United States General Accounting Office

GAO

Office of General Counsel

September 1991

Decisions of the Comptroller General of the United States

Volume 70

Pages 699-737

PCN 45300710100

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

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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-Digest of the Published Decisions of the Comptroller General of the United States" 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., 69 Comp. Gen. 6 (1989). Decisions of the Comptroller General that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-237061, September 29, 1989.

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

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September 1991

B-243315, September 6, 1991

Civilian Personnel

Compensation

■ **Overpayments**

■■ **Error detection**

■■■ **Debt collection**

■■■■ **Waiver**

A reemployed annuitant's request for waiver must be denied when he was aware that the amount of the annuity was not being deducted from his salary and that he was being overpaid. Although the employee immediately notified the agency, we have consistently held that when an employee is aware of an error he cannot reasonably expect to retain the overpayment. Financial hardship cannot form the basis for waiver.

Matter of: David L. Williams—Waiver of Overpayments—Knowledge of Pay Error

Mr. David L. Williams, a reemployed annuitant for the Department of Labor, has requested waiver of salary overpayment under the provisions of 5 U.S.C. § 5584 (1988). We deny the request.

Background

Mr. Williams was hired as a reemployed annuitant by the Department of Labor on July 5, 1987, and appointed to a GS-13, step 7 position at a salary of $46,473 per annum. As a reemployed annuitant, Mr. Williams' salary was subject to reduction by the amount of Civil Service Annuity received. 5 U.S.C. § 8344 (1988). Due to an error in the Department's automated payroll system, no reductions were made in Mr. Williams' salary from July 5, 1987, through June 16, 1990. Thus, Mr. Williams was overpaid $75,693.28.

Mr. Williams does not assert that he was unaware that his salary was subject to reduction of his annuity; in fact, the record shows that he was so advised in an employment interview. In addition, his initial Standard Form 50, and several later Form 50s were annotated to the effect "that the annual salary is to be reduced by the amount of the retirement annuity and by future cost of living increases." However, Mr. Williams states that on numerous occasions he advised his supervisor and appropriate officials in his personnel and payroll offices that he was being overpaid and his requests were either ignored or he was ad-

vised that his payroll records were correct and that he was receiving the correct amount of pay. Mr. Williams says that it would cause him extreme hardship if he had to repay the amount of the overpayment at this time. In support of his request, Mr. Williams states that this Office waived overpayment of pay for a reemployed annuitant under similar circumstances in decision *Lula F. Fones*, B-203186, Dec. 29, 1981.

Mr. Williams also requests that consideration be given to recent interim regulations issued by the Office of Personnel Management (OPM) pertaining to reemployment of military and civilian retirees. The regulations contain special provisions for reemployment without penalty (deduction of retired pay) to meet exceptional recruiting or retention needs. 56 Fed. Reg. 6206 (1991) to be codified at 5 C.F.R. Part 553.

The Department of Labor has recommended that Mr. Williams' waiver request be denied on the basis that he was aware of the overpayment and this places him partially at fault and such a finding of fault precludes waiver of his claim.

Opinion

The provision of law authorizing the waiver of claims of the United States against employees arising out of erroneous payments of pay, 5 U.S.C. § 5584 (1988), permits such waivers only when the collection of the erroneous payments would be against equity and good conscience and not in the best interests of the United States and only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee, or any other persons having an interest in obtaining a waiver.

It has been consistently held that when an employee is aware of an overpayment of pay when it occurs, he is not entitled to relief under 5 U.S.C. § 5584 if he accepts such an overpayment knowing it to be erroneous. The employee cannot reasonably expect to retain it and he should make provision for its repayment. In such case, collection of an overpayment is not considered to be against equity, good conscience, or contrary to the best interests of the United States, notwithstanding the fact that the employee may have brought the situation promptly to the attention of the proper authorities and sought an explanation or correction of the error. *Guy Cloutier*, B-231019, Jan. 26, 1989; *William J. McGovern*, B-232546, Oct. 17, 1989; *Hawley E. Thomas*, B-227322, Sept. 19, 1988.

It appears from the record that Mr. Williams knew from the receipt of his first paycheck that he was receiving pay in excess of his entitlement. Although he questioned his pay on numerous occasions, there is no indication that he specifically stated that he was a reemployed annuitant and that his salary was subject to reduction by the amount of his annuity. For example, in his memorandum to Personnel he stated only that his pay appeared to be excessive and may need to be adjusted. Further, the assertion that he repeatedly called the error to the attention of proper authority does not establish a basis upon which waiver may be granted. *See Richard W. DeWeil*, B-223597, Dec. 24, 1986, where we denied

waiver to a reemployed annuitant who was aware of a pay error and brought the error to the attention of the agency on 10 separate occasions, and who retained such amount after he still continued to be overpaid.

The case cited by Mr. Williams in support of his contention that waiver should be granted, *Lula F. Fones,* B-203186, *supra,* is distinguishable. The employee in that case was aware that her salary would have to be reduced by the amount of her annuity and she brought this fact to the attention of her payroll office where she was assured that her proper annuity was being deducted and the amount of pay she was receiving was correct. Ms. Fones accepted the assurance from her payroll office as correct. In Mr. Williams' case, the record indicates he did not believe his pay was correct and that he was entitled to retain the money.

Since we find that Mr. Williams was on notice of the overpayment we cannot find that he was free from fault. The fact that collection of the debt will create a financial hardship does not provide a basis to excuse this indebtedness. An employee on notice of an error in his pay has a duty to return the excess sums or set aside this amount for refund at such time as the administrative error is corrected. *James T. Harrod,* B-195889, Feb. 14, 1980; *Frank A. Ryan,* B-218722, Dec. 17, 1985.

As regards Mr. Williams' request that we consider the new OPM regulations pertaining to the hire of retirees without penalty, we would point out that the regulations were not in effect when Mr. Williams was hired.

Accordingly, Mr. Williams' request for waiver is denied.

B-243074, September 11, 1991

Appropriations/Financial Management

Appropriation Availability

■ Time availability

■ ■ Time restrictions

■ ■ ■ Advance payments

Payments for McDonald's gift certificates and movie tickets, which will be redeemed at a later date for their full value, are not in violation of the advance payment prohibition in 31 U.S.C. § 3324, provided that adequate administrative safeguards for the control of the certificates and tickets are maintained, the purchase of the certificates and tickets is in the government's interest, and the certificates and tickets are readily redeemable for cash.

Matter of: Department of the Interior, Bureau of Indian Affairs—Payments for McDonald's Gift Certificates and Movie Tickets

An authorized certifying officer, Department of Interior, Bureau of Indian Affairs (BIA), requested an advance decision pursuant to 31 U.S.C. § 3529 (1988) on whether payments for McDonald's gift certificates and movie tickets, which will

be redeemed after payment has been made, are prohibited advances of public money. Under 31 U.S.C. § 3324, an advance of public money may be made only if it is authorized by a specific appropriation or the President.[1]

BIA submitted five vouchers for our consideration. BIA has already paid two vouchers for McDonald's gift certificates for students at the Chemawa Indian School, Salem, Oregon, a voucher for movie tickets for grade school students at the Wahpeton Indian School, Wahpeton, North Dakota, and a voucher for discount movie tickets for students at the Richfield Dormitory, Richfield, Utah. The fifth voucher, for $3,000 worth of McDonald's gift certificates for students at the Flandreau Indian School, Flandreau, South Dakota, which BIA has not yet paid, prompted this request for an advance decision.

In a similar case, 39 Comp. Gen. 201 (1959), we held that paying for coupon books which would later be used to purchase gasoline at a discount for official vehicles was not a prohibited advance of public moneys under 31 U.S.C. § 3324. In that case, as here, payment was made in advance of receipt of the item or service desired. We concluded, however, that the payment for the coupons was unobjectionable because administrative safeguards were in place to assure that the coupons were used for official purposes only, the purchase of gasoline at a discount was in the government's interest, the unused coupons were readily redeemable for cash, and the payment did not exceed the actual value of the coupon books. *Id.* We have no objection to BIA's proposed payments so long as BIA satisfies these criteria.

BIA's payment of four of the five vouchers suggests that it believes the purchase of gift certificates and movie tickets is in the government's interest. Also, the vouchers submitted indicate that the payments will not exceed the actual value of the gift certificates and tickets. However, the BIA submission does not indicate that administrative safeguards are in place, or that unused items will be readily redeemable for cash.

In this regard, BIA informally advised that it is developing guidelines for the proper safeguarding and control of the gift certificates and movie tickets. So long as BIA also ensures that the certificates and tickets are readily redeemable for cash, we would have no objection to the proposed payments.

[1] BIA, in its submission, did not identify any specific authority to make advance payments in this case, and we are not aware of any such authority.

B-240236, September 12, 1991

Military Personnel

Pay

■ Basic quarters allowances

■■ Rates

■■■ Determination

■■■■ Dependents

A member with dependents is entitled to a basic allowance for quarters at the "with-dependent" rate (BAQ-W) when adequate government quarters are not provided for him and his dependents. A divorced member may qualify for BAQ-W for a child living with the member's former spouse in private quarters if he pays child support in an amount at least equal to the difference between BAQ at the "with-" and "without-dependents" rates.

Military Personnel

Pay

■ Basic quarters allowances

■■ Rates

■■■ Determination

■■■■ Dependents

The cost of maintaining a separate residence for the times when the member has custody of the child may not be used instead of or in addition to support payments to qualify for BAQ-W.

Military Personnel

Pay

■ Variable housing allowances

■■ Amount determination

A divorced member who is entitled to a variable housing allowance (VHA) may receive the higher rate for a member with dependents (VHA-W) for continuous periods in excess of 3 months when his child is living with him. The costs of maintaining a home for the child's visits does not entitle him to VHA-W when the child is living with the member's former spouse or visiting the member for shorter periods.

Matter of: Technical Sergeant Fred D. Walker, USAF—Claims for BAQ and VHA at the with-dependent rate

We have been asked to render an advance decision on the claim of Technical Sergeant Fred D. Walker, USAF, for basic allowance for quarters (BAQ) and Variable Housing Allowance (VHA), both at the rates for a member with dependents (BAQ-W and VHA-W).[1] VHA is provided to assist members entitled to BAQ to defray housing costs in high housing-cost areas. In connection with this claim, we have also been asked a series of questions regarding the entitlement to BAQ-W of divorced service members who share custody of their children. For

[1] The Department of Defense Military Pay and Allowance Committee has assigned the number DO-AF-1502 to the request.

the reasons presented below, Sergeant Walker is not entitled to BAQ-W or VHA-W. We have responded to the shared custody questions posed to us as well.

Sergeant Walker and his wife were divorced November 9, 1987. According to their divorce decree, they share legal custody of their son, but Mrs. Walker was awarded primary physical custody. The child spends approximately 2 days per week during the school year and 3 days per week during the summer with Sergeant Walker, who pays $90 per month in child support. Neither Sergeant Walker nor his former wife, a civilian, reside in government quarters. We have been asked whether all or part of Sergeant Walker's expenses of providing a residence for his son may be used to increase his entitlement to BAQ and VHA.

Members of the uniformed services who are entitled to basic pay are entitled to BAQ unless they are provided government quarters adequate for themselves and their dependents. 37 U.S.C. § 403. A divorced member may qualify for BAQ-W for a child living with the member's former spouse in private quarters if he pays child support in an amount at least equal to the difference between BAQ at the "with-" and "without-dependents" rate for his grade. Department of Defense Military Pay and Allowances Entitlements Manual (Pay Manual), paragraph 30236(d).[2]

Since Sergeant Walker's former wife has primary physical custody of their son, he should be considered a noncustodial parent for the purpose of entitlement to allowances. Thus, as noncustodial parent of a child living in private quarters, Sergeant Walker would be entitled to BAQ-W if he paid sufficient child support—in his case, $123.90. Sergeant Walker is obligated to pay $90. If he were voluntarily to pay the additional $33.90 per month, his ex-wife would have to agree to accept the additional amount in order for him to qualify for BAQ-W. Pay Manual paragraph 30236(g). She apparently has not done so. Sergeant Walker is therefore entitled to BAQ at the rate for members without dependents only.

Likewise, to qualify for BAQ-W on a basis other than sufficiency of child support, the dependent child must reside with the member on a nontemporary basis, *e.g.*, for a continuous period in excess of 3 months, to qualify for the BAQ-W for the nontemporary period. The cost of maintaining a residence sufficient to accommodate a child would not entitle a member to the "with-dependent" allowance. *Major Norris G. Cotton,* 69 Comp. Gen. 407 (1990). *See also Major Garry R. Scott, USAF, and Captain Christopher Bonwich, USAF,* 64 Comp. Gen. 224 (1985) (a case which provides further explanation of the 3-month rule).

A member entitled to BAQ is also entitled to VHA whenever permanently assigned to duty in an area of the United States which is a high housing-cost area with respect to the member. 37 U.S.C. § 403a(a)(1). The Joint Federal Travel Regulations (JFTR) paragraph U8000-1 *et seq.* implement the law. A member who is not assigned to government quarters and receives BAQ-W solely because

[2] A member who fails to make ordered payments is not entitled to BAQ-W. *See* Pay Manual, paragraph 30236(b).

he is paying child support is entitled to VHA only at "without-dependent" rate. 37 U.S.C. § 403a(a)(4) and JFTR para. U8011-B.

Thus, while Sergeant Walker may be entitled to VHA if he lives in a high-cost area, he is not entitled to VHA-W unless his son lives with him for a continuous period in excess of 3 months, as the fact that he maintains a residence sufficient to accommodate his dependent child does not entitle him to VHA-W when his son lives with his former wife or lives with him for shorter periods. *See* 69 Comp. Gen. 407, 409, *supra.*

We have also been asked a series of questions regarding entitlement to BAQ-W when joint custody is awarded. Our responses refer to divorced parents with joint physical custody in instances where the parties do not live in government quarters.

In instances where both parents are service members, the Pay Manual, paragraph 30236.1(i), provides that in the absence of support payments each member will be entitled to BAQ-W for the periods when the child actually lives with him or her. If support is paid, support payments will take precedence over physical custody.

If only one parent is a member, the previous discussions of entitlement to BAQ-W apply. *See* Pay Manual, paragraph 30236(d), and 64 Comp. Gen. 224, *supra.* During a period when the child is living with the member in private quarters for a continuous period in excess of 3 months, BAQ-W is payable without additional payment of child support. The cost of maintaining a home is not a factor in determining entitlement to BAQ-W and cannot be used instead of or in addition to child support to qualify for the increased allowances.

Since Sergeant Walker's claim is denied, the vouchers submitted will be retained by this Office.

B-235945, September 16, 1991

Appropriations/Financial Management

Appropriation Availability

■ **Specific purpose restrictions**

■■ **Account balances**

■■■ **Cancelled checks**

■■■■ **Procedures**

Treasury checks issued to pay benefits provided under the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §§ 351-369, and expenses incurred by the Railroad Retirement Board in administering RUIA are subject to the check cancellation and disposition procedures in 31 U.S.C. § 3334(b), as added by section 1003 of the Competitive Equality Banking Act of 1987, by virtue of the comprehensive language "all Treasury checks" in section 3334(b).

Appropriations/Financial Management

Appropriation Availability
■ Specific purpose restrictions
■■ Account balances
■■■ Cancelled checks
■■■■ Statutory interpretation

The operative language of 31 U.S.C. § 3334(b), as added by section 1003 of the Competitive Equality Banking Act of 1987, and statutory provisions governing the use of funds in accounts established by the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §§ 351-369, are not irreconcilable. The provisions of RUIA do not address the cancellation and disposition of uncashed Treasury checks issued against the RUIA accounts and hence, under applicable canons of statutory construction, the procedures specified in section 3334(b), the general law on the subject, apply.

Matter of: Applicability of 31 U.S.C. § 3334(b) to Canceled Checks Previously Issued for Payments under the Railroad Unemployment Insurance Act

The Deputy General Counsel of the Railroad Retirement Board (Board) has asked whether 31 U.S.C. § 3334(b) (1988), as added by section 1003 of the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552, 658, supercedes restrictions that the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §§ 351-369, places on the use of funds appropriated to the accounts established under RUIA.[1] For the reasons stated below, we conclude that 31 U.S.C. § 3334(b) applies to uncashed Treasury checks issued to pay RUIA benefits.

Background

Section 3334(b) requires that proceeds of all Treasury checks issued before that provision's effective date of October 1, 1989, be applied to clear Treasury's uncollectible accounts receivable and other accounts associated with payment of checks and claims by Treasury on behalf of all payment certifying agencies, with any remaining funds to be deposited to Treasury's miscellaneous receipts account. Section 3334(c) preserves the underlying obligation represented by those Treasury checks issued before October 1, 1989.[2]

[1] We were subsequently asked whether Treasury checks issued for salaries of Board employees and to vendors for services rendered to the Board in its administration of RUIA also are subject to 31 U.S.C. § 3334(b). Our opinion deals with the applicability of section 3334(b) to all Treasury checks issued pursuant to RUIA, and therefore is equally applicable to Treasury checks issued to Board employees and vendors.

[2] 31 U.S.C. § 3334(b) and (c) read as follows:

(b) CHECKS ISSUED BEFORE EFFECTIVE DATE.—(1) Not later than 18 months after the effective date of this section, the Secretary shall identify and cancel all Treasury checks issued before such effective date that have not been paid in accordance with section 3328 of this title.

(2) The proceeds from checks canceled pursuant to paragraph (1) shall be applied to eliminate the balances in accounts that represent uncollectible accounts receivable and other costs associated with the payment of checks and check claims by the Department of the Treasury on behalf of all payment certifying agencies. Any remaining proceeds shall be deposited to the miscellaneous receipts of the Treasury.

(c) NO EFFECT ON UNDERLYING OBLIGATION.—Nothing in this section shall be construed to affect the underlying obligation of the United States, or any agency thereof, for which a Treasury check was issued.

Sections 10(a) and 11(a) of RUIA, 45 U.S.C. §§ 360(a) and 361(a), establish, respectively, the Railroad Unemployment Insurance Account (RUI Account) to pay unemployment and sickness benefits to U.S. railroad employees, and the Railroad Unemployment Insurance Administration Fund (RUI Administration Fund) to pay the expenses of administering RUIA. Sections 10(a), 10(b), and 11(c) of RUIA, 45 U.S.C. §§ 360(a), 360(b) and 361(c), restrict the use of funds in the two RUIA accounts to the purposes for which those accounts were established, and prohibits the transfer of funds in those accounts to any other fund or account.[3]

Treasury takes the position that 31 U.S.C. § 3334(b) is applicable to all Treasury checks without exception, including those issued for paying RUIA benefits and the Board's expenses in administering RUIA, since the language of section 3334(b) provides no basis for treating one check any differently from another based on the origin or nature of the underlying funds. The Board disagrees with Treasury's position, and argues that the language of sections 10(a), 10(b), and 11(c) of RUIA indicates that Congress intended that funds in the RUIA accounts only be used for the purposes for which they were established. It relies on the rule of statutory construction that where a general statute and a specific statute dealing with the same subject matter cannot be harmonized, the specific statute will control and be considered an exception to the general statute, absent a clear expression by Congress to the contrary. *See* 82 C.J.S. *Statutes* § 369. The Board concludes that 31 U.S.C. § 3334(b) and the cited RUIA provisions cannot be harmonized, and therefore the proceeds from any such canceled Treasury checks representing payments under RUIA should be returned to their respective RUIA accounts. The Board also contends that Treasury's interpretation of section 3334(b) would cause the unintended result of the RUIA accounts incurring double liability; they would be charged when checks are first issued and would be charged again upon reissuance when requested by a claimant, since 31 U.S.C. § 3334(c), as added by section 1003 of CEBA, preserves the underlying obligation on such claims.

Analysis

We agree with Treasury that the language of section 3334(b) evidences a clear and unambiguous intent by Congress that the requirements of that provision

[3] Sections 10(a) and (b) of RUIA provide:

(a) Notwithstanding any other provision of law, all moneys credited to the [RUI Account] shall be mingled and undivided, and are hereby permanently appropriated to the Board to be continuously available to the Board without further appropriation, for the payment of benefits and refunds under [RUIA], and no part thereof shall lapse at any time, or be carried to the surplus fund or any other fund.

(b) All moneys in the [RUI Account] shall be used solely for the payment of benefits and refunds provided for by [RUIA].

45 U.S.C. § 360(a), (b).

Section 11(c) of RUIA provides:

Notwithstanding any other provision of law, all moneys at any time credited to the [RUI Administration Fund] are permanently appropriated to the Board to be continuously available to the Board without further appropriation for any expenses necessary or incidental to administering [RUIA] . . . .

45 U.S.C. § 361(c).

apply to all Treasury checks without regard to the source or nature of the underlying funds. Such an intention we think is evident from Congress's choice of the comprehensive, all-inclusive language, "all Treasury checks." Based on the well-established principle that words or phrases in a statute should be given their ordinary and commonly understood meaning absent explicit indications or compelling reasons to the contrary, the only rational construction which can be placed on the operative language of section 3334(b) is that it applies to all Treasury checks without exception. *American Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982); *United States v. Turkette,* 452 U.S. 576, 580 (1981); *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). There is nothing in the legislative history of CEBA indicating that the language should be construed otherwise. Therefore, based on the plain language of section 3334(b), the check cancellation and disposition procedures established therein apply to pre-October 1, 1989, Treasury checks issued to pay benefits authorized under RUIA and expenses incurred by the Board in the administration of that act.

We recognize, as the Board points out, that such a literal interpretation of section 3334(b) could lead to double liability for the RUIA accounts, but this is a result that could occur for virtually every agency in government. In the absence of compelling legislative history on this point, we have no basis from which to derive an alternative interpretation of that provision. In this regard, we cannot assume that Congress, while considering enactment of CEBA, was not aware of this potential impact on agencies' operations. Further, we do not view the specific impact of section 3334(b) on RUIA accounts to be so peculiar, when compared to the impact on the myriad government accounts affected, so as to represent the type of absurd consequence that would argue against a reading of the statute consistent with its plain meaning. *See Crooks v. Harrelson,* 282 U.S. 55, 60 (1930). *See also TVA v. Hill,* 437 U.S. 153, 187, n.33 (1978).

In addition, we have considered the Board's argument regarding the asserted conflict between 31 U.S.C. § 3334(b) and sections 10(a), 10(b), and 11(c) of RUIA and do not find it to be persuasive. While we agree that section 3334(b) is a general, comprehensive statute and sections 10(a), 10(b), and 11(c) are specific provisions enacted to further specific congressional objectives, they do not cover the same subject matter. Section 3334(b) deals only with procedures for the cancellation of uncashed Treasury checks and the disposition of their proceeds. Sections 10(a), 10(b), and 11(c) of RUIA deal exclusively with the appropriations of moneys credited to the RUIA accounts and limit the use of such funds to RUIA benefits and refunds. Neither these nor any other provisions of RUIA address the disposition of proceeds from uncashed Treasury checks issued against those accounts.

We see no irreconcilable conflict between these statutory provisions. *See* 82 C.J.S. *Statutes* §§ 291, 366. Under established principles of statutory construction, the disposition of such proceeds would be governed by 31 U.S.C. § 3334(b), which provides the general law on the subject, since no check cancellation and disposition procedures are provided in RUIA. *See* 82 C.J.S. *Statutes* § 369, p. 840, n.20; 2A Sutherland *Statutory Construction* § 23.15 (4th ed. 1984), pp. 370-371,

n.3. We do not believe the overall purposes of the RUIA provisions would be thwarted by such a construction since a diversion of only a limited amount of funds from the RUIA accounts would be effected by section 3334(b). Moreover, there is no basis to believe that applying section 3334(b) would impact the RUIA accounts either to such an extent as to impair the Board's ability to meet its obligations under RUIA or in a manner or fashion different than the myriad other similarly situated agency accounts. Thus, such a construction reconciles those provisions by allowing them to operate while giving reasonable effect to their respective congressional purposes.

Based on these considerations, we believe that any uncashed Treasury checks which were issued prior to October 1, 1989, for payment of RUIA benefits or Board expenses should be canceled by Treasury and their proceeds disposed of in accordance with 31 U.S.C. § 3334(b) rather than returned to their respective RUIA accounts. It should be noted that there is no authority to charge the General Fund of the Treasury upon reissuance of a Treasury check in satisfaction of the underlying obligations or entitlement of such payments.

B-244384.2, September 16, 1991

Procurement

Bid Protests
■ GAO procedures
■■ Preparation costs

Procurement

Competitive Negotiation
■ Offers
■■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest where agency promptly took corrective action after the protest was filed, responding to 37 specific questions raised by the protester in two amendments totaling 39 pages.

Matter of: J&J Maintenance, Inc.—Claim for Costs

Donald E. Barnhill, Esq., East & Barnhill, for the protester.

Penny Rabinkoff, Esq., Naval Facilities Engineering Command, for the agency.

John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

J&J Maintenance, Inc. requests that our Office declare the protester entitled to recover reasonable costs of filing and pursuing its protest against the terms of request for proposals (RFP) No. N62477-91-R-0021, issued by the Department of

the Navy for maintenance, repair, and other services at the Navy Family Housing Complex, Woodbridge, Virginia. In its protest, filed on June 7, 1991, J&J argued that the solicitation was ambiguous and did not contain sufficient information to enable offerors to compete on an equal basis. On June 10 and 11, after receiving notice of the protest, the agency issued solicitation amendment Nos. 3 and 4 that addressed all of the issues raised in the protest. As a consequence, on June 21, J&J withdrew its protest.

When J&J withdrew its protest, it filed a claim with our Office under section 21.6(e) of our Regulations for the costs of filing and pursuing the protest. 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.6(e)). A protester is not entitled to such costs where an agency takes prompt corrective action in response to the protest. *Oklahoma Indian Corp.—Claim for Costs,* B-243785.2, June 10, 1991, 70 Comp. Gen. 558, 91-1 CPD ¶ 558; *General Physics Corp.,* B-244240.4, July 16, 1991, 91-2 CPD ¶ 62.

J&J states that it submitted two sets of questions on May 23 and 24 concerning substantially the same issues it raised in its protest to our Office and it did not get a response from the agency until it protested to our Office and amendments 3 and 4 were issued. J&J concludes that it is entitled to its protest costs because the protest showed that the RFP was not consistent with applicable statutes and regulations and because the agency's inaction forced the firm to file the protest.

The Navy explains that it thought that it answered most of J&J's numerous questions when it issued amendments 1 and 2 prior to the protest and it maintains that when the protest was filed it responded rapidly with amendments 3 and 4 on June 10 and 11, respectively.

We agree with the agency that it took prompt corrective action in response to the protest. *General Physics Corp.,* B-244240.4, *supra.* Further, we do not think that the relatively short time—about 2 weeks—it was given to consider the large number of questions submitted[1] prior to the protest and in the protest constitutes a reason to disturb our view that the agency action was prompt under all the circumstances. Finally, the agency's prompt corrective action makes it irrelevant whether or not the RFP was legally defective prior to its amendment.

The request for award of costs is denied.

[1] Amendment 3 was nine pages and responded to 31 specific questions, and amendment 4 was 30 pages, including answers to seven specific questions.

B-239138, September 25, 1991

Civilian Personnel

Compensation

■ Retroactive compensation

■■ Bonuses

■■■ Interest

Federal agency and labor union have adopted provisions in collective bargaining agreement that specify criteria for granting cash incentive awards, impose deadlines for the agency's payment of such incentive awards, and require the agency to pay interest on late payments of awards. Under these circumstances incentive awards constitute "pay, allowances, or differentials" for purposes of the Back Pay Act, 5 U.S.C. § 5596, and the Act (including its interest provision) applies in the case of failure of an agency to comply with award payment deadlines it has agreed to in collective bargaining.

Matter of: Interest on Late Payments of Mandatory Employee Incentive Awards

This decision responds to a question presented to us by a joint submission from the Internal Revenue Service (IRS) and the National Treasury Employees Union (NTEU), Chapters 83 and 193, pursuant to 4 C.F.R. Part 22 (1991). The issue is whether a provision proposed to be included in a collective bargaining agreement between IRS and NTEU which requires IRS to pay interest if it makes a late payment of a mandatory award to an employee is legally supportable. For the reasons set forth below, we conclude that the provision is legally supportable.

Background

The national collective bargaining agreement between IRS and NTEU contains a section, entitled "Mandatory Performance Awards," which requires that employees who attain an average score of "5.0" for all critical elements in their performance ratings shall receive a mandatory performance award of at least 2 percent of salary. According to the submission, these are incentive awards payable pursuant to 5 U.S.C. § 4503.

The national agreement required local negotiations as to the award amount and criteria for other mandatory awards. Pursuant to this mandate, IRS and NTEU entered into local negotiations but were unable to reach agreement. One issue the parties were unable to resolve, and which led to the submission to us, concerns the payment of interest on late payment of mandatory performance awards, as proposed in the following provision of the local agreement:

> Monetary awards shall be paid no later than 60 days from the date of discussion between the manager and the employee regarding the annual rating of record; but, in any event no later than 90 days after the employee's annual rating date.
>
> If determined to be legal, interest is to be paid on the late payment of cash awards beginning on the 61st day, per [the above] paragraph, and ending on the actual date of payment.

The submission indicates that both IRS and NTEU support the interest provision and believe that it is consistent with the Back Pay Act, 5 U.S.C. § 5596. In this regard, the submission cites our decision in *Albert W. Lurz*, 61 Comp. Gen. 492 (1982), holding that an agency may limit its discretion by accepting a mandatory policy in a collective bargaining agreement and thereby provide a basis for backpay under the Act. However, the submission raises the question of whether incentive awards constitute "pay allowances, or differentials" within the application of the Act.

Analysis

The Back Pay Act provides for awards of backpay to an employee who is found by an appropriate authority "to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." 5 U.S.C. § 5596(b)(1). A "personnel action" for purposes of the Act "includes the omission or failure to take an action or confer a benefit." *Id.*, § 5596(b)(4). As amended in 1988, the Act provides that backpay shall be payable with interest, to be computed "for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made." *Id.*, §§ 5596(b)(2)(A) and (B).

The Office of Personnel Management (OPM) prescribes regulations to carry out the Act. *See* 5 U.S.C. § 5596(c). The OPM regulations appear at 5 C.F.R. §§ 550.801 *et seq.* (1991). Based on the provisions of the Back Pay Act and OPM's implementing regulations, as well as our discussions with OPM officials, we conclude that the interest provision proposed in the IRS-NTEU collective bargaining agreement is consistent with the Act.

While the Act does not define "pay, allowances, or differentials," the OPM regulations define this term expansively as meaning—

> monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function.

As noted previously, the awards are paid pursuant to 5 U.S.C. § 4503 (1988). Section 4503 provides:

> The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who—
>
> (1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork; or
>
> (2) performs a special act or service in the public interest in connection with or related to his official employment.

While these awards are generally considered discretionary with the agency, here the agency has bargained away its discretion by agreeing to the specific criteria under which they will be granted. Therefore OPM's definition of pay, allowances, or differentials clearly covers the incentive awards here involved.

Likewise, when an agency has committed itself in a collective bargaining agreement to confer benefits or make payments within specific time limits, the agency's failure to comply with such commitments falls squarely within OPM's definition of an "unjustified or unwarranted personnel action" which results in a withdrawal or reduction of pay as follows:

an act of commission or an act of omission (i.e., failure to take an action or confer a benefit) that an appropriate authority subsequently determines on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).

Finally, we note that the IRS-NTEU collective bargaining agreement proposes that interest be paid until the actual date of payment of the award. This is not inconsistent with the Back Pay Act, which provides for interest to end "on a date *not more than* 30 days before the date on which payment is made." 5 U.S.C. § 5596(b)(2)(B)(i) [italic supplied]. OPM interprets this language as leaving agencies discretion to fix the date at which interest will end within the 30-day outer limit. We concur with OPM's interpretation.

Accordingly, it is our opinion that the interest provision in the IRS-NTEU collective bargaining agreement is consistent with the Back Pay Act and may be given effect.

B-240956, September 25, 1991

Civilian Personnel

Travel
■ Travel expenses
■■ Air carriers
■■■ Code-share
■■■■ Use

Travel under a ticket issued by a U.S. certificated air carrier which leases space on the aircraft of a foreign air carrier under a "code-share" arrangement in international air transportation is considered to be "transportation provided by air carriers holding certificates" as required under 49 U.S.C. App. § 1517 (1988), the Fly America Act. Thus, passengers may properly use tickets paid for by the government under a "code-share" arrangement if the tickets were purchased from the U.S. air carrier.

Matter of: Fly America Act—Code Sharing—Transportation by U.S. Carrier

The question in this case, presented by the Department of State, is whether a U.S. flag air carrier's arrangement to provide passenger service in international air transportation on the aircraft of a foreign air carrier under a "code-share" arrangement with the foreign air carrier would meet the requirements of the

Fly America Act, 49 U.S.C. App. § 1517 (1988).[1] Since it appears that such service generally would be considered to be service by a U.S. air carrier in international air transportation rather than by a foreign air carrier, that service should also be considered transportation provided by a U.S. air carrier for purposes of the Fly America Act.

Background

The State Department's submission states that to allow themselves access to markets for passengers which they would prefer not to serve with their own aircraft, U.S. air carriers have developed a technique called "code-sharing." Through the technique, a U.S. air carrier leases space on a foreign air carrier and intends this service to be considered as service provided by the U.S. air carrier. The benefits of this for the U.S. air carrier are stated to be developing new markets, expanding sales and services to U.S. and other customers, and providing substantial new income without having to use their own aircraft.

As we understand this arrangement, generally, code-sharing between domestic and foreign airlines operates as follows:

1. The foreign air carrier and U.S. air carrier must each have the bilateral rights and economic authority to serve the city-pair markets in which they offer code-share service.

2. The U.S. air carrier and the foreign air carrier each uses its own code on the tickets it issues for the flight between the two cities in question, resulting in both air carriers claiming responsibility for a portion of the passengers on a single aircraft. For example, a U.S. certificated carrier, Continental Airlines, has a code-share with a foreign carrier, Scandinavian Airlines System (SAS). Under this code-share, a ticket issued by Continental on its ticket stock for a flight from Chicago, Illinois, to Copenhagen, Denmark, would show flight CO 8912 for the portion of the flight from Newark, New Jersey, to Copenhagen, Denmark, whereas a ticket issued by SAS on its stock for the same portion of that flight would show SK 912.

3. The U.S. air carrier and foreign air carrier each advertises to the public that it is providing the service, and each indicates responsibility for the service on the tickets it sells, regardless of which air carrier's aircraft actually provides the transportation. However, each selling/ticketing air carrier must disclose, in all holding out, the operation of any part of the trip by another air carrier.

4. In some code-share arrangements, neither code-sharing carrier need commit in advance to purchase a specified number of seats on the code-shared flight provided by the cooperating air carrier; in others, each carrier has purchased a specified number of seats.

[1] The question was submitted by the Assistant Secretary of State for Administration.

5. A significant portion of the cost of the ticket goes to the U.S. carrier (over 50 percent in the example above, but this varies depending on the agreement and length of the route flown).

The way the code-share flight from Chicago to Copenhagen in fact operates is that a Continental Airlines aircraft picks up the passenger in Chicago and flies to Newark where the passenger is transferred to an SAS aircraft manned with an SAS crew which departs from Newark and completes the journey to Copenhagen. The Official Airline Guide (Worldwide Edition) (OAG), the industry guide used by airlines to provide travel offices and passengers notice of scheduled flights, does not list the flight from Chicago to Copenhagen as a through flight, but lists it as a connecting flight through New Jersey with one Continental flight number from Chicago to Newark listed and another Continental flight number (the code-share flight number) listed from Newark to Copenhagen. The OAG has a star beside Continental's code-share flight number from Newark to Copenhagen, indicating that the actual flight is operated by a different air carrier than Continental. Thus, if the traveler buys a ticket from Continental, the ticket indicates that Continental is the air carrier responsible for the entire flight between Chicago and Copenhagen, and the OAG indicates that Continental is the responsible carrier for both legs of the journey in which aircraft are exchanged at Newark. Since the Fly America Act permits government-financed air transportation to be provided by available U.S. air carriers only, the question in this case is whether the part of the flight from Newark to Copenhagen, for example, on a foreign aircraft is being provided by a U.S. air carrier.

The submission states that it is the view of the Department of State that a code-share agreement provides transportation on a U.S. carrier notwithstanding the fact that the aircraft used to provide some of the service may not belong to the U.S. carrier. The Department recognizes that the purpose of the Fly America Act as shown by its legislative history was to help improve the economic and competitive position of the U.S. flag carriers against the foreign air carriers. *See* 57 Comp. Gen. 401, 403 (1978). Therefore, so that U.S. carriers might maintain a significant role in the transaction, the Department suggests that it might be advisable to apply the following restraints to a code-share agreement before it may be considered service provided by a U.S. air carrier:

1. The entire ticket must be issued by and on the U.S. flag carrier (not necessarily the carrier operating the aircraft);

2. At least one leg of the journey must be on the U.S. domestic service of the U.S. carrier beyond (or behind, depending on the direction of travel) the U.S. gateway; and,

3. A code-share flight may not be used solely for travel between the U.S. and foreign gateway or vice versa, unless no other U.S. carrier participates in that market.

Analysis And Conclusion

The Fly America Act, 49 U.S.C. App. § 1517, requires U.S. government-financed air transportation to be "provided by" air carriers holding certificates of public convenience and necessity under 49 U.S.C. App. § 1371, *i.e.*, U.S. flag air carriers. We note that there is no language in the Fly America Act specifying that air transportation must occur "on" aircraft of any particular registry, but simply, that the air transportation must be provided by a U.S. air carrier. We have had no previous cases exploring the manner in which U.S. air carriers holding such certificates may provide air transportation and still be considered as U.S. air carriers.[2] Also, our Guidelines for Implementation of the "Fly America Act"[3] do not treat this issue.

When the Fly America Act was amended in 1980 to permit, among other things, foreign air carriers to be used in addition to U.S. air carriers for government-financed air transportation as part of a negotiated bilateral agreement[4], a related issue was whether or not the Federal Aviation Act would be amended to grant U.S. air carriers new authority to lease foreign aircraft with or without foreign crews to provide their own service in interstate or overseas air commerce. Although the act was not amended to provide this authority, the evidence in support of the amendment showed that U.S. air carriers were already allowed to lease foreign aircraft with or without foreign crews in order to provide U.S. service in some international air commerce. *See Hearings on H.R. 5481 Before the House Subcommittee on Aviation, Committee on Public Works and Transportation,* 96th Cong., 1st Sess. 133-139 (1979). Presumably, U.S. air carriers are still leasing foreign aircraft in international air commerce today.

Consequently, since apparently leasing an entire foreign aircraft by a U.S. carrier is a permissible practice in international commerce and is considered to be service by a U.S. carrier, we see no reason why the same approach could not apply to the more limited control of individual seats on foreign aircraft for which the U.S. air carrier sells its tickets under the code-share arrangement.[5] Although we have not been provided any particular code-share agreements and related documentation, we assume that the code-share arrangement which is described here as the type engaged in by U.S. air carriers and which has the endorsement of the Department of State as service provided by a U.S. air carrier is in effect similar to a lease by a U.S. air carrier of a portion of a foreign air carrier's aircraft and crew. As such, it is the U.S. carrier that is responsible for the travel service. Also, it is our understanding that the U.S. carrier receives a substantial portion of the revenue; it does not act as a mere booking agent on

[2] Our cases involving involuntary rerouting of a passenger by a U.S. air carrier to a foreign air carrier involve the rewriting of a ticket substituting a foreign air carrier for a U.S. air carrier rather than a holding out that the service on a foreign air carrier was provided by a U.S. air carrier. *See e.g.,* 62 Comp. Gen. 496 (1983).

[3] *See* Comptroller General's Guidelines, B-138942, Mar. 31, 1981, restated in the Federal Travel Regulations, 41 C.F.R. § 301-3.6(b) and (c) (1991).

[4] *See* section 21 of the International Air Transportation Competition Act of 1979, 49 U.S.C. App. § 1517(c) (1988). We informally inquired of the Department of State whether code-sharing arrangements had been negotiated specifically under section 1517(c), and the Department replied that they had not.

[5] An informal contact with a representative from the Department of Transportation confirms this view.

behalf of the foreign carrier. Therefore, we conclude that such service is air transportation provided by a U.S. air carrier for purposes of the Fly America Act and an acceptable form of air transportation service for government-financed travelers.

As to the three restraints that the State Department suggests might be advisable, we agree that the entire ticket must be issued by the U.S. carrier. It follows, in our view, that the government's payment should be made to the U.S. carrier.

Concerning the other two suggested restraints, we recognize that they are designed to insure that the U.S. carrier maintains a significant role in the transaction and that code-sharing is not used to undermine the competitive position of other U.S. carriers. Thus, we agree that they would be appropriate to consider incorporating into the agency's travel management policies. We suggest that, in doing so, the agency consult with the General Services Administration.

B-239363, September 27, 1991

Civilian Personnel

Relocation
■ Expenses
■ ■ Reimbursement
■ ■ ■ Eligibility
■ ■ ■ ■ Manpower shortages

A new manpower shortage category appointee, while on temporary duty in Washington, D.C., for orientation/training en route to his undetermined first permanent duty station, was requested during that training to execute a 1-year service agreement designating Washington, D.C., as his permanent duty station, but the agency states no decision on his duty station had in fact been made. One week later he was issued a permanent change-of-station authorization and his wife shipped their household goods and travelled at government expense to Washington, D.C. Therefore, since the record does not establish notice to the employee of his duty station assignment until he received his permanent change-of-station authorization, his temporary duty allowances continued until that latter date.

Matter of: David S. Shafer—Manpower Shortage Category Appointee—Per Diem at Location Made Permanent Duty Station

This decision is in response to a request from an Authorized Certifying Officer, Department of Energy (DOE).[1] The question raised is whether a newly appointed employee may continue to receive per diem for temporary duty at an orientation/training location after it has been designated his first permanent duty station. For the following reasons, we conclude that his entitlement to re-

[1] Mr. V. Joseph Startari.

ceive per diem ended when permanent change-of-station orders were issued to him.

Background

Mr. David S. Shafer, a new manpower shortage category appointee with DOE, was authorized to perform temporary duty travel from Phoenix, Arizona, to Washington, D.C., to attend orientation/training in the agency's Management Intern Development Program for the period July 7 to August 8, 1989, prior to being assigned to his first permanent duty station. That travel authorization was amended three times as follows: (1) on July 10, 1989, for temporary additional duty travel from Washington, D.C., to Oak Ridge, Tennessee, and return; (2) on August 4, 1989, to extend the temporary duty orientation/training in Washington, D.C., through September 1, 1989; and (3) on September 25, 1989, to further extend that temporary duty period in Washington, D.C., to September 9, 1989.

In the meantime, on August 4, 1989, Mr. Shafer was asked to sign a 1-year service agreement designating Washington, D.C., as his permanent duty station. However, no final decision had been made at that time that Washington, D.C., would be his permanent station; the agency did this for administrative convenience because it was the last day all the interns would be together. On August 11, 1989, he was issued a permanent change-of-station authorization to permit his wife to ship their household goods and travel from Tucson, Arizona, to Washington, D.C.

Mr. Shafer submitted a claim voucher for his wife's travel from Arizona to Washington covering the period August 20-24, 1989. He also submitted a voucher in the amount of $3,937.50 to cover his living expenses for the period August 5 through September 9, 1989, when he completed his orientation/training. Payment on that latter voucher was administratively disallowed on the basis that his temporary duty assignment in Washington, D.C., had been made permanent effective August 4, 1989, when he signed the service agreement. Mr. Shafer has appealed that disallowance.

By way of support for Mr. Shafer, the Director of Personnel and Career Development of DOE, by memorandum dated February 28, 1990, points out that a number of administrative errors were made in processing Mr. Shafer's personnel actions and in the issuance of his various travel orders. He explains that, although it was expected that Washington, D.C., would become his permanent duty station, there was the possibility that he might have been assigned elsewhere. He states that the actual decision to assign Mr. Shafer to permanent duty in Washington was not made until the week of September 18, 1989.

Opinion

It is a longstanding rule that officers and employees of the federal government must bear the expense of travel and transportation to their first permanent

duty stations in the absence of a provision of law or regulation providing otherwise. One such provision of law is contained in 5 U.S.C. § 5723 (1982). That provision authorizes the travel and transportation expenses of a manpower shortage position appointee and his immediate family. This includes the movement of their household goods and other personal effects from their place of residence at the time of selection to the first permanent duty station. However, it does not include travel per diem for members of the employee's immediate family, temporary quarters subsistence expenses, real estate expenses, or a miscellaneous expense allowance. Those expense reimbursements are authorized only for federal employees who are being transferred from one official station or agency to another for permanent duty (5 U.S.C. § 5724(a)(1)).

The statutory provision authorizing per diem to employees on official travel away from their posts of duty is contained in 5 U.S.C. § 5702 (1988). This authority has been interpreted by the implementing provisions of section 301-7.4(a) of the Federal Travel Regulations (FTR),[2] to prohibit an employee from receiving per diem at his permanent duty station. We have consistently held that when an employee is transferred to a place at which he is already on temporary duty, the transfer is effective on the date he receives definite notice thereof, and he may not thereafter be paid per diem at that location. *John W. Corwine,* B-203492, Dec. 7, 1982, and decisions cited. *See also* 30 Comp. Gen. 94 (1950). This is true even though there may be an administrative delay in the processing and issuance of a formal transfer order. 24 Comp. Gen. 593 (1945) and *Bertram C. Drouin,* 64 Comp. Gen. 205 (1985).

Where an employee performs temporary duty at a location away from his permanent duty station and while there executes a 1-year service agreement designating the temporary duty location as his new permanent duty station, ordinarily such action would qualify as notice to an employee of his immediate transfer to that location for the purpose of terminating per diem. However, the facts in this case are unusual.

The service agreement was presented to Mr. Shafer for signature on August 4 only as a matter of administrative convenience. According to the agency a decision to assign him to Washington had not been made at that time, and the record before us does not establish that Mr. Shafer was on notice that Washington would be his permanent duty station. We think the record does establish that he was on notice of his assignment to Washington on August 11 when the travel authorization for his wife was issued. Within a week his household goods were moved out of his residence in Tucson and on August 20 his wife began travel to Washington. Under these circumstances we have no objection to the payment of temporary duty allowances to Mr. Shafer through August 11.

With regard to his claim for the period August 12 to September 9, 1989, we do not believe it is appropriate to submit the matter to the Congress as a meritorious claim under 31 U.S.C. § 3702(d) (1988). It is not the purpose of the Meritorious Claims Act to provide for payment simply because expenses were incurred.

[2] 41 C.F.R. 301-7.4(a) (effective May 10, 1989). Formerly FTR, para. 1-7.4a.

There must be a direct causal relationship between an agency error and expenses which the employee would not have incurred otherwise. *John H. Teele*, 65 Comp. Gen. 679 (1986). The expenses involved here were day-to-day living expenses which Mr. Shafer would have continued to incur, whether or not he was entitled to per diem.

B-242391, September 27, 1991

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Necessary expenses rule
■■■ Prizes

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Specific purpose restrictions
■■■ Lotteries

National Oceanic and Atmospheric Administration's (NOAA) proposal to pay cash prizes to selected individuals providing information about certain fish is intended to further NOAA's acquisition of that information and its statutorily required research. The proposal thus satisfies a requirement for an authorized purpose for the use of appropriated funds under 31 U.S.C. § 1301(a) (1988) and our related cases. However, NOAA's proposal contains certain elements of a lottery which may be prohibited by certain federal statutes, state laws, and regulations. NOAA therefore is advised to consult with the Department of Justice and other appropriate agencies to ensure that its proposal is not a prohibited lottery before spending appropriated funds as proposed.

Matter of: Cash Prize Drawing by National Oceanic and Atmospheric Administration

The Chief of the Financial Management Division of the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (Commerce), requests an advance decision on whether NOAA may use appropriated funds to make cash payments to the winners of drawings held by the National Marine Fisheries Service (NMFS). NOAA proposes to conduct the drawings and make cash payments to encourage fishermen to return fish tags used by NMFS for research on the history and migration rate of certain fish. We conclude that NOAA may make the proposed expenditures of appropriated funds to the extent discussed below.

Background

Section 304(e) of the Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331, 352 (1976) (codified at 16 U.S.C. § 1854(e) (1988)), re-

quires Commerce to conduct research to support fishery conservation and management. Commerce's research under section 304(e), actually conducted by NOAA and NMFS, concerns matters bearing upon the abundance and availability of fish, including the interdependence of fisheries or stocks of fish and the impact of pollution on fish populations. In connection with this research, NMFS issues fish tags displaying questions about the circumstances under which the fish was caught, a return address, and the word "reward." When completed and returned by fishermen, the fish tags provide information on the history and migration rates of the tagged fish.

NMFS currently pays a reward of $5 for the return of fish tags. To increase the return rate on fish tags and to enhance its research, NOAA proposes to expand NMFS' reward program by offering the choice of the present $5 reward, a baseball cap with the reward program logo, or a chance in an annual cash prize drawing to those returning fish tags. NOAA proposes to offer $1,000 for first prize and $500 each for two second prizes. To support its proposal, NOAA cites B-230062, Dec. 22, 1988, in which we did not object to the Army's purchase of recruiting posters to be awarded by drawing to individuals providing needed information to Army recruiters.

NOAA would pay for the cash prizes from its appropriation for Operations, Research, and Facilities. For fiscal year 1991, this appropriation was available for "necessary expenses of activities authorized by law." Title I of the Departments of Commerce, Justice, and State Appropriations Act for Fiscal Year 1991, Pub. L. No. 101-515, 104 Stat. 2101, 2104-2106 (1990).

Discussion

NOAA requests our opinion on its proposal to pay cash prizes to the individuals selected in annual drawings. However, an analysis of NOAA's present program would be relevant to an analysis of its proposal. Therefore, we begin by addressing the legality of the reward program as presently conducted.

Under 31 U.S.C. § 1301(a) (1988), appropriated funds may be used only for authorized purposes. The determination that a particular expense is necessary for an authorized purpose is, in the first instance, a matter of agency discretion. B-223608, Dec. 19, 1988. Accordingly, when we consider whether an expense is necessary, we determine only whether it falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range. *Id.* at 4.

We have considered agencies' use of appropriated funds to obtain information on several occasions. For example, in B-172259, April 29, 1971, we held that the Forest Service could use appropriated funds to pay individuals for information regarding violations of laws and regulations protecting national forests. The Secretary of Agriculture was statutorily required to protect national forests from destruction, and the Forest Service's appropriation for fiscal year 1971 provided funds for the necessary expenses of forest protection. We found that

paying individuals for information concerning violations of laws protecting national forests was necessary for the effective administration and enforcement of those laws. Therefore, we raised no objection to the Forest Service's proposed expenditure of appropriated funds. *See also* B-183922, Aug. 5, 1975, and B-106230, Nov. 30, 1951 (both approving the use of appropriated funds to compensate informers under the necessary expense theory where the information obtained was required for the accomplishment of agency functions).

More recently, in B-230062, Dec. 22, 1988, we considered the Army's proposed purchase of framed posters to distribute as prizes to selected individuals providing information needed for recruiting purposes. The Army was statutorily required to "conduct an intensive recruiting campaign" and received funds for that purpose. The Army argued that the availability of prizes prompted individuals to provide recruiters with information essential to the recruiting effort, *i.e.,* name, address, and telephone number. We found that the Army's purchase of posters to facilitate its acquisition of needed information from potential recruits was directly related to the accomplishment of its statutory mandate and, therefore, a permissible expenditure of appropriated funds.

The circumstances presented here and our prior decisions justify NOAA's use of appropriated funds for cash rewards. Commerce is statutorily required to conduct research supporting fishery management, and it carries out that function through NOAA and NMFS. In order to carry out that function effectively, NMFS must obtain information from members of the public. As in the Forest Service and Army cases, NMFS' rewards facilitate its acquisition of the needed information; the rewards provide an incentive to members of the public to return fish tags that they might otherwise collect, display, or discard.[1] Therefore, NOAA's present distribution of $5 rewards is reasonably necessary to its accomplishment of an authorized purpose and a permissible expenditure of appropriated funds available for necessary expenses.[2]

Although the necessary expense rule may justify the expenditure of appropriated funds for purposes not specifically provided for, it does not support expenditures that are prohibited by a provision of law or legal principle. Such expenditures do not fall within the agency's legitimate range of discretion. B-240001, Feb. 8, 1991. We have consistently held that agencies may not use appropriated funds to purchase personal gifts. *See* 57 Comp. Gen. 385 (1978); 54 Comp. Gen. 976 (1975). However, we have based our determinations that particular items are personal gifts on the absence of any connection between the items at issue and the purposes of the appropriations to be charged. *See, e.g.,* B-201488, Feb. 25, 1981. Since the $5 rewards are reasonably necessary to the accomplishment

[1] In its submission, NOAA explained that, for a variety of reasons, it is difficult to achieve a high return rate on fish tags issued. Further, NOAA identified several entities that have successfully used reward drawings to increase the return rate on fish tags.

[2] We note that the right to a reward can be derived only under a binding and enforceable contract including both a valid offer, of which both parties have knowledge, and acceptance of the offer. 41 Comp. Gen. 410 (1961); 26 Comp. Gen. 605 (1947). The fish tag displaying the word "reward" constitutes a valid offer and a fisherman's performance of the specified task, *i.e.,* the return of the completed tag to NMFS, constitutes a valid acceptance of the offer.

of NMFS' research, an authorized purpose, our decisions on personal gifts do not bar this expenditure of appropriated funds.

We now turn to NOAA's proposed expansion of its reward program to include the alternative of participating in an annual drawing for a limited number of large cash prizes.[3] Like the present $5 rewards, NOAA would distribute the chances and prizes in connection with its statutorily required research. In addition, NOAA intends its proposed prizes to induce fishermen to return fish tags that would facilitate its acquisition of information needed for the research. These facts support NOAA's determination that the proposed prizes are reasonably necessary to its accomplishment of an authorized purpose.

Therefore, the prizes to be awarded by drawing are reasonably necessary to NOAA's accomplishment of an authorized purpose, and satisfy a requirement for the use of appropriated funds under 31 U.S.C. § 1301(a) and our related cases. However, we note that various federal statutes (*e.g.,* 18 U.S.C. §§ 1301–1304), state laws, and regulations prohibit federal employees and the public from conducting and participating in lotteries except under limited circumstances. The three essential elements of a lottery are (1) the distribution of prizes, (2) according to chance, (3) for consideration. *Federal Communications Commission v. American Broadcasting Co., Inc.,* 347 U.S. 284 (1953). NOAA's proposal certainly contains the first two elements, and arguably contains the third as well. Further, regardless of whether NOAA's proposal is lawful, the decision to conduct what some may perceive as a lottery presents policy questions that should be carefully considered. We therefore suggest that NOAA consult with the Department of Justice, the Office of Personnel Management, and appropriate Congressional committees before implementing its proposal.

B–236782, September 30, 1991

Appropriations/Financial Management

Accountable Officers
■ Disbursing officers
■■ Relief
■■■ Illegal/improper payments
■■■■ Overpayments

Bureau of Indian Affairs certifying official is relieved of liability pursuant to 31 U.S.C. § 3528(b)(1)(B) for certifying payments that were not proper under the appropriation. However, BIA should take appropriate action to resolve the amount owed the government as a result of the improper payments.

Matter of: Department of Interior

[3] The analysis under which we conclude that the present $5 rewards are authorized applies to the proposed use of appropriated funds for baseball caps as well.

This responds to your request of August 30, 1989, modified by letter of May 21, 1990, asking that we grant relief to a Bureau of Indian Affairs (BIA) certifying official who certified payments totalling $268,634.94 under contracts with various Pacific Northwest tribes. Subsequent to these payments, the Interior Department Associate Solicitor determined that the contracts were unauthorized and, thus, void *ab initio*. In addition, by letter of February 8, 1991, the Regional Solicitor asked whether a recent amendment to the Education of the Handicapped Act now authorizes payments to these tribes for the services that BIA previously contracted for, and settles the debt the tribes owe the government as a result of the improper payments. For the reasons stated below, we grant relief. However, since relief of the certifying official does not extinguish the underlying debt, BIA should adjust its accounts to charge the amounts that the tribes owe to otherwise available funds.

Background

The Department of Education (Education) provides funds to states, localities, and other federal agencies through the Education of the Handicapped Act (EHA) to assure that all disabled children have available to them free, timely and appropriate public education. 20 U.S.C. § 1400(c). The Department of the Interior (Interior) receives funding under the EHA to implement programs through BIA for disabled Indian youth. As a part of its responsibilities under the Act, BIA uses the pass-through funds from Education to support programs that provide special educational services to disabled Indian preschoolers. 20 U.S.C. § 1411(f)(2)(B).

Prior to 1986, each state had the discretion to determine whether or not it would provide special educational services to disabled preschoolers. Thus, BIA only provided special educational services to preschoolers in states where accreditation standards required such services. In 1986, the Congress mandated that every state, no later than fiscal year 1991, establish programs to provide appropriate educational services to all disabled preschoolers. Pub. L. No. 99-457, § 201, 100 Stat. 1145, 1155. In addition, the Congress amended 20 U.S.C. § 1411(f) to require the Secretary of Education to make payments to the Secretary of the Interior for the provision of special educational services to all disabled Indian children on reservations served by BIA-funded schools, regardless of the accreditation standards of the particular state. Pub. L. No. 99-457, § 404, 100 Stat. at 1173.[1]

By the beginning of the 1987-88 school year, BIA had established a comprehensive program to identify and serve disabled preschoolers on reservations with BIA-funded schools. Then, in fiscal year 1988, in addition to providing special educational services to preschoolers on reservations with BIA-funded schools, the Pacific Northwest Region of BIA entered into nine contracts with tribal con-

[1] Prior to the 1986 amendment, payments to the Secretary of Interior were subject to the discretion of the Secretary of Education. The amendment also increased the amount appropriated for the education of disabled Indian youth.

tractors to provide special educational services to disabled preschoolers in programs on reservations without BIA-funded schools. The Region renewed the nine contracts and entered into an additional contract in fiscal year 1989. These contracts provided special educational services to disabled Indian preschoolers who would have otherwise gone without appropriate education due to the lack of state-established programs.

A Region certifying official certified payments under these contracts in April, May, August, and October 1988 authorizing expenditures totalling $268,624.92.[2] The certifying official made the certifications after receiving approval of the programs from the Interior Deputy to the Assistant Secretary (Office of Indian Education Programs) (hereinafter, the "Deputy").

In April 1989, the Interior Associate Solicitor, Indian Affairs, notified the Deputy that the contracts were void *ab initio* and that BIA should deobligate funding for the contracts. In a memorandum to Portland's Educational Program Administrator, the Deputy explained that the EHA only authorized BIA to fund special educational services in preschool programs that are on reservations with BIA-funded schools.[3] Thus, the Deputy instructed the Administrator to close out all contracts for special educational services provided on the noncomplying reservations.

Discussion

Relief of Liability

Under 31 U.S.C. § 3528(a), a certifying official is liable for improper payments. The Comptroller General is authorized to relieve a certifying official of liability under the provisions of 31 U.S.C. § 3528(b)(1) if he decides that

> (B) (i) the obligation was incurred in good faith;
>
> (ii) no law specifically prohibited the payment; and
>
> (iii) the United States Government received value for payment.

31 U.S.C. § 3528(b)(1)(B).

We have concluded that subparagraph (B) provides us a basis on which to grant relief in this case.

We found no evidence to suggest that the certifying official lacked good faith when she certified the payments. In prior decisions, we found good faith when there was no evidence that the certifying official doubted his/her authority to

[2] One of the contracts was actually certified on March 13, 1989; however, since the records indicate that no money was disbursed pursuant this particular certification, it does not effect the personal liability of the certifying official.

[3] At the time, the EHA provided, in pertinent part, as follows:

> The Secretary [of Education] shall make payments to the Secretary of the Interior according to the need for assistance for the education of handicapped children on reservations served by elementary and secondary schools *operated for Indian children by the Department of Interior. . . .*

20 U.S.C. § 1411(f)(1) (1988) (italic added).

make certifications. *See, e.g.,* B-241879, Apr. 26, 1991; B-222048, Feb. 10, 1987. The determination of whether the certifying official should reasonably be charged with doubt concerning his/her authority to certify payment cannot be resolved on the basis of a hard and fast rule, but must necessarily involve a weighing of all the facts and circumstances surrounding the questioned certification. Here, we found no evidence indicating that the certifying official doubted or had reason to doubt her authority to certify the payments to the tribal contractors.

In addition, no law specifically prohibited the payments to the tribal contractors. We have interpreted the second element of subparagraph (B) as referring to statutes which expressly prohibit payments for specific items or services. B-191900, July 21, 1978. *See also* 46 Comp. Gen. 135 (1966). After reviewing the relevant provisions of the EHA plus the provisions of the Snyder Act,[4] we conclude not only that there is no express prohibition on payments, but that other statutory authority was available that would have permitted payment, although not with EHA pass-through funds to Interior. *See* B-222048, Feb. 10, 1987. At the time of the certification, 20 U.S.C. § 1411(f)(1) only authorized BIA to use Education pass-through funds to provide special educational services for disabled Indian children on reservations served by BIA-funded schools. However, this does not mean that other appropriated funds were not available for these payments.

Lastly, the government received value for the payments to the tribal contractors. BIA audits establish that the payments to the tribal contractors reflect the actual benefit that BIA received for the services rendered. Thus, since all three elements for relief under subparagraph (B) are present, we grant relief to the certifying official.

Adjustments

Concerned that BIA's withdrawal of services would prove harmful by denying special educational services to certain Indian preschoolers, the Congress, on October 30, 1990, amended the EHA to establish the eligibility of those tribal contractors who had received contracts to provide special educational services prior to fiscal year 1989.[5] Although the legislative history of the amendment indicates that its purpose was to "requalify" or "reinstate the eligibility of" the nonqualifying tribal contractors,[6] the language of the amendment itself includes no indication that it should apply retroactively. *See* B-183290, Aug. 21, 1975. Therefore, BIA should take appropriate action to resolve the improper

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[4] The Snyder Act gives BIA broad authority to use appropriated funds for the benefit, care and assistance of Indians. 25 U.S.C. § 13.

[5] Section 1411(f)(1) currently provides, in pertinent part, as follows:

The Secretary [of Education] shall make payments to the Secretary of the Interior according to the need for assistance for the education of children with disabilities on reservations (A) served by elementary and secondary schools operated for Indian children by the Department of Interior, and *(B) for whom services were provided through contract with an Indian tribe or organization prior to fiscal year 1989.* . . .

20 U.S.C. § 1411(f)(1), as amended by Pub. L. No. 101-476, § 201, 104 Stat. 1103, 1111 (1990) (italic added).

[6] *See* H.R. Conf. Rep. No. 787, 101st Cong., 2d Sess. 57 (1990); H.R. Rep. No. 544, 101st Cong., 2d Sess. 19 (1990).

payments by adjusting its accounts to use appropriations which remain available from fiscal years 1988 and 1989 for the operation of Indian programs, by exercising any available authority under the Federal Claims Collection Act, 31 U.S.C. ch. 37 (in consultation with the Department of Justice as appropriate), or by requesting private relief legislation to effectuate the intent evident in the committee reports cited above. With regard to those tribal contractors whom BIA has not yet paid, BIA should consider using funds for the operation of Indian programs to cover such payments.

B-238962, September 30, 1991

Civilian Personnel

Travel

■ Government vehicles

■■ Use

Civilian Personnel

Travel

■ Temporary duty

■■ Travel expenses

■■■ Privately-owned vehicles

■■■■ Mileage

Customs Inspectors are not entitled to mileage reimbursement where Customs Service determines that use of government-owned vehicles (GOVs) is advantageous to the government, a GOV is available, and Inspectors do not request or receive agency approval to use their privately owned vehicles (POVs) to travel from headquarters to nearby airports in order to perform inspections. *See* 41 C.F.R. § 301-4.4(c) (1990).

Civilian Personnel

Travel

■ Temporary duty

■■ Travel expenses

■■■ Privately-owned vehicles

■■■■ Mileage

Where a GOV is available for use but the Customs Service expressly authorizes an Inspector to use his POV for official travel, the Inspector is entitled to mileage at the rate of 9.5 cents per mile. *See* 41 C.F.R. § 301-4.4(c). The agency may deduct from this mileage allowance the distance the Inspector would normally travel between his residence and headquarters.

Civilian Personnel

Travel

■ **Non-workday travel**

■■ **Travel time**

■■■ **Overtime**

Customs Inspectors may be entitled to overtime under 5 U.S.C. § 5542(b)(2)(B) (1988) if Customs Service requires them to spend time in travel outside normal duty hours to return GOVs to headquarters following completion of inspections. Entitlement to overtime would depend upon the particular circumstances and cannot be determined in the abstract.

Matter of: Elliot Kaplan, *et al.*—Customs Service—Overtime Compensation—Mileage Entitlement

This decision is in response to a joint request for a decision concerning the overtime compensation and mileage entitlements of Mr. Elliot Kaplan and other Inspectors of the United States Customs Service, Department of the Treasury, New York Region. The request was submitted by the United States Customs Service, Department of the Treasury, and the National Treasury Employees Union (NTEU) pursuant to the labor-management relations procedures set forth in 4 C.F.R. Part 22 (1991).

Background

As a condition of employment, the Customs Inspectors work standard Monday to Friday schedules and are also assigned scheduled and unscheduled overtime involving the inspection of aircraft and seagoing vessels before and after regular hours and on weekends and holidays. The Inspectors' permanent duty post is the New York Seaport Area located at 90 North River, Pier 90, at 50th Street and 12th Avenue, Manhattan. The Inspectors perform overtime work at three Long Island airports which are located outside of the headquarters area: Republic—52 miles from North River; Islip/McArthur—75 miles from North River; and Westhampton/Suffolk County—95 miles from North River. The Inspectors are all employed under the General Schedule.

The specific factual situation presented involves Mr. Elliot Kaplan, a Customs Service Inspector assigned to the New York Seaport Area of the New York Region. He is required to work overtime assignments pursuant to the provisions of 19 U.S.C. §§ 261, 267, and 1451 (1988).[1] The assignments are worked prior to 8 a.m., after 5 p.m., and on weekends and holidays.

The agency reports that on June 17, 1988, Inspector Kaplan was assigned to perform overtime work at Westhampton Airport, commencing at 5 p.m. He was at

[1] As a condition of their employment, the Inspectors are assigned and are expected to perform "1911 Act overtime" (Act of Feb. 13, 1911, 36 Stat. 899, governing overtime pay for Customs Service Inspectors), now codified at 19 U.S.C. §§ 261, 267, and 1451 (1988). This overtime applies only to the performance of inspectional duties. Overtime for travel of the Customs Inspectors here involved is governed by 5 U.S.C. § 5542.

90 North River when he received the assignment. The agency states that, although a GOV was available for his use at North River, Mr. Kaplan did not seek approval to use his POV, left the facility at 2:30 p.m., and drove approximately 100 miles by POV to Westhampton/Suffolk Airport.[2]

Mr. Kaplan sought reimbursement of 21 cents a mile for the trip to Westhampton Airport, which the Customs Service denied. He filed a grievance pursuant to the negotiated agreement between NTEU and Treasury. The agency denied his grievance at all three steps of the grievance procedure. In lieu of going to arbitration, the NTEU and the agency agreed to submit the matter to this Office for decision pursuant to 4 C.F.R. § 22.7(b) (1991).

The questions presented for our consideration relate primarily to the mileage reimbursement entitlements of Customs Inspectors who use their POVs in connection with travel to perform overtime inspection work. Specifically, we are asked (1) whether the Customs Service can refuse to reimburse Inspectors for mileage when they are permitted but not required to use POVs to perform overtime assignments, and, (2) if they are entitled to reimbursement, what the mileage rate should be. We are also asked whether Customs Inspectors must be paid overtime if they use a GOV and are directed to drive the GOV back to the agency headquarters following completion of their inspection work.

The Position of the NTEU

The NTEU contends that the Customs Service implements its local travel policy so that Inspectors who live on Long Island are required to travel from their homes to their permanent duty station at 90 North River in order to pick up a GOV and perform their overtime assignments. The union states that Inspectors are permitted to use their POVs to perform overtime assignments but, according to agency policy, do not receive mileage reimbursement.

The NTEU argues that, because of the extra mileage and time involved in traveling to 90 North River to pick up a GOV, Inspectors will often use their POVs to travel to and from temporary duty assignments. However, the union states that when this occurs, the practical effect of the agency policy is to make the Inspectors ineligible for travel reimbursement. An example given is where an Inspector lives near Republic Airport and chooses to drive his own vehicle a few miles to the overtime assignment rather than drive an extra 90 miles to pick up a GOV, then drive to the temporary duty station on official time, and later return the GOV to 90 North River.

The union asserts that the Customs Service's policy is not cost effective. In this regard, it argues that if Customs forces Inspectors to use GOVs for the travel in question and requires them to return the GOVs to 90 North River, the return travel must be treated as overtime under 5 U.S.C. § 5542.

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[2] Apparently, Inspector Kaplan lives near the Westhampton/Suffolk Airport.

The NTEU contends that even if the agency's policy is upheld, an Inspector who uses a POV when a GOV is available is still entitled to be reimbursed 9.5 cents per mile pursuant to Chapter 1 of the Federal Travel Regulations and our decision, *Wayne G. Kirkegaard,* B-223537, May 21, 1987.

The Position of the Customs Service

According to the Customs Service, its published policy, issued on November 20, 1987, states that Inspectors will use GOVs whenever possible, that they must receive prior approval to use a POV during regular working hours for official purposes, and that they must use the most inexpensive direct method of transportation when traveling between two duty stations or to and from a temporary duty station.[3] In a memorandum dated February 5, 1988, from the Assistant Area Director to Supervisory Inspectors and Inspectors, it was stated that the elective use of a POV in lieu of an available official vehicle is not deemed advantageous to the government and, therefore, not authorized for local travel reimbursement.

The Customs Service states that it has several GOVs at 90 North River for the express and exclusive use of its Inspectors for local travel. The agency states that it has additional cars located at various places throughout the New York Region, including Long Island, Brooklyn, and Staten Island, so that Inspectors are not always required to go to 90 North River to pick up a car.

The Customs Service reports that it does permit mileage reimbursement of 9.5 cents per mile on a case-by-case basis when prior approval is given for use of a POV. However, the agency says that it will not give wholesale approval for the Inspectors to use their POVs in a work area involving almost 400 Inspectors who perform an average of 825 overtime assignments per week. The Customs Service contends that in those individual instances where an Inspector requests to use a POV in spite of the availability of a GOV, the agency may, but is not required to, approve reimbursement of 9.5 cents per mile.

With regard to the payment of overtime compensation for returning a GOV to 90 North River, the Customs Service argues that the mere act of driving a GOV does not qualify for overtime pay under 5 U.S.C. § 5542(b)(2)(B).

Opinion

Entitlement to Mileage When Inspectors Use POVs Without Express Authorization

The first question is whether the Customs Service may refuse to reimburse the Inspectors for their mileage expenses when the Inspectors are permitted but are not expressly authorized or required to use their POVs in performing overtime assignments. Section 5704(a) of title 5, United States Code, 1988, provides that,

[3] The collective bargaining agreement between the parties defines a temporary duty station as any job site which is not the employee's regular duty station.

under regulations prescribed by the Administrator of General Services (in the Federal Travel Regulations (FTR)), an employee who is engaged on official business for the government, is entitled to reimbursement of mileage expenses not in excess of the current mileage rate, 25 cents a mile, for the use of a POV when that mode of transportation is authorized or approved as being more advantageous to the government. The section also provides that when an employee who is engaged on official business for the government chooses to use a POV in lieu of a GOV, payment on a mileage basis is limited to the cost of travel by a GOV.

The implementing Federal Travel Regulations further provide that when a GOV is available for use and the employee would not ordinarily be authorized to use a POV instead of a GOV, but requests use of a POV, reimbursement may be authorized or approved at the rate of 9.5 cents per mile, the approximate cost of operating a GOV, fixed costs excluded. *See* 41 C.F.R. § 301-4.4(c) (1990).

As indicated above, the FTR provision provides the agency with discretionary authority to authorize or approve reimbursement at 9.5 cents per mile when a POV is used in lieu of an available GOV. We have held that authorizing mileage to an employee for the use of his automobile, is discretionary with the agency. 52 Comp. Gen. 446, 451 (1973). Our decision, *Wayne G. Kirkegaard,* B-223537, *supra,* cited by the union in support of its contention that reimbursement should be made, is distinguishable here. In that case, the employee had been authorized to use his POV. We held that he was properly limited to reimbursement at 9.5 cents per mile since a GOV was available. Thus, it was only the amount of reimbursement that was in question, not the authorization.

Accordingly, in response to the first question, the Customs Service has the authority to deny reimbursement to an employee for the employee's use of his POV, in lieu of an available GOV, without express authorization.

With respect to the factual circumstances involving Inspector Kaplan, he is not entitled to reimbursement of mileage expenses. It appears from the record that a GOV was available for his use at North River. He did not request a GOV but rather, as a matter of personal preference, chose to drive his POV to the airport. While we do not know what the agency would have done in Mr. Kaplan's case, it is clear that he did not seek approval to use his POV and therefore he violated the published agency policy.

Mileage Rate Entitlement When Inspectors Are Expressly Authorized to Use POVs

Where an Inspector requests permission to use a POV to travel to the airport to perform official duty even though a GOV is available for use, and the Customs Service expressly authorizes or approves the use of the POV, the Inspector is entitled to reimbursement of mileage expenses at the rate of 9.5 cents per mile.[4]

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[4] 41 C.F.R. § 301-4.4(c) (1990).

The Customs Service may deduct the distance the Inspector would normally travel between his residence and headquarters.[5]

Entitlement to Overtime Compensation

The final question presented concerns the entitlement of Customs Inspectors to overtime compensation for their travel time under the provisions of 5 U.S.C. § 5542(b)(2)(B) (1988).[6] The statute provides that time spent in a travel status away from the employee's official duty station is not hours of employment unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively, including return travel.

The NTEU maintains that the overtime assignments cannot be scheduled or controlled administratively and, therefore, that travel in connection with these assignments qualifies for overtime pay under § 5542(b)(2)(B)(iv). The Customs Service disagrees and states that the Inspectors are scheduled to perform the overtime work at the airports on an advance basis. Thus the agency contends that the work can be scheduled and controlled administratively.

Our Office has held that in order for an employee to be compensated for overtime under section 5542(b)(2)(B)(iv), the travel must result from an event which could not be scheduled or controlled administratively and there must exist an immediate official necessity in connection with the event requiring the travel to be performed outside the employee's regular duty hours.[7] Thus, where the necessity for the travel is not so urgent as to preclude proper scheduling of travel, overtime compensation may not be paid nor compensatory time granted for the after-hours travel time.[8]

We conclude that the travel in the instant case does not meet this test. The union has not established that the airport work assignments are unscheduled or administratively uncontrollable so as to permit the payment of overtime compensation under 5 U.S.C. § 5542(b)(2)(B)(iv). Although the arrival times of the airplanes to be inspected are not within agency control, the flights are scheduled and, thus, the Customs Service is able to control the scheduling of the inspections and the Inspectors are given advance notice of the overtime work assignments.

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[5] *Howard M. Feuer,* 59 Comp. Gen. 605, 606 (1980); 36 Comp. Gen. 795 (1957); 32 Comp. Gen. 235 (1952); *Brian E. Charnick,* B-184175, June 8, 1979, and Aug. 5, 1975.

[6] The claims of the Inspectors do not involve overtime compensation under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (1988).

[7] *Daniel L. Hubbel,* 68 Comp. Gen. 29 (1988); *John B. Schepman, et al.,* 60 Comp. Gen. 681 (1981); *Erich P. Rudolph,* B-236012, Nov. 8, 1989; *Charles S. Price, et al.,* B-222163, Aug. 22, 1986; *Thomas G. Hickey,* B-207795, Feb. 6, 1985.

[8] *Hankins and Archie,* B-210065, Apr. 2, 1984, and cases cited therein.

Inasmuch as the inspections are scheduled administratively, the return travel of the Inspectors from making the inspections to their headquarters at 90 North River is not compensable as overtime under § 5542(b)(2)(B)(iv).[9]

While 5 U.S.C. § 5542(b)(2)(B)(iv) does not apply, there might be a basis for overtime pay if Customs requires Inspectors to use GOVs and to drive them back to 90 North River following completion of the inspection duty. We have held that time spent returning specially equipped government vehicles constitutes overtime in some circumstances. *See Baxter and Hunter,* 61 Comp. Gen. 27 (1981); 43 Comp. Gen. 273 (1963). Moreover, Customs Directive No. 51250-03, dated December 20, 1988, states at pages 10-11:

> An overtime assignment shall begin when the employee reports to the first job site prepared for duty and shall terminate when the employee leaves the last job site after completion of the tasks associated with the assignment. Should the employer require an employee to utilize specific equipment, e.g. a government vehicle, etc., which the employee does not have the option to take from work to home, the overtime assignment shall begin when the employee reports to the location where the equipment is stored and, if required by the employer, shall stop when the equipment is returned to the location of the equipment.

The record before us, however, contains no information concerning the actual practice of Customs in this regard. Rather, this possibility is presented only as a hypothetical situation. Therefore, we are not in a position to express an opinion on whether and under what precise circumstances overtime might be payable.

B-239870, September 30, 1991

Civilian Personnel

Relocation

■ Overseas personnel

■■ Return travel

■■■ Eligibility

An employee, who had vested return travel rights under 5 U.S.C. § 5722 from Hawaii, received an inter-agency transfer to the continental United States. He is entitled to full relocation expense reimbursement under 5 U.S.C. § 5724 and § 5724a from the gaining agency. A losing agency pays vested return right expenses only when the return travel is performed before an inter-agency transfer occurs. *Thomas D. Mulder,* 65 Comp. Gen. 900 (1986).

[9] *See Barth v. United States,* 568 F.2d 1329 (Ct. Cl. 1978); *Benjamin Brown and John R. Schacht,* 69 Comp. Gen. 385 (1990); *Aimee A. Stover,* B-229067, Nov. 29, 1988, *aff'd on reconsideration,* B-229067.2, Feb. 28, 1990; *Rudolph, supra.*

Civilian Personnel

Relocation

■ **Residence transaction expenses**

■■ **Reimbursement**

■■■ **Eligibility**

An employee executed an agreement to sell his old residence after he received and accepted an intra-agency job offer involving transfer to a new duty station. He later accepted a job offer from another agency, also involving transfer to a new duty station, declined the first job offer and settled on the residence sale after receiving his travel authorization from the second agency. Declination of first job offer after accepting second job offer does not defeat his right to residence sale expense reimbursement so long as the conditions of entitlement under paragraph 2-6.1 of the Federal Travel Regulations (FTR) are met. *Paul W. Adamske*, B-239590, Jan. 29, 1991, 70 Comp. Gen. 205.

Civilian Personnel

Relocation

■ **Overseas personnel**

■■ **Household goods**

■■■ **Shipment**

■■■■ **Privately-owned vehicles**

An employee shipped a privately owned vehicle (POV) to Hawaii at government expense. Due to an accident and damage to the POV, he purchased a foreign manufactured vehicle as a replacement from a commercial automobile dealer in Hawaii. On subsequent transfer to another agency, he seeks reimbursement for shipment of that POV to the continental United States. While the FTRs are silent on the point, the gaining agency has discretionary authority to allow shipment at government expense of that foreign-made POV to the continental United States upon his return. Following the rule in *Thomas D. Mulder*, 65 Comp. Gen. 900 (1986), and under authority of paragraph 2-1.6 of the FTR, the cost of that shipment, if determined to be appropriate, is to be borne by the gaining agency.

Matter of: Ronald G. West—Inter-agency Transfer—Agency Liability for Expenses of Transfer from an Overseas Location

This decision is in response to a request from an Authorized Certifying Officer, Bonneville Power Administration (BPA), Department of Energy.[1] At issue is the entitlement of a BPA employee to be reimbursed for certain relocation expenses and for the shipment of his privately owned vehicle (POV), incident to an inter-agency transfer from an overseas location in September 1988. For the following reasons we conclude that the employee is entitled to residence sale expenses. BPA has discretionary authority to allow return shipment expenses for Mr. West's vehicle. The gaining agency, the BPA, is responsible for paying these expenses.

[1] Ms. Joanne C. Henry, Reference DSDT.

Background

Mr. Ronald G. West, an employee of the Department of the Navy, was transferred to Kekaha, Hawaii, in May 1985, subject to a 36-month overseas service agreement. According to Mr. West, in June 1988, following satisfactory completion of his tour of duty, he received an oral offer from the Navy to make a lateral transfer to its facility at Point Mugu, California. He orally accepted the offer on July 1 and placed his residence in Hawaii on the market. On July 9, 1988, he executed a contract to sell that residence with a settlement date scheduled to occur in September 1988.

In August 1988, while still employed by the Navy in Kekaha, Hawaii, Mr. West was notified that he was selected by the BPA under its merit promotion program for a position in Portland, Oregon. He accepted that position and declined the Point Mugu position offered by the Navy. On August 26, 1988, the BPA issued him a travel authorization for his transfer to Portland, Oregon, with a departure date of September 7, 1988, and a reporting date of September 12, 1988. He settled on his Hawaiian residence on September 2, 1988.

Mr. West filed a travel voucher with the BPA claiming the amount of $1,061.51 for the expenses of residence sale. The BPA disallowed reimbursement, asserting that he had become legally bound to sell the residence before BPA's job offer was made, citing to *George S. McGowan*, B-206246, Aug. 29, 1984, as controlling. Mr. West has appealed that disallowance.

In conjunction with Mr. West's appeal, the BPA has raised several additional questions. The first question is whether the Navy, as the losing agency, is responsible to pay the cost of shipping Mr. West's household goods and POV back to the continental United States, since he had fulfilled all conditions of service with the Navy and became entitled to return travel under the provisions of 5 U.S.C. § 5722(a)(2) (1988). The second and third questions are whether either agency is responsible for the cost of shipping Mr. West's POV from Hawaii to Portland, Oregon, since that POV was a replacement vehicle of foreign manufacture, and, if so, which agency must bear that expense.

Opinion

Relocation Expenses

The provisions of law governing reimbursement for relocation expenses incident to a transfer from one duty station to another are contained in 5 U.S.C. §§ 5724 and 5724a (1988). The only statutory limitation on those rights are that the transfer must be (1) in the interest of the government and (2) without a break in service. Additionally, where the transfer is between agencies, 5 U.S.C. § 5724(e) mandates that ". . . the agency to which . . . [an employee] transfers pays the expenses authorized by this section." In contrast, 5 U.S.C. § 5724(d) provides that an employee transferred to a post of duty outside the continental United

States is entitled to the expenses of travel to and from that location by his employing agency as limited under 5 U.S.C. § 5722. [2]

Our decision, *Thomas D. Mulder,* 65 Comp. Gen. 900 (1986), involved an inter-agency transfer similar to the present case. We ruled therein that where an employee performs an inter-agency transfer from an overseas location in the interest of the government and without a break in service he is entitled to the full range of relocation benefits under 5 U.S.C. §§ 5724 and 5724a, even though he has vested overseas return travel rights under 5 U.S.C. § 5722(a)(2). Also in *Mulder,* citing to our decision, *Milton G. Parsons,* 58 Comp. Gen. 783 (1979), we concluded that, if an employee is returned to the continental United States prior to an inter-agency transfer, the losing agency is responsible for the employee's return travel expenses authorized by 5 U.S.C. § 5722. However, if the inter-agency transfer is effected before the employee returns to the continental United States, the gaining agency is responsible for all relocation expenses authorized by 5 U.S.C. §§ 5724 and 5724a. *Mulder, supra,* at page 904.

In the present case, since the BPA transferred Mr. West from Hawaii to Oregon, the BPA, as the gaining agency, is responsible for his relocation expenses under 5 U.S.C. §§ 5724 and 5724a.

Having concluded that the BPA is responsible to pay relocation expenses in Mr. West's case, we now turn to the question of his specific entitlements.

Residence Sale Expenses

We do not agree with the BPA's position that Mr. West is not entitled to residence sale expenses simply because he executed an agreement to sell his residence on a date prior to his selection for the BPA position. We also do not consider *George S. McGowan,* B-206246, *supra,* as controlling Mr. West's real estate expense entitlement. In *McGowan* the employee completed settlement on the sale of his residence prior to the issuance of the vacancy announcement that led to his selection for the position. Since there was nothing in the record of that decision to show a prior administrative intent to transfer him before the expenses were incurred at settlement, we concluded therein that the employee may not be reimbursed residence sale expenses. *See also Benjamin M. Johnson,* B-229390, Sept. 14, 1988.

Our decision *Paul W. Adamske,* B-239590, Jan. 29, 1991, 70 Comp. Gen. 205, also involved a situation substantially similar in part to that involved in Mr. West's case. We ruled therein, that where an employee contracts to sell his residence following acceptance of a job offer, the fact that he later accepts a different job offer and declines the prior offer would not defeat his right to residence sale expense reimbursement, so long as the conditions of entitlement under FTR, para. 2-6.1 (currently 41 C.F.R. § 302-6.1 (1990)) are met. In the present case,

[2] An employee's return travel expense reimbursements under 5 U.S.C. § 5722 are significantly more limited than those under 5 U.S.C. §§ 5724 and 5724a.

since those conditions were met, Mr. West is to be reimbursed residence sale expenses by the BPA.

Foreign POV Shipment

Mr. West had shipped a domestic vehicle to Hawaii at government expense when he was transferred there in 1985 by the Navy. However, when that vehicle was damaged in an accident, he purchased a foreign manufactured vehicle as a replacement from a commercial dealer in Hawaii. In connection with his transfer to BPA, he informed BPA that he owned a foreign POV and BPA authorized and paid for its shipment from Hawaii to Oregon. BPA now questions the legality of that payment.

Under authority of 5 U.S.C. § 5727 (1988) and FTR, para. 2-10.2c, an employee's POV may be transported to a post of duty outside the continental United States when the agency determines that use of the vehicle there is in the interest of the government and satisfies all the conditions listed in clauses (1) through (6) of that FTR paragraph. Clause (6) requires that the POV which is to be shipped to the overseas location is to be of United States manufacture, unless it is further determined that shipment of a foreign manufactured POV is allowed for the reasons stated therein. While FTR, para. 2-10.3e authorizes shipment of a replacement vehicle to that overseas location at government expense, the replacement vehicle is subject to the same determinations and conditions applicable to the overseas shipment of the original vehicle. *Wilfred O. Tungol,* B-208695, Nov. 30, 1982. Upon satisfactory completion of an overseas assignment, an employee's POV which was authorized to be shipped to the overseas location is authorized to be shipped back to the continental United States at government expense. FTR, para. 2-10.3b.

The FTR does not specifically address the return shipment of replacement vehicles (either domestic or foreign manufactured) if purchased overseas. However, some agencies have adopted policies authorizing such return shipment. See, for example, 2 JTR para. C11003-2c, which authorizes return shipment of replacement vehicles purchased overseas by civilian employees of defense agencies, including foreign manufactured vehicles if the requisite determinations are made. We believe that this practice is appropriate.

Therefore in our view, BPA has discretionary authority to allow return shipment expenses for Mr. West's vehicle if it determines that this would be appropriate. In this event, BPA would be responsible for payment of the expenses. *See Mulder, supra. See also* FTR, para. 2-1.6, which provides in part:

> b. *Funding of transfers between agencies.* In the case of transfer from one agency to another, allowable expenses [under chapter 2 of the FTR] shall be paid from the funds of the agency to which the employee is transferred.

If BPA has no existing policy regarding the return shipment of foreign manufactured vehicles, it might consider applying the standards now contained in the JTR provision or the FTR standards governing the shipment of a foreign manufactured vehicle to an overseas location.

Appropriations/Financial Management

Accountable Officers
■ **Disbursing officers**
■■ **Relief**
■■■ **Illegal/improper payments**
■■■■ **Overpayments**

Bureau of Indian Affairs certifying official is relieved of liability pursuant to 31 U.S.C. § 3528(b)(1)(B) for certifying payments that were not proper under the appropriation. However, BIA should take appropriate action to resolve the amount owed the government as a result of the improper payments.

723

Appropriation Availability
■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Prizes**

National Oceanic and Atmospheric Administration's (NOAA) proposal to pay cash prizes to selected individuals providing information about certain fish is intended to further NOAA's acquisition of that information and its statutorily required research. The proposal thus satisfies a requirement for an authorized purpose for the use of appropriated funds under 31 U.S.C. § 1301(a) (1988) and our related cases. However, NOAA's proposal contains certain elements of a lottery which may be prohibited by certain federal statutes, state laws, and regulations. NOAA therefore is advised to consult with the Department of Justice and other appropriate agencies to ensure that its proposal is not a prohibited lottery before spending appropriated funds as proposed.

720

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Lotteries**

National Oceanic and Atmospheric Administration's (NOAA) proposal to pay cash prizes to selected individuals providing information about certain fish is intended to further NOAA's acquisition of that information and its statutorily required research. The proposal thus satisfies a requirement for an authorized purpose for the use of appropriated funds under 31 U.S.C. § 1301(a) (1988) and our related cases. However, NOAA's proposal contains certain elements of a lottery which may be prohibited by certain federal statutes, state laws, and regulations. NOAA therefore is advised to consult with the Department of Justice and other appropriate agencies to ensure that its proposal is not a prohibited lottery before spending appropriated funds as proposed.

720

■ Specific purpose restrictions
■■ Account balances
■■■ Cancelled checks
■■■■ Procedures

Treasury checks issued to pay benefits provided under the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §§ 351-369, and expenses incurred by the Railroad Retirement Board in administering RUIA are subject to the check cancellation and disposition procedures in 31 U.S.C. § 3334(b), as added by section 1003 of the Competitive Equality Banking Act of 1987, by virtue of the comprehensive language "all Treasury checks" in section 3334(b).

705

■ Specific purpose restrictions
■■ Account balances
■■■ Cancelled checks
■■■■ Statutory interpretation

The operative language of 31 U.S.C. § 3334(b), as added by section 1003 of the Competitive Equality Banking Act of 1987, and statutory provisions governing the use of funds in accounts established by the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §§ 351-369, are not irreconcilable. The provisions of RUIA do not address the cancellation and disposition of uncashed Treasury checks issued against the RUIA accounts and hence, under applicable canons of statutory construction, the procedures specified in section 3334(b), the general law on the subject, apply.

706

■ Time availability
■■ Time restrictions
■■■ Advance payments

Payments for McDonald's gift certificates and movie tickets, which will be redeemed at a later date for their full value, are not in violation of the advance payment prohibition in 31 U.S.C. § 3324, provided that adequate administrative safeguards for the control of the certificates and tickets are maintained, the purchase of the certificates and tickets is in the government's interest, and the certificates and tickets are readily redeemable for cash.

701

Civilian Personnel

Compensation
■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

A reemployed annuitant's request for waiver must be denied when he was aware that the amount of the annuity was not being deducted from his salary and that he was being overpaid. Although the employee immediately notified the agency, we have consistently held that when an employee is aware of an error he cannot reasonably expect to retain the overpayment. Financial hardship cannot form the basis for waiver.

699

■ Retroactive compensation
■■ Bonuses
■■■ Interest

Federal agency and labor union have adopted provisions in collective bargaining agreement that specify criteria for granting cash incentive awards, impose deadlines for the agency's payment of such incentive awards, and require the agency to pay interest on late payments of awards. Under these circumstances incentive awards constitute "pay, allowances, or differentials" for purposes of the Back Pay Act, 5 U.S.C. § 5596, and the Act (including its interest provision) applies in the case of failure of an agency to comply with award payment deadlines it has agreed to in collective bargaining.

711

Relocation
■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Manpower shortages

A new manpower shortage category appointee, while on temporary duty in Washington, D.C., for orientation/training en route to his undetermined first permanent duty station, was requested during that training to execute a 1-year service agreement designating Washington, D.C., as his permanent duty station, but the agency states no decision on his duty station had in fact been made. One week later he was issued a permanent change-of-station authorization and his wife shipped their household goods and travelled at government expense to Washington, D.C. Therefore, since the record does not establish notice to the employee of his duty station assignment until he received his permanent change-of-station authorization, his temporary duty allowances continued until that latter date.

717

■ Overseas personnel
■■ Household goods
■■■ Shipment
■■■■ Privately-owned vehicles

An employee shipped a privately owned vehicle (POV) to Hawaii at government expense. Due to an accident and damage to the POV, he purchased a foreign manufactured vehicle as a replacement from a commercial automobile dealer in Hawaii. On subsequent transfer to another agency, he seeks reimbursement for shipment of that POV to the continental United States. While the FTRs are silent on the point, the gaining agency has discretionary authority to allow shipment at government expense of that foreign-made POV to the continental United States upon his return. Following the rule in *Thomas D. Mulder,* 65 Comp. Gen. 900 (1986), and under authority of paragraph 2-1.6 of the FTR, the cost of that shipment, if determined to be appropriate, is to be borne by the gaining agency.

734

■ Overseas personnel
■■ Return travel
■■■ Eligibility

An employee, who had vested return travel rights under 5 U.S.C. § 5722 from Hawaii, received an inter-agency transfer to the continental United States. He is entitled to full relocation expense reimbursement under 5 U.S.C. § 5724 and § 5724a from the gaining agency. A losing agency pays vested return right expenses only when the return travel is performed before an inter-agency transfer occurs. *Thomas D. Mulder,* 65 Comp. Gen. 900 (1986).

733

■ Residence transaction expenses
■■ Reimbursement
■■■ Eligibility

An employee executed an agreement to sell his old residence after he received and accepted an intra-agency job offer involving transfer to a new duty station. He later accepted a job offer from another agency, also involving transfer to a new duty station, declined the first job offer and settled on the residence sale after receiving his travel authorization from the second agency. Declination of first job offer after accepting second job offer does not defeat his right to residence sale expense reimbursement so long as the conditions of entitlement under paragraph 2-6.1 of the Federal Travel Regulations (FTR) are met. *Paul W. Adamske,* B-239590, Jan. 29, 1991, 70 Comp. Gen. 205.

734

Travel
■ Government vehicles
■■ Use

Customs Inspectors are not entitled to mileage reimbursement where Customs Service determines that use of government-owned vehicles (GOVs) is advantageous to the government, a GOV is available, and Inspectors do not request or receive agency approval to use their privately owned vehicles

(POVs) to travel from headquarters to nearby airports in order to perform inspections. *See* 41 C.F.R. § 301-4.4(c) (1990).

727

■ **Non-workday travel**
■■ **Travel time**
■■■ **Overtime**

Customs Inspectors may be entitled to overtime under 5 U.S.C. § 5542(b)(2)(B) (1988) if Customs Service requires them to spend time in travel outside normal duty hours to return GOVs to headquarters following completion of inspections. Entitlement to overtime would depend upon the particular circumstances and cannot be determined in the abstract.

728

■ **Temporary duty**
■■ **Travel expenses**
■■■ **Privately-owned vehicles**
■■■■ **Mileage**

Customs Inspectors are not entitled to mileage reimbursement where Customs Service determines that use of government-owned vehicles (GOVs) is advantageous to the government, a GOV is available, and Inspectors do not request or receive agency approval to use their privately owned vehicles (POVs) to travel from headquarters to nearby airports in order to perform inspections. *See* 41 C.F.R. § 301-4.4(c) (1990).

727

■ **Temporary duty**
■■ **Travel expenses**
■■■ **Privately-owned vehicles**
■■■■ **Mileage**

Where a GOV is available for use but the Customs Service expressly authorizes an Inspector to use his POV for official travel, the Inspector is entitled to mileage at the rate of 9.5 cents per mile. *See* 41 C.F.R. § 301-4.4(c). The agency may deduct from this mileage allowance the distance the Inspector would normally travel between his residence and headquarters.

727

■ **Travel expenses**
■■ **Air carriers**
■■■ **Code-share**
■■■■ **Use**

Travel under a ticket issued by a U.S. certificated air carrier which leases space on the aircraft of a foreign air carrier under a "code-share" arrangement in international air transportation is considered to be "transportation provided by air carriers holding certificates" as required under 49 U.S.C. App. § 1517 (1988), the Fly America Act. Thus, passengers may properly use tickets paid for by the

government under a "code-share" arrangement if the tickets were purchased from the U.S. air carrier.

713

Procurement

Bid Protests

■ GAO procedures

■■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest where agency promptly took corrective action after the protest was filed, responding to 37 specific questions raised by the protester in two amendments totaling 39 pages.

709

Competitive Negotiation

■ Offers

■■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest where agency promptly took corrective action after the protest was filed, responding to 37 specific questions raised by the protester in two amendments totaling 39 pages.

709