Mr. Zulick, a single family dwelling, neither FTR paragraph 2-5.2c nor our decisions preclude a detached single family dwelling from constituting temporary quarters.

With respect to expressions of intent by Mr. Zulick in seeking permanent living quarters, such expressions were clearly manifested when he made intensive, definite, and substantial efforts, with the assistance of realtors, to locate a permanent residence to purchase or lease. *See Robert D. Hawks*, B-205057, Feb. 24, 1982. *See also David R. McVeigh*, B-188890, Nov. 30, 1977, where the employee submitted no evidence of his efforts to purchase or rent another home.

As to the length of time Mr. Zulick resided at the Atlantic Avenue address, approximately 1-1/2 years, a presumption arises that occupancy of the residence for this length of time makes such quarters permanent in nature. *Paul P. Semola*, B-167632, Aug. 20, 1969; *John M. Bonvissuto*, B-164379, Aug. 21, 1968. In *Semola* and *Bonvissuto*, the employees continued to reside in living quarters for a period in excess of 1 year. However, in neither case was there any evidence of any bona fide efforts by the employees to vacate the claimed temporary quarters at any specific time and, therefore, we held that the quarters were not temporary within the meaning of the applicable law and regulations.

In the case before us, while we recognize that Mr. Zulick continued to reside at the Atlantic Avenue address for about 1-1/2 years, his intensive efforts to locate suitable permanent quarters, with the assistance of realtors, over a protracted period of time, and the uncertainty caused by the proposed transfer of his place of employment, clearly demonstrate that he did not intend for the Atlantic Avenue property to be his permanent residence. Hence, we conclude that the presumption created by the occupancy of this house for approximately 1-1/2 years is sufficiently rebutted by the evidence to the contrary showing that such residence was only temporary in nature.

Conclusion

The facts before us reasonably establish that, at the time Mr. Zulick first occupied the single family dwelling on West Atlantic Avenue, he intended to remain there only for a temporary period of time. Therefore, we conclude that the dwelling constituted "temporary quarters" for Mr. Zulick for which he was entitled to reimbursement of temporary quarters subsistence expenses.

B-229107, August 22, 1988

Civilian Personnel

Relocation
■ Household Goods
■■ Advance Payments
■■■ Liability
■■■■ Waiver

Based on erroneous agency information an employee, expecting to pay $150, placed insurance on his household effects being transported at government expense from Puerto Rico to New York. The insurance actually cost $900, and the employee requests waiver of the $750 the agency paid the carrier for the employee's insurance in excess of the $150. Since the employee's debt resulted from the erroneous advice of his agency, it is considered to have arisen out of an erroneous payment and is subject to consideration under the waiver statute. We concur with the agency's recommendation to waive the $750.

Matter of: Paul Rodriguez—Transportation Debt Waiver—Household Goods Insurance

Mr. Paul Rodriguez, an employee of the U.S. Department of Agriculture, was authorized to ship his household effects from Puerto Rico to New York under a Government Bill of Lading (GBL) in August 1986.[1] He desired insurance on the household goods and was advised by his employing agency that the cost to him would be 50 cents for each $100 of valuation. Based on this advice, he chose to insure his goods for $30,000 at an expected cost of $150 for which he would be responsible.

The agency had given Mr. Rodriguez erroneous advice, and in fact, the applicable insurance rate was $3 per $100 valuation. The rate quoted to Mr. Rodriguez was applicable only to domestic shipments and not those emanating from overseas. Consequently, upon shipping his goods, Mr. Rodriguez incurred insurance costs of $900 and not $150, as expected. Following its authorized practice, the agency paid the carrier for all costs associated with shipping the goods including the insurance costs, and it then billed Mr. Rodriguez for the $900. However, the agency has recommended that $750 be waived. We agree with this recommendation.

[1] This case originally was submitted to our Claims Group by Larry Wilson, Acting Director of the Office of Finance and Management, U.S. Department of Agriculture.

As amended by Public Law 99-224 (December 28, 1985), § 1, 99 Stat. 1741, section 5584(a) of title 5, United States Code (Supp. III 1985), authorizes the waiver of—

> A claim of the United States against a person . . . arising out of an erroneous payment of travel, transportation or relocation expenses and allowances, to an employee of an agency, the collection of which would be against equity and good conscience and not in the best interests of the United States . . . .[2]

This waiver authority, however, applies only to claims "arising out of an erroneous payment." Thus, before a claim can be considered for waiver, it must be determined that the claim arose from an "erroneous payment" within the scope of the waiver statute.

It is the long-standing and standard practice of government agencies to ship a qualifying individual's household goods at government expense and to then collect any charges for excess weight or extra services such as insurance from the individual.

When a household goods shipment is made under this system, the GBL constitutes a contract between the government and the carrier under which the carrier is entitled to be paid for its services. Therefore, we have concluded that there is no "erroneous payment" for purposes of the waiver statutes where the government in the first instance pays or bears the cost of a household goods shipment which exceeds the applicable weight allowance in reliance on collection of the additional charges for the excess weight from the employee in accordance with the standard procedure described above. In these circumstances, the government has committed no "error," but has merely made payment in the normal course of business to satisfy its obligation to the carrier. *See* B-229337, June 21, 1988, 67 Comp. Gen. 484. The same rule applies in the case of extra services such as insurance requested by the employee. Thus, the initial payment of additional charges for insurance, like the payment for excess weight, by an agency in accordance with this standard practice is not "erroneous," and claims against employees arising from such payments may not be considered for waiver under the waiver statute, 5 U.S.C. § 5584. *See* B-229337, June 21, 1988, 67 Comp. Gen. 484.

In B-229337, *supra,* we recognized, however, that there might be some cases where excess weight charges were incurred as the result of government error, such as where the excess weight was shipped on the basis of erroneous authorizing orders. We noted that these unusual cases should be dealt with on a case-by-case basis. *Id.* This rule would also be applicable to extra charges for insurance where it is clear that the charges were incurred by the employee in reliance on erroneous advice.

In the present case, the agency indicates that Mr. Rodriguez's debt for the additional $750 above what he expected to pay for insurance arose solely from the

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[2] This additional authority to waive claims arising out of erroneous travel or transportation payments is applicable to payments made on or after the effective date of the new legislation, December 28, 1985. *See* Public Law 99-224, § 4, *supra.* The payment was made in Mr. Rodriguez's case in 1986; thus, it is covered by the statute.

clearly erroneous advice he received from the agency. This is not in issue. Indeed, the agency is recommending waiver because it considers that its erroneous advice was what caused the claimant to incur the $750 debt, implying that he would not have requested the insurance had he been apprised of its true cost. The agency did forward to us a copy of a letter the carrier indicates it sent Mr. Rodriguez shortly before the move in which the correct insurance rates are quoted; however, Mr. Rodriguez states unequivocally that he never received this letter nor any other insurance cost advice from the carrier. His statement was accepted by his agency; we see no reason to question it. Thus, we consider Mr. Rodriguez to have acted in good faith and to be free from fault in this matter.

Accordingly, we hold that collection action would be against equity and good conscience. Therefore, Mr. Rodriguez's debt of $750 arising from the erroneous information he received is waived.

B-232325, August 22, 1988

Procurement

Contractor Qualification

■ **Licenses**

■■ **State/Local Laws**

■■■ **GAO Review**

In the absence of a specific licensing requirement in the solicitation, a contracting officer properly may make award without regard to whether the awardee is in compliance with state and local licensing requirement.

Matter of: James C. Bateman Petroleum Services, Inc. dba Semco

James C. Bateman Petroleum Services, Inc., dba Semco, protests the award of a contract for the removal of underground storage tanks under invitation for bids No. F04612-88-B-0017 issued by Mather Air Force Base, California. The protester complains that California law requires the contractor to be licensed and certified as having successfully completed a hazardous substances removal examination, that the awardee is not certified, and that the awardee therefore is not qualified to do the work. We dismiss the protest.

Contracting officers may, by appropriate solicitation language, require bidders to comply with specific state and local licensing requirements, and in such cases compliance with such requirements is a prerequisite to award. 53 Comp. Gen. 51 (1973); *Washington Patrol Service, Inc.,* B-195900, Aug. 19, 1980, 80-2 CPD ¶ 132. However, where a solicitation merely contains a more general requirement that the contractor comply with state and local licensing requirements, a contracting officer is not expected to inquire into what such licensing requirements may be or whether a bidder will comply; instead, the matter is one to be resolved between the contractor and the licensing authorities. *New Haven Ambulance Service, Inc.,* 57 Comp. Gen. 361 (1978), 78-1 CPD ¶ 225; *Olson and Associates Engi-*

neering, Inc., B-215742, July 30, 1984, 84-2 CPD ¶ 129; *Metropolitan Ambulance Service, Inc.*, B-213943, Jan. 9, 1984, 84-1 CPD ¶ 61.

Here, the protester states that the solicitation requires the contractor to comply with "any applicable Federal, state, and municipal laws, codes, and regulations in connection with the prosecution of the work." That clearly is merely a general requirement of the type referenced to in the cases cited above. Accordingly, the contracting officer was free to make award under the solicitation without regard to whether the awardee is licensed or certified by California.

Moreover, to the extent the contracting officer might have had reason to consider the awardee's compliance with California licensing requirements, the matter is encompassed by that official's determination that the awardee was responsible, that is, capable of performing the contract. *See Old Dominion Security, Inc.*, B-218324, June 7, 1985, 85-1 CPD ¶ 656; *Metropolitan Ambulance Service, Inc., supra.* This Office does not review challenges to such determinations except in limited circumstances not present here. *See* 4 C.F.R. § 21.3(m)(5) (1988).

The protest is dismissed.

B-231542, August 24, 1988

Appropriations/Financial Management

Appropriation Availability

■ **Purpose Availability**

■■ **Specific Purpose Restrictions**

■■■ **Personal Expenses/Furnishings**

Voice of America radio broadcaster who rented a tuxedo for the purpose of attending an official function where formal dress was mandatory, may not be reimbursed from public funds if it is shown that attendance at such functions was part of his regular duties and that formal attire was a personal furnishing which the employee may reasonably be required to provide at his own expense. If, on the other hand, formal dress is required only rarely for radio broadcasters at comparable positions in his agency, the rental expense may be reimbursed. Because there was conflicting factual information in the report submitted with the employee's request for reconsideration of the denial of his claim for reimbursement, GAO sets out the applicable principles and instructs the agency to pay or deny the claim, depending on how the conflicting information is resolved.

Matter of: Ghassan Ghosn—Request for Reconsideration

This decision is based on the claimant's request of April 27, 1988, that we reconsider our decision Z-2864991, June 8, 1987, disallowing his claim for reimbursement as a Voice of America (VOA) employee for the cost of renting a tuxedo. As explained below, because of a conflict in the factual statements of the VOA's parent organization, the United States Information Agency (USIA) and the claimant's VOA division chief, we are unable to determine whether there are grounds to authorize reimbursement. We will, however, set forth the principles governing the claimant's right to reimbursement. We suggest that the VOA resolve the factual discrepancy and authorize or deny reimbursement accordingly.

Background

Ghassan Ghosn, an international radio broadcasting employee of the VOA, submitted a claim to the GAO Claims Group in the amount of $72.72 for the rental of a tuxedo. The employee-claimant was assigned to attend a function at the Kennedy Center hosted by the Lebanese ambassador to the United States, for the purpose of conducting interviews and generally covering the event for subsequent broadcast to Arabic-speaking audiences. The invitation to the function indicated that the required attire was "black tie." The claimant had never been asked to attend a "black tie" affair before and did not own a tuxedo. His supervisor advised him to rent one, assuring him that he would be reimbursed.

In order to determine whether reimbursement was justified in this case, our Claims Group asked the employee to resubmit his claim, attaching an administrative report from his agency. He did so, on April 9, 1987, but the report was from the Chief, Financial Operations Division, USIA. The administrative report was distinctly negative and did not support the claim or the claimant's justification for reimbursement. It stated:

> The Agency has in its employment other personnel holding similar positions [similar to the claimant's] such as television, radio and magazine correspondents and reporters who are required to attend many different functions some of which may require the wearing of 'formal attire' in the performance of their official duties.
>
> The Agency has consistently denied reimbursement for the rental of tuxedos to its correspondents and reporters based on Comptroller General decisions [citations omitted]. Individuals in these positions could reasonably be required to wear a tuxedo at some time in the performance of the work for which they have been employed.

It was on the basis of this report that our Claims Group adjudicator denied the claim.

Discussion

The general rule, as set forth in 3 Comp. Gen. 433 (1924) and many subsequent cases, is that most items of apparel are considered to be the personal responsibility of the employee and may not be provided at public expense, even when worn in the course of public business. However, we have made an exception in certain cases where the item of clothing in question is not a usual part of every employee's wardrobe and where an occasion requiring him to wear such clothing on official business arises very infrequently. *See,* for example, B-164811, July 28, 1969, in which we authorized reimbursement to certain Justice Department attorneys for rental costs of formal cutaway coats and striped pants required at that time by the Supreme Court to be worn by all attorneys appearing before it. We noted in that case that the individual attorneys claiming reimbursement were only occasionally required to appear before the Supreme Court and it was therefore unreasonable to expect them to purchase such formal attire.

The conditions for applying this exception were set forth in some detail in a 1924 decision, 3 Comp. Gen. 433. In determining whether the "equipment" [in that case, laboratory coats] should be expected to be furnished by the employee

at his or her own expense, we said that the decision turns on "whether the 'equipment' is to be used by the employee in connection with his regular duties or only in emergencies or at infrequent intervals."

The claimant is quite familiar with those decisions. In his request for reconsideration of his claim, he reminds us of B-164811, discussed above, and suggests that his situation is quite analogous to that of the Justice Department attorneys for whom we authorized reimbursement.

We think the claimant has accurately characterized our decisions. If, in fact, he or employees in similar positions at the VOA are seldom called upon to wear formal clothing on official business and he had no reason to anticipate that this requirement would arise, we think he can properly be reimbursed for the rental costs he incurred. In support of his contention, the claimant submits a letter written by the chief of the North Africa, Near East and South Asia Division, VOA (the division in which the claimant works) to the Chief, Administrative Operations, VOA. The chief takes sharp issue with the basis we offered for rejecting the original claim—that is, the administrative report we received from the USIA. He states:

> Let me point out that I have been Chief of this division for a little over two years now—we have approximately 150 broadcasters, and in the entire two years, Ghosn [the claimant] is the only one who has been obliged to wear formal attire to cover a story.
>
> Again, I contend that Comptroller General decisions [denying reimbursement] do not apply; individuals who are IRB's [International Radio Broadcasters] cannot 'reasonably be required to attend' such functions and certainly the allegation that employees of Gus' [the claimant] level [he was a GG 11, equivalent to the GS scale, at the time of the event] level are 'required to attend many functions requiring formal attire' is patently untrue.

We are not in a position to resolve the disparity between the USIA report provided with the first submission of the claim and the above-quoted statement of the claimant's VOA chief. If it is administratively determined by the Administrator of USIA or his designee that formal attire is not reasonably related to the carrying out of Mr. Ghosn's duties, the claim may be paid if otherwise correct.

B-229433, August 25, 1988

Civilian Personnel

Leaves of Absence
■ Annual Leave
■■ Charging
■■■ Retroactive Adjustments
■■■■ Leave-Without-Pay

An employee who received advance credit of annual leave as a temporary employee used all that leave and was placed in a leave-without-pay (LWOP) status to cover the remainder of his absence. When he was later appointed to a permanent position during the same leave year and received advance crediting of additional annual leave, he requested it be retroactively substituted for part of the LWOP period previously charged. The request is denied. The prior period of LWOP was properly

charged because the employee did not have sufficient leave to cover his absence. Since the entitlement to additional advance annual leave arose only because of his new employment status, it may not be retroactively substituted for any period prior to the first date it became available for his use.

Matter of: Monideep K. De—Annual Leave—Retroactive Substitution for Leave Without Pay Previously Charged

This decision is in response to a request from the Director, Division of Accounting and Finance, United States Nuclear Regulatory Commission (NRC). It concerns the entitlement of an NRC employee to retroactively substitute annual leave for a period of approved leave without pay (LWOP). We conclude that the employee may not do so, for the following reasons.

Background

Dr. Monideep K. De was initially appointed by NRC to a 2-year full-time temporary position to expire on May 19, 1987. That full-time temporary appointment was extended for 3 months effective May 20, 1987. Dr. De was appointed to a full-time permanent position effective August 16, 1987.

The NRC policy regarding the crediting of annual leave is different than that followed by most other agencies. The NRC makes available to its employees, temporary and permanent, all the annual leave that each employee could earn in the leave year at the beginning of that leave year or from the date of their entry onto duty. However, as that policy relates to a full-time temporary employee, the advancement of annual leave for the year in which his appointment expires is treated differently. Since it is not known at the beginning of that leave year whether a temporary appointment will be renewed, extended, or converted to a permanent employment status, the employee only receives advance credit for annual leave which is equal to the number of whole biweekly pay periods remaining in their term of service.

Dr. De had a zero annual leave balance at the end of the 1986 leave year (January 3, 1987). At the beginning of the 1987 leave year he was advanced 36 hours of annual leave which he would accrue prior to the expiration of his temporary appointment. When his full-time temporary appointment was extended effective May 20, 1987, he was advanced an additional 28 hours. The total number of annual leave hours credited to him as a full-time temporary employee during the 1987 leave year was 64 hours.

On June 11, 1987, while still serving under a temporary appointment, Dr. De requested annual leave during the period June 11 to July 2, 1987, in order to travel to India to attend his mother's funeral. Since he had previously used 15 annual leave hours, his available annual leave balance was only 49 hours. He was granted permission to take leave; however, since he did not have sufficient annual leave to cover all 99 hours of his absence, 50 hours were charged as LWOP.

On August 16, 1987, approximately 6 weeks after his return, he was appointed to a full-time permanent position. Under NRC policy, he was advanced 40 hours of annual leave which represented the leave which would accrue to him during the remainder of the 1987 leave year. Dr. De then requested that these 40 annual leave hours be substituted for 40 of the hours of LWOP previously assessed him. His basic argument was that this annual leave became available to him in the same leave year. The NRC's position is that temporary employment and permanent employment are deemed separate employment statuses under their system. Since Dr. De used all of the annual leave which had been advanced to him as a temporary employee, such additional time away from his official duties then could only be covered by him being placed in an LWOP status. It is also their view that the subsequent permanent employment initiated a new annual leave entitlement. Since additional annual leave could not accrue to him before August 16, 1987, such leave as was advanced on that date could not be used for any period prior to that date. We concur.

Ruling

The granting of annual leave, including advance annual leave, is governed by 5 U.S.C. § 6302 (1982). Subsection (d) thereof, provides that:

(d) The annual leave provided by this subchapter, including annual leave that will accrue to an employee during the year, may be granted at any time during the year as the head of the agency concerned may prescribe.

The regulations issued by the Office of Personnel Management regarding annual leave and contained in Federal Personnel Manual Supplement 990-2, Book 630, subchapter S3-4(4) provide:

(4) *Advancing annual leave.* Annual leave which will be earned during the leave year may be credited to an employee's leave account at the beginning of the leave year. When it is so credited, it is available for use during the year . . . .

Under the plain language of the law and regulations, heads of executive agencies and departments have discretionary authority to establish the manner in which annual leave may be credited to an employee's account. So long as that agency practice, once established, is consistently applied, this Office would have no basis to challenge the validity of agency determinations in this matter. *See Margaret E. Thorpe,* B-187171, June 7, 1977.

We have held that annual leave may not be substituted retroactively for any part of a period of LWOP, absent a mistake of law or fact in the charging of LWOP, since to do so would increase the employee's right to compensation during the prior period. B-180870, Aug. 27, 1974; *Brenda T. Williams,* B-184773, Sept. 23, 1976; and *John L. Swigert, Jr.,* B-191713, May 22, 1978.

It is our view that the 40 hours of annual leave to which Dr. De was entitled to be credited effective August 16, 1987, was only available for his use beginning that date and may not be substituted retroactively for a prior period of LWOP.

B-231124, August 25, 1988

Procurement

Bid Protests
■ GAO Procedures
■■ Protest Timeliness
■■■ 10-Day Rule

Protest against disclosure of proprietary data is untimely where filed more than 10 working days after the protester knew of the disclosure.

Procurement

Bid Protests
■ Intellectual Property
■■ Disclosure
■■■ Remedies

The appropriate remedy for a firm that contends that the government has infringed its proprietary rights is an action against the government for damages or administrative settlement of its claim.

Matter of: Del Mar Avionics

Del Mar Avionics protests request for proposals (RFP) No. N00123-88-R-0312, issued by the Naval Supply Systems Command to acquire remote strafe scoring systems. Del Mar contends that the RFP violates its proprietary rights in acoustic strafe scoring technology. We dismiss the protest.

The Navy issued this RFP in February of 1988, to acquire a data linked remote strafe scoring system for the Navy Fleet Analysis Center located in Corona, California. These systems employ sensors, called "transducers," placed in the target area with related circuitry, to detect aircraft-fired projectiles within the target zone and a communications system (the "data link") to send the information to a remote unit which displays the number of "hits" to an observer; the systems may be adjusted to accommodate different types of projectiles and sizes of targets. The RFP includes detailed specifications for the up-range and down-range units, including schematic diagrams and component lists for the circuitry that accompanies the transducer and display; the requirements for the data link are described in functional terms. The RFP refers readers to an Air Force technical manual, Technical Order (T.O.) No. 43E7-7-0-1, dated September 25, 1972, for more in-depth details of the system. The RFP requires that all components of the system be interchangeable and compatible with the Eon SSS-101 Remote Strafe Scoring System manufactured by Eon Instrumentation, Inc.

Del Mar states that it was was the originator of acoustic strafe scoring technology, developed at private expense, and first sold its system, known as the DA-3/H, to the Air Force in 1972, with accompanying technical information. Del Mar's technical information is contained in Air Force T.O. No. 43E7-7-9-1, dated December 15, 1972, which is subject to a limited data rights provision restricting the government's right to disclose the data except for emergency repairs and in certain other limited circumstances. Del Mar states that the Air Force has pro-

cured systems from Del Mar since 1972 for itself, the Army, Navy and others, and has never questioned Del Mar's proprietary rights in the technology.

Del Mar contends that the Eon SSS-101 referenced in the current solicitation is an outgrowth of an improper disclosure by the Navy of Del Mar's data in a 1985 Navy procurement for modification of a DA-3/H system to support a more sophisticated communications link between the down-range and up-range units. Del Mar contends that Eon used data gained through this procurement to reverse engineer Del Mar's entire DA-3/H system. In support of this assertion, Del Mar points to a 1986 noncompetitive procurement by the Navy of a complete remote strafe scoring system from Eon, announced in the *Commerce Business Daily* (CBD) on January 8, 1987, which Del Mar suggests establishes that Eon reverse engineered Del Mar's acoustic technology. Del Mar, a participant in the 1985 competition, states that it did not object to the disclosure of its data in that procurement because the information would be essential to any contractor to develop the necessary interfaces between the components of the system and Del Mar assumed the Navy would provide the data subject to appropriate restrictions.

Del Mar contends that the current RFP is an effort by the Navy to further erode Del Mar's proprietary rights. Del Mar does not assert proprietary rights to the data link, but does contend that the acoustic technology employed in the transducer and related circuitry, the display units, and the collected data upon which adjustments to the system are based, are proprietary to Del Mar and are disclosed by the current RFP. Del Mar also objects to the Navy's failure to disclose the modifications to its DA-3/H employed in the Eon SSS-101, without which, Del Mar contends, it is not possible to satisfy the requirement for component interchangeability and compatibility.

The Navy states that Del Mar did not submit an offer before the April 22 closing date of the solicitation and is not, therefore, an interested party within the meaning of our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1988). The Navy also challenges Del Mar's claim of a proprietary interest in acoustic strafe scoring technology and argues that, in any event, the RFP does not require any particular design. The Navy asserts that the system being acquired is different from the DA-3/H because it does not require the hard-wired communication link employed in the DA-3/H. The Navy also states that it did not acquire the data rights to the Eon SSS-101. The Navy characterizes Del Mar's objections as a refusal to acknowledge that competitors may have reverse engineered Del Mar's system.

The Navy's view notwithstanding, a protester need not actually submit an offer to have its protest against a solicitation considered by our Office, where the protester has a direct economic interest that would be impinged by the alleged defect in the solicitation. *See, e.g., M.C.&D. Capital Corp.*, B-225830, July 10, 1987, 87-2 CPD ¶ 32. It is clear that Del Mar has an economic interest in protecting its proprietary data and in arguing that it unfairly has been excluded from the competition by the Navy's failure to provide sufficient information

with which to prepare an offer. Del Mar is an interested party for both of these questions.

The record contains several Air Force memoranda and communications with Del Mar, some as recent as March 1988, which support Del Mar's contention that the Air Force currently considers Del Mar's data to be proprietary. A copy of Air Force T.O. No. 43E7-7-9-1 provided by Del Mar contains a limited data rights provision. We also have informally contacted Air Force personnel who have confirmed that the Air Force views the DA-3/H data as proprietary to Del Mar. The Navy has offered no evidence to support its contention that the data in its possession, which Del Mar asserts the Navy obtained from the Air Force, was not proprietary. In these circumstances, it appears that the DA-3/H data was proprietary to Del Mar when it came into the Navy's possession.

We have held that in the interest of preserving the integrity of the government as a purchaser, and of avoiding possible legal liability, the government should recognize an individual's proprietary rights and not use or disclose proprietary information for procurement purposes unless it has acquired the rights to do so. 52 Comp. Gen. 312 (1972). However, we have also recognized that the value of such information lies in its continued confidentiality, *EDN Corp.,* B-225746.2, July 10, 1987, 66 Comp. Gen. 563, 87-2 CPD ¶ 31, and that the burden is upon the owner of the information to prevent its unauthorized disclosure. 46 Comp. Gen. 885 (1967). We think Del Mar should have known that its data was going to be disclosed in conjunction with the Navy's 1985 procurement, and any asumptions Del Mar may have made about possible Navy restrictions on the use of the data in conjunction with that procurement should have been dispelled no later than January 1987, when Del Mar learned of the sole-source award to Eon. Moreover, Del Mar should have known, on the basis of the latter acquisition, that Eon may have used the data to reverse engineer the DA-3/H.

Our Bid Protest Regulations require that protests be filed within 10 working days of when the protester knew or should have known of the basis for its protest. 4 C.F.R. § 21.2(a)(2). Because Del Mar did not protest the disclosure within 10 days of notice of the sole-source award to Eon in January 1987, Del Mar's objections to the past disclosure to Eon, as well as related allegations that the Navy engaged in technical transfusion and leveling, are untimely and will not be considered.

With respect to the current procurement, as noted above, the Navy states that it did not acquire a data package on the SSS-101, and we cannot recommend that the Navy disclose such data to Del Mar to allow it to compete in the present acquisition. Also, it would do no good to recommend deletion of Del Mar's data from the RFP, since it appears already to be in the possession of Eon, which Del Mar cites as the only other known competitor. The appropriate remedy for a firm that contends that the government has infringed its proprietary rights is an action against the government for damages or administrative settlement of its claim. *See Garrett Pneumatic Systems Division,* B-207213, *et al.,* May 6, 1982, 82-1 CPD ¶ 435. Also, to the extent Del Mar objects to Eon's use of its data, this is a matter between private parties not appropriate for consider-

ation under our bid protest function. *Aeronautical Instrument and Radio Co.*, B-224431.3, Aug. 7, 1986, 86-2 CPD ¶ 170.

The protest is dismissed.

B-231167, August 30, 1988

Procurement

Competitive Negotiation
■ Requests for Proposals
■■ Evaluation Criteria
■■■ Cost/Technical Tradeoffs
■■■■ Weighting

A protest that the contracting agency did not properly evaluate technical proposals according to the solicitation's stated evaluation scheme is denied, where the record shows that the evaluators conducted a detailed evaluation of proposals in each of the technical evaluation factors listed in the request for proposals (RFP) and each factor was weighted to give it the appropriate degree of importance accorded it in the RFP.

Procurement

Competitive Negotiation
■ Requests for Proposals
■■ Evaluation Criteria
■■■ Cost/Technical Tradeoffs
■■■■ Technical Superiority

A contracting agency properly decided to award a cost-plus-fixed-fee contract to the offeror of the higher-rated, higher-cost proposal, where the solicitation emphasized that technical factors were more important than cost considerations, and the contracting officer reasonably determined that the awardee's higher technical merit was worth the relatively slight additional cost.

Matter of: ORI, Inc.

ORI, Inc., protests award of a 3-year, cost-plus-fixed-fee contract to Syscon Corp. by the Department of the Navy pursuant to request for proposals (RFP) No. N66604-87-R-5061. The RFP requested proposals to provide technical and engineering services on an indefinite delivery, indefinite quantity basis to enhance the capabilities of and to contribute to the maintenance of the Navy's test and measurement systems. ORI contends that it should have been selected for award because its proposed cost was lower than Syscon's and its technical proposal was equal to or better than Syscon's. Alternatively, ORI charges, the Navy improperly selected Syscon for award on the basis of factors not stated in the RFP's evaluation formula.

We deny the protest.

The RFP was issued by the Naval Underwater Systems Center (NUSC) on March 3, 1987. The solicitation stated that the contract would be awarded to the

offeror whose conforming proposal was determined to be most advantageous to the government, price and other factors considered. The evaluation factors, in descending order of importance, were: personnel, technical approach, management approach, corporate experience, facilities, and cost. Although cost was the least important factor, the RFP stated that the importance of cost would increase with the degree of equality of proposals in relation to the other factors, or if an offer was so high in cost as to diminish the value of the proposal's technical superiority to the government. Cost was to be adjusted for realism.

NUSC received three proposals by the April 9, 1987 closing date.[1] After evaluation by a technical evaluation panel, ORI's initial technical proposal was rated overall as superior and Syscon's was rated overall as acceptable. The contracting officer reviewed the technical evaluation panel's findings and decided that ORI's proposal had been rated too high, because the evaluators considered favorably the experience and expertise of a subcontractor—A.D. Little—in evaluating ORI's proposal. In the contracting officer's opinion, the evaluators should have rated the ORI proposal lower because the role of this subcontractor was not well defined in the technical proposal and because no costs were included in ORI's cost proposal for A.D. Little personnel. [2]After consulting with the chairman of the technical evaluation panel, the contracting officer lowered ORI's overall rating to highly acceptable. The contracting officer determined that all proposals were in the competitive range as each had a reasonable chance of being selected for award.

Discussions were held with all offerors in early 1988 (it is not clear from the record why it took from April of 1987 until then to initiate negotiations), and best and final offers (BAFOs) were submitted by March 3, 1988. After reviewing the revised technical proposals, the evaluation panel concluded that those ORI and Syscon were highly acceptable in each of the five technical evaluation categories. Even though the best and final technical proposals of both Syscon and ORI were rated as highly acceptable overall, the evaluators concluded that "Syscon is the superior company based on the technical evaluation." This conclusion was supported by detailed evaluation documents that showed that Syscon had improved its technical proposal significantly between its initial and BAFOs, to the extent that Syscon's technical proposal was ultimately ranked first (or tied for first) in four of the five technical evaluation areas, while ORI's technical proposal was ranked first (or tied for first) in only two evaluation areas.

Proposals were adjusted for cost realism, resulting in an evaluated cost plus fee of $12,043,531 for ORI and $12,230,046 for Syscon. The source selection authority determined that Syscon's technical superiority was worth more than the $186,515 in additional costs it represented and, therefore, the contract was awarded to Syscon on April 19. ORI filed its protest on April 28.

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[1] For the purpose of resolving the protest we will only discuss the offers of ORI and Syscon even though the third offeror did participate throughout and did submit a best and final offer.

[2] The technical evaluation panel members evaluated the proposals without the benefit of seeing the offerors' cost proposals.

ORI first complains that the contracting officer improperly downgraded ORI's initial overall rating from superior to highly acceptable. ORI argues that the contracting officer or the evaluators should have restored the superior rating when ORI clarified A.D. Little's role in its best and final proposal.

The record shows that ORI's initial proposal received a superior overall rating primarily because A.D. Little was proposed as part of ORI's contract team. However, this rating was conditioned upon ORI's somehow formalizing and clarifying its agreement with A.D. Little. The evaluators were concerned because no clarification was provided as to A.D. Little's commitment to the ORI team, no breakdown was provided by labor category or otherwise to show the extent of A.D. Little personnel's participation, and A.D. Little personnel were to be provided only on an "as required" basis. For these reasons, the contracting officer concluded that ORI's superior rating was too speculative. After discussing the matter with the chairman of the technical evaluation panel, he lowered ORI's overall rating accordingly. Moreover, when ORI provided clarification of A.D. Little's participation as a subcontractor, ORI proposed to use the key A.D. Little personnel for only 150 hours over the 3 years of the contract. This is less than 1 percent of the total effort. As ORI's initial superior rating was expressly conditioned on use of A.D. Little as a formal member of ORI's proposal team, and as the final proposal offered use of A.D. Little personnel for only a minimal amount of time, we find no fault in the evaluators' not restoring ORI's superior ranking. Thus, we believe that the contracting officer and the evaluators had a reasonable basis for their ratings of ORI's proposal in that regard.

ORI next contends that Syscon was selected for award because Syscon proposed ready access to certain laboratory facilities including acoustic measurement facilities, signal processing facilities, hardware test equipment and data reduction facilities. ORI says it did not offer such facilities because the RFP did not require them, and argues that the Navy should have identified its requirement for such facilities in the RFP as an evaluation factor if it was going to evaluate them as it did with Syscon. ORI also charges that the Navy improperly did not point out this deficiency in ORI's initial proposal to ORI during discussions.

The Navy responds that Syscon's enhanced laboratory facilities and acoustic expertise included specialized analytic software with direct application to the contract requirements that would cost the Navy approximately $375,000 to duplicate. The Navy further points out that Syscon's evaluated cost plus fee was only $186,515 more than ORI's, which represents only about 1.5 percent of the total contract cost, so that Syscon's proposal clearly represented the greater value to the government.

The noted laboratory facilities were not set forth in the RFP as a minimum requirement that a proposal had to meet in order to qualify for contract award. The evaluation documents show that the Navy had very high regard for ORI's initial technical proposal and considered ORI fully capable of performing the required work using only the facilities ORI had proposed. Thus, the Navy properly did not consider ORI's proposal deficient for failing to offer the above-listed laboratory facilities, and the Navy was not required to cite this matter as a defi-

ciency in ORI's initial proposal during discussions. *See* Federal Acquisition Regulation § 15.610(c)(2) (FAC 84-16).

On the other hand, we believe that the RFP did put ORI sufficiently on notice that these types of laboratory facilities could be considered as enhancements to its technical proposal and might result in a more favorable evaluation. The RFP stated that, in describing their technical approach to the statement of work, offerors should identify "any unique capabilities which will be used to enhance the overall approach to the required tasks." The RFP also stated that 80 percent of the engineering tasks to be performed would involve mid-level engineering capability, while 20 percent of the engineering tasks would involve high-level technology in disciplines such as acoustic propagation and signal processing, among others. In addition, the RFP directed offerors to identify equipment, facilities and procedures to be used for computer facilities, as well as fabrication of prototype hardware. The RFP also specified that offerors should demonstrate their understanding of the statement of work by discussing software programs, systems analysis, fiber-optic systems, and radiated noise analysis, among other things. We believe that the above-enumerated facilities clearly related to the RFP requirements and that the RFP reasonably put offerors on notice that such facilities properly could be viewed as increasing the technical merit of a proposal. *See Human Resources Research Organization,* B-203302, July 8, 1982, 82-2 CPD ¶ 31.

As to the Navy's actual evaluation of Syscon's proposal in this regard, Syscon's final proposal included the use of a subcontractor that added experience and access to certain laboratory facilities and analytic tools to solve the many acoustic related problems, as well as a source of analytic models and software programs to facilitate the work. The evaluators were impressed by Syscon's subcontractor's facilities and expertise and properly evaluated the subcontractor as a strength in RFP-specified evaluation subfactors—such as understanding the statement of work, software programs, and radiated noise analysis—under the technical approach evaluation factor. The addition of these facilities also helped to upgrade Syscon's proposal under the facilities evaluation factor. As these facilities and tools reasonably related to the work required under the RFP, we do not think the Navy evaluators acted improperly in considering them as enhancements to Syscon's proposal.

ORI alleges that the evaluators improperly downgraded ORI's best and final proposal in the management approach evaluation factor. The evaluators were concerned because the key personnel proposed by ORI were dispersed in 17 different geographic locations throughout the country. The evaluators were also concerned because ORI proposed an individual for the position of project manager who would contemporaneously act as a division manager for one of ORI's divisions. ORI claims that its personnel were dispersed over only eight different locations, which represents a dispersal over only one location more than Syscon's personnel team. Furthermore, ORI charges, the Navy had no basis for discounting the program manager's effort as he was fully committed to the project

full-time and because his administrative assistants would perform most of the corporate/management functions required of him as a division manager.

We find no impropriety in the Navy's evaluation of ORI's proposal. The record shows that the Navy specifically told ORI during discussions that it was concerned about ORI's efficiency and effectiveness in managing and coordinating the project team because ORI had proposed team personnel from 10 separate locations. Instead of acting to allay the Navy's concerns about dispersal of its key personnel, ORI actually increased the dispersal of its key personnel to 17 locations. In this regard, ORI arrives at its calculation of only eight geographic locations by considering different offices that are near each other to be the same location even if they are in different towns. We think the Navy evaluators were reasonable in treating each office as a separate location, however, because offices were independently managed, each office was some distance from other offices, and many of the offices ORI considers to be near each other actually are offices of different companies acting as subcontractors on the ORI team. We think the Navy reasonably found that a proposal team made up of six separate companies in 17 different offices might be more difficult to manage effectively.

Moreover, we can understand the evaluators' concern that a project manager who also had duties to perform as a division manager might be less effective by virtue of his dual roles. It was incumbent upon ORI to explain in its BAFO how this person could handle both jobs well, which ORI failed to do. We note also that the evaluators did upgrade ORI's evaluation in the personnel factor for the outstanding quality of the personnel team and project manager it proposed. In our view, the evaluation was reasonable in this regard.

In sum, we find no legal basis to object to the Navy's evaluation of proposals. The record shows a very detailed evaluation in each of the five technical categories set forth in the RFP. The record further shows that the evaluations were weighted to give each factor the appropriate degree of importance accorded it in the RFP. Close examination of the evaluation materials reveals that the evaluators were able to discern varying degrees of technical excellence within the broad, highly acceptable rating. Of the five factors in which technical proposals were evaluated, Syscon's proposal was decidedly better than ORI's in three, while ORI's proposal was superior to Syscon's in only one. While the Navy regarded ORI's proposal as a fully qualified or very good proposal, the Navy reasonably found that Syscon's proposal was even better.

We have recognized that in a negotiated procurement selection officials have the discretion to make cost/technical tradeoffs, and the extent of such tradeoffs is governed only by the tests of rationality and consistency with the established evaluation criteria. *See Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. We have upheld awards to higher technically rated offerors with higher proposed costs where the contracting agency reasonably determined that the cost premium involved was justified considering the significant technical superiority of the selected offeror's proposal. *See*, for example, *Tracor Marine, Inc.*, B-226995, July 27, 1987, 87-2 CPD ¶ 92.

Based on our analysis of the Navy's evaluation of proposals as discussed above, we think the agency properly exercised its discretion when it determined that the superiority of Syscon's offer was worth more than the slight cost advantage of ORI's offer. The Navy's determination is especially justified because the RFP emphasized the importance of technical merit over cost considerations. *See Todd Logistics, Inc.*, B-203808, Aug. 19, 1982, 82-2 CPD ¶ 157. Furthermore, the Navy calculated the value of certain of Syscon's analytic software with direct application to the contract requirements to be worth approximately $375,000 to the government; even though this amount was not considered in the cost evaluation, we note it is about double the amount of the cost advantage of ORI's proposal. Accordingly, the Navy's decision to award to the offeror with the higher-rated technical proposal at a slightly higher evaluated cost was reasonable and consistent with the evaluation formula.

The protest is denied.

Appropriations/Financial Management

Civilian Personnel

Compensation
■ Rates
■■ Determination
■■■ Highest Previous Rate Rule

An employee who previously held a position as an intermittent employee is not eligible for highest previous rate consideration upon reemployment under 5 C.F.R. § 531.203(c) (1987), since the highest previous rate rule is based upon a regularly scheduled tour of duty and intermittent employment by definition does not involve a regularly scheduled tour of duty. Moreover, in this case the employee was properly classified as an intermittent employee inasmuch as the employee independently scheduled her work and the days and hours worked fluctuated each pay period.

570

■ Annual Leave
■■ Charging
■■■ Retroactive Adjustments
■■■■ Leave-Without-Pay

An employee who received advance credit of annual leave as a temporary employee used all that leave and was placed in a leave-without-pay (LWOP) status to cover the remainder of his absence. When he was later appointed to a permanent position during the same leave year and received advance crediting of additional annual leave, he requested it be retroactively substituted for part of the LWOP period previously charged. The request is denied. The prior period of LWOP was properly charged because the employee did not have sufficient leave to cover his absence. Since the entitlement to additional advance annual leave arose only because of his new employment status, it may not be retroactively substituted for any period prior to the first date it became available for his use.

594

■ Leave Substitution
■■ Eligibility

After separation from his employment with the government, a former employee seeks to have a portion of his period of leave without pay (LWOP) converted to sick leave because he was not previously informed that sick leave might be available to him while he held outside employment. We hold that sick leave may not be substituted retroactively after separation in the absence of a *bona fide* error or violation of a regulation governing the employee's separation.

565

Relocation
■ Household Goods
■■ Advance Payments
■■■ Liability
■■■■ Waiver

Based on erroneous agency information an employee, expecting to pay $150, placed insurance on his household effects being transported at government expense from Puerto Rico to New York. The insurance actually cost $900, and the employee requests waiver of the $750 the agency paid the carri-

er for the employee's insurance in excess of the $150. Since the employee's debt resulted from the erroneous advice of his agency, it is considered to have arisen out of an erroneous payment and is subject to consideration under the waiver statute. We concur with the agency's recommendation to waive the $750.

589

■ **Temporary Quarters**
■■ **Actual Subsistence Expenses**
■■■ **Eligibility**
■■■■ **Extension**

A transferred employee purchased a yet-to-be constructed residence which was not scheduled for completion until a date beyond the 60-day period of temporary quarters for subsistence expenses (TQSE). The agency denied his request for an additional 15 days TQSE. Paragraph 2-5.2 of the Federal Travel Regulations permits an agency to grant an extension of time for TQSE purposes, but only if events arise during the initial TQSE period to cause permanent quarters occupancy delays and if the events are beyond the employee's control. Since there were no such delaying events in this case, the claim is denied.

567

■ **Temporary Quarters**
■■ **Actual Subsistence Expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

A transferred employee was authorized and reimbursed for temporary quarters subsistence expenses for 60 days, but the agency questions whether the quarters were temporary based upon the duration of the lease (6 months), the movement of household goods into the residence, the type of quarters (single family dwelling), the lack of clear and definite intent to seek permanent quarters, and the length of time the employee occupied the dwelling (1-1/2 years). We hold that the record supports a determination that, at the time he moved into the dwelling, the employee only intended to occupy it on a temporary basis. He attempted to negotiate a shorter-term lease, he made substantial efforts to locate a permanent residence, he moved his household goods into the residence but did not unpack most of them, and, later, he was uncertain as to whether to purchase a residence since he might be transferred again to another city. Under these circumstances, we conclude that the payment of temporary quarters was proper.

585

Military Personnel

Pay
■ Death Gratuities
■■ Eligibility
■■■ Children

■ Death Gratuities
■■ Eligibility
■■■ Former Spouses

■ Death Gratuities
■■ Eligibility
■■■ Stepchildren

A woman's claim for a death gratuity as the widow of a deceased service member is denied since she never obtained a divorce from her first husband and legally was not a surviving spouse. Also, her alternative claim for the death gratuity to be paid to her children as the stepchildren of the deceased is denied since her invalid marriage to the deceased precludes her children from having become the deceased's stepchildren.

569

■ Survivor Benefits
■■ Annuities
■■■ Eligibility
■■■■ Former Spouses

Army officer, having validly divorced his first wife in 1946, married again in 1960. When he then married a third wife in 1972 without dissolving his second marriage, his third wife was not legally married to him and therefore did not qualify as the beneficiary of his Survivor Benefit Plan (SBP) annuity. Since the second wife was legally married to the retired officer at the time of his death, she is his widow and is the proper beneficiary of the SBP annuity in spite of the third ceremonial marriage.

561

Relocation
■ Variable Housing Allowances
■■ Eligibility
■■■ Amount Determination

A service member married a woman who owned a house with a first and second mortgage on it, and it became their family residence. She had been previously married, and she had taken the second mortgage to pay her former husband an amount due him in their community property settlement whereby she retained the house after their divorce. The regulation defining monthly housing costs for purposes of computing a uniformed service member's variable housing allowance (VHA) excludes the cost of a second mortgage taken for other than repairing, renovating or enlarging a residence since VHA is an allowance to help a member pay for housing in a high-cost area, not to satisfy a

community property settlement. Neither may the second mortgage in these circumstances be considered a mortgage taken for the initial purchase of a residence.

578

■ **Variable Housing Allowances**

■■ **Eligibility**

■■■ **Amount Determination**

The definition of monthly housing costs for purposes of computing a variable housing allowance (VHA) may not include a cost for the interest or other return on investment a service member loses for the money he puts down upon purchasing his residence (a so-called "opportunity cost"). In promulgating the VHA regulations, the services chose not to include opportunity costs, and it was within their latitude under the law to do so.

578

Procurement

request for proposals (RFP) and each factor was weighted to give it the appropriate degree of importance accorded it in the RFP.

600

■ Requests for Proposals
■■ Government Estimates
■■■ Wage Rates

Protest challenging as too low the wage rates (of employee classes not covered by wage rate determination) used in government's cost estimate and, thus, the propriety of the cost realism analysis based on that estimate, is without merit where record indicates that, although protester utilized higher-skilled employees in its proposal than agency utilized in developing estimate, agency's use of lower-skilled employees in estimate was not inconsistent with solicitation requirements.

581

Contract Formation Principles
■ Contract Awards
■■ Offers
■■■ Acceptance

Allegation that a valid contract exists between the protester and the contracting agency is without merit where the agency made award contingent upon the inclusion of the protester's safety proposal into the resulting contract, and the protester refused to agree to this new contingency.

563

Contractor Qualification
■ Licenses
■■ State/Local Laws
■■■ GAO Review

In the absence of a specific licensing requirement in the solicitation, a contracting officer properly may make award without regard to whether the awardee is in compliance with state and local licensing requirement.

591