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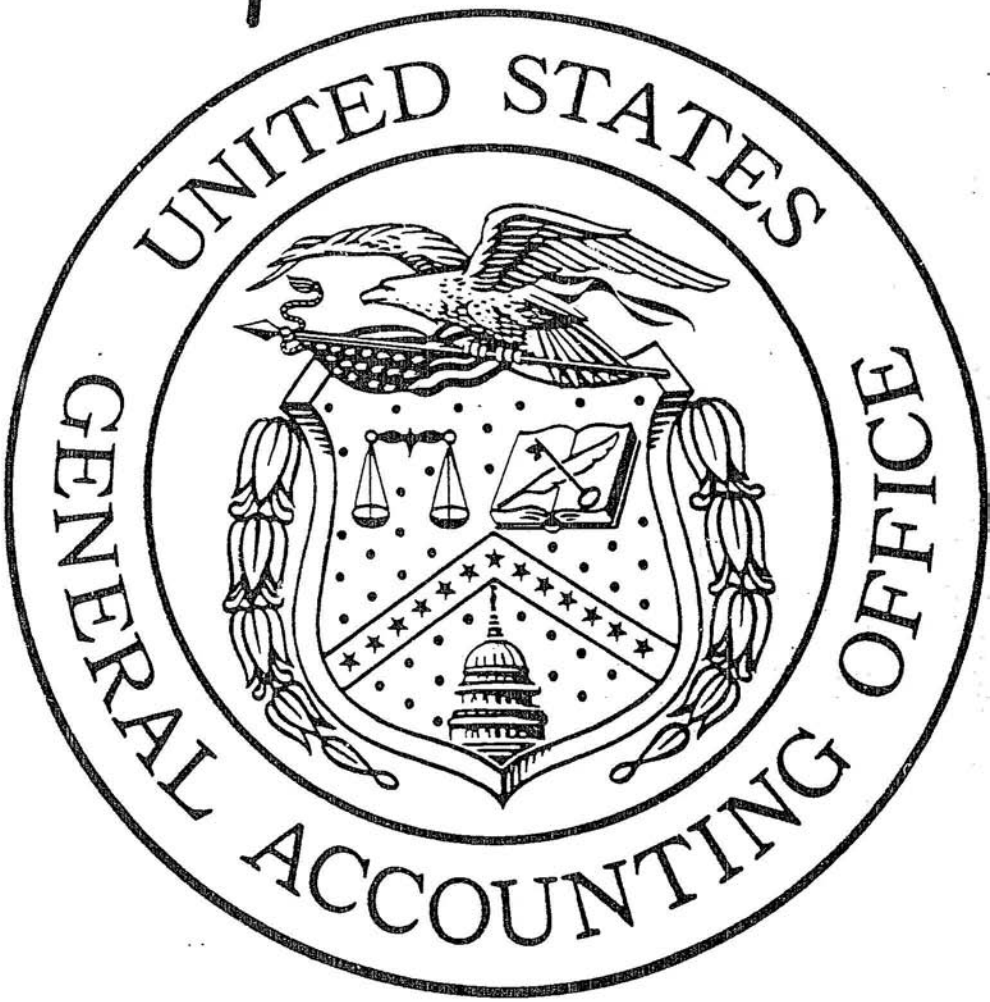

Civilian Personnel Law Manual

Title 1 - Compensation

OFFICE OF GENERAL COUNSEL
U.S. GENERAL ACCOUNTING OFFICE

FOREWORD

Since the last issuance of this Office's Manuals covering the compensation, leave, and travel of Federal civilian personnel, the laws pertaining thereto have undergone major changes.

In an attempt to provide an overview of the complex and ever expanding field of Federal civilian personnel law and in order to outline the role of the General Accounting Office in this area, a new manual was considered to be necessary. This manual, entitled the Civilian Personnel Law Manual, is divided into four titles: title I, Compensation; title II, Leave; title III, Travel Expenses; and title IV, Relocation Expenses. Title I, Compensation, is currently being distributed and contains decisions through September 30, 1976. Title II, Leave, will be distributed in the near future, with title III, Travel Expenses, and title IV, Relocation Expenses, to follow thereafter.

Every effort has been made to ensure the accuracy and relevancy of the material. However, we would welcome any comments that you might have regarding any aspect of the Manual.

Finally, we strongly recommend that you read the Introduction, which contains information on how to use the Manual, and also to familiarize yourself with the Index, which is essential to efficient use of this Manual as a research tool.

Paul G. Dembling
General Counsel

May 1977

INTRODUCTION

The Civilian Personnel Law Manual (CPLM) is published by the Office of the General Counsel, General Accounting Office, in order to provide an overview of the legal areas which are handled by the Civilian Personnel Law section of this Office. Additionally, the CPLM will function as a ready research aid enabling a person to do initial legal research into a desired area. By utilizing the CPLM in conjunction with the telephone research service (to be discussed later) provided by the Index-Digest Section of this Office, a complete research job, including "updating" relevant citations, may be accomplished. It is important to remember that the CPLM is essentially a research tool, and it should not be cited as legal authority. Citations should be to the cases set out in the CPLM.

In order to obtain the maximum benefit while using the CPLM, the user should be aware of the following points relating to the organization of the CPLM.

--An Index consisting of all of the headings of every chapter may be found immediately preceding each title. The Index allows the researcher to determine the correct location of the desired material. Users of the CPLM should read through the Index to familiarize themselves with the range and location of the material contained in each chapter.

--All legal citations in the CPLM are made in conformance with the general rules of citation and style contained in "A Uniform System of Citation" published and distributed by the Harvard Law Review Association. Unless otherwise noted, all citations to the U.S. Code are to the 1970 edition and its supplements, and all citations to the Code of Federal Regulations are to the 1976 edition. Citations to the U.S. Code in the CPLM have been converted to the 1970 edition, even though a prior edition of the U.S. Code may have been cited in the reference case. This was done to make research on current problems easier.

--Abbreviations have been substituted for certain recurring words and phrases. See the "Table of Abbreviations" immediately following this material.

--The first citation to a decision immediately following the textual material is the proper citation to the decision set forth in the text. Any following citations are to cases which illustrate variations of the same legal concept or to other pertinent regulatory or statutory material.

We realize that the CPLM will not provide the answer for every question that arises. CPLM users should utilize the services of the telephone research service, Index-Digest Section, Office of the General Counsel. Personnel of the telephone research service will perform research tasks for Government personnel and members of the public upon request at no charge. The caller should provide a brief synopsis of the pertinent facts and the legal issue that he desires to have researched. The telephone research service may be reached on (202) 275-5028. If copies are desired of decisions for which a B-number and date are known, they may be obtained, free of charge, by calling (202) 275-5308.

In the event that the above procedures are not able to resolve the problem the possibility of submitting the question to this Office should be explored.

Individuals who have claims against the United States should first submit the claim to their employing agency, and then, if not satisfied with the result, request that the matter be submitted to the Claims Division, General Accounting Office, Washington, D.C. 20548. Claimants should ensure that they meet the filing requirements contained in 4 C.F.R. Part 31. That Part also contains procedures for appealing claims which have been denied by the Claims Division.

Under 31 U.S.C. §§ 74 and 82d, disbursing officers, certifying officers, or the head of any executive department, or other establishment not under any of the executive departments may apply for an advance decision by the Comptroller General upon any question involving payments from appropriated funds. Such requests should be addressed to the Comptroller General of the United States, General Accounting Office, Washington, D.C. 20548. Since decisions are normally rendered on the basis of the written record, care should be taken to ensure that the record submitted is complete and that, where applicable, the employee or union involved is provided an opportunity to submit comments. Also, the name and telephone number of someone familiar with the case should be provided.

Cases are normally acknowledged shortly after receipt by this Office. Thereafter, the status of a case may be checked by calling (202) 275-5203 and referring to the case number on the acknowledgement letter.

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TABLE OF ABBREVIATIONS

GAO - United States General Accounting Office

CSC - United States Civil Service Commission

FPM - Federal Personnel Manual

CFR - Code of Federal Regulations

USC - United States Code

JTR - Joint Travel Regulations

FTR - Federal Travel Regulations

CHAPTER 1

CIVILIAN PAY SYSTEMS

A. GENERALLY

The pay systems, schedules, and authorities for fixing the compensation of civilian employees of the United States and the District of Columbia governments are many and varied. It has been reported that more than 60 such systems, schedules, and authorities exist in the executive branch alone. However, for practical purposes these pay fixing procedures may be grouped into three categories: (1) the General Schedule System, (2) prevailing rate systems, and (3) other systems, schedules, and authorities.

B. GENERAL SCHEDULE SYSTEM

Generally

The General Schedule (GS) system, sometimes called the Classification Act system, is one of the three statutory systems covered by 5 U.S.C. § 5301 which establishes the policy of equal pay for substantially equal work and comparability of Federal pay rates with those in private enterprise. (The other two statutory systems are those for the Foreign Service and for the Bureau of Medicine and Surgery, Veterans Administration.) This system is prescribed by chapters 51 and 53, title 5, U.S.C. The positions of General Schedule employees are classified into 18 grades in accordance with the procedures prescribed by chapter 51, and a range of pay rates or steps is established for each of these grades (grade GS-18 has only one rate) through the procedures prescribed by subchapter 1 of chapter 53. Revisions of General Schedule pay rates are promulgated by Executive orders and are subsequently published in salary tables.

Coverage

The great majority of employees in clerical, administrative, technical and professional positions fall within the General Schedule system. Specific coverage is defined in 5 U.S.C. § 5102; subpart B, part 511, title 5, C.F.R.; and subchapter 2, chapter 511 FPM. Generally speaking, this system applies to all employees in the executive branch and the District of Columbia Government except those whose positions are specifically excluded by statute, and a number of employees in the judicial and legislative branches whose positions are included by statute. In addition some agencies with authority to fix the pay of their

employees administratively have adopted this system in whole or in part. CSC has final authority to determine whether an employee's position is covered by the General Schedule system. 5 U.S.C. § 5103. But see B-170668, September 30, 1970.

Position classification

Generally

Positions of employees who are paid under this system must be described and classified in one of the 18 grades of the General Schedule on the basis of the level of difficulty, responsibility, and qualification requirements of the work. 5 U.S.C. § 5106. Standards for classifying positions are prepared by the CSC. 5 U.S.C. § 5105.

By agencies (GS-1 through GS-15)

Generally--Agencies are authorized to classify positions in grades GS-1 through GS-15 in conformance with or consistent with published standards without prior approval of CSC, and the grades thus assigned are the basis for pay and personnel transactions. 5 U.S.C. § 5107 and B-166057, February 4, 1969. However, agency classification actions are subject to review and change, if warranted, by CSC. 5 U.S.C. §§ 5110 and 5112 and 42 Comp. Gen. 521 (1963).

Effective date

Administrative actions

Administrative action is effective from date action is taken by the proper administrative officer to finally allocate or reallocate position, or such later date as may be administratively fixed. 30 Comp. Gen. 156 (1950). Such later date as may be administratively fixed must be a reasonable time. 37 Comp. Gen. 492 (1958). When agency reclassifies an occupied position to higher grade, it must within a reasonable time either promote the incumbent, if qualified, or remove him from the position. 53 Comp. Gen. 216 (1973).

Revised or new standards

When CSC prepares and publishes revised or new position classification standards, administrative agencies must implement them within a reasonable time. 37 Comp. Gen. 492 (1958) and Brech v. U.S. Immigration and Naturalization Service, 362 F. Supp. 914 (1973).

CSC decisions

For effective date of classification decisions made by CSC see subpart G, part 511, title 5, C.F.R.

GAO jurisdiction--GAO does not have authority to change a classification determination made by an agency or CSC. B-182695, September 15, 1975; B-184979, November 14, 1975; and B-186087, June 1, 1976. Cf. 50 Comp. Gen. 581 (1971).

By civil service commissioners (GS-16, 17, & 18)

Unless specifically provided otherwise by statute, a position may be classified in grade GS-16, 17, or 18 only upon the approval of a majority of the civil service commissioners. 5 U.S.C. § 5108.

By statute

The grades of a few General Schedule positions are specifically prescribed by 5 U.S.C. § 5109. See also 5 U.S.C. § 5108(c).

Rates for new appointments

New appointments to General Schedule positions are usually made at the minimum rate of the grade. However under some conditions a new appointment may be made at a higher rate. 5 U.S.C. § 5333(a) and 5 C.F.R. § 531.203

Higher minimum rates (special rates)

When necessary to recruit and retain well-qualified individuals, pay rates higher than those in the basic General Schedule may be established by CSC for particular occupations, grade levels, or localities. 5 U.S.C. § 5303 and subpart C, part 530, title 5, C.F.R.

Rates for GS supervisors of wage-board employees

General Schedule employees who supervise employees whose pay is fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates may be paid at a rate of their grade which is above the highest rate of basic pay being received by employees supervised, or at the maximum rate for their grade, as provided by the regulations. 5 U.S.C. § 5333(b) and subpart C, part 531, title 5, C.F.R.

Step-increases

Periodic

Employees occupying permanent General Schedule positions and paid on an annual basis are advanced to the next higher pay rate within their grade at specified intervals, provided they have not received an equivalent increase from any cause during the waiting period and their work is of an acceptable level of competence. 5 U.S.C. § 5335 and subpart D, part 531, title 5, C.F.R.

Additional (quality)

General Schedule employees may be granted one additional step-increase in a 52-week period in recognition of high quality performance. 5 U.S.C. § 5336 and subpart D, part 531, title 5, C.F.R.

Rates on position or appointment changes (highest previous rate)

For rates of pay on change of position or type of appointment see 5 U.S.C. § 5334 and 5 C.F.R. § 531.203.

Rates on promotion

Generally, employees who are promoted from one General Schedule position to another in higher grade are entitled to basic pay at the lowest rate of the higher grade which exceeds their existing rate of basic pay by not less than two step-increases of the grade from which they are promoted. 5 U.S.C. § 5334(b) and 5 C.F.R. § 531.204.

Salary retention (pay saving)

Under certain specified conditions, General Schedule employees who are reduced in grade through no fault of their own may retain all or a substantial portion of their rate of pay immediately prior to reduction for a period of up to 2 years. 5 U.S.C. § 5337 and subpart E, part 531, title 5, C.F.R.

Pay Limitation

Employees covered by the General Schedule system may not be paid at a rate in excess of the rate of basic pay for level V of the Executive Schedule. 5 U.S.C. § 5308.

C. PREVAILING RATE SYSTEMS

Generally

These are the systems, frequently referred to as wage board systems, by which the pay of employees in recognized trades or crafts, or other skilled mechanical crafts or in unskilled, semi-skilled, or skilled manual labor occupations is fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates, usually on a locality basis.

Federal wage system

Generally

The great majority of prevailing rate employees fall within what CSC has designated as the Federal Wage System. This system is prescribed by subchapter IV, chapter 53, title 5, U.S.C., and implemented by part 532, title 5, C.F.R., and FPM Supplement 532-1.

Coverage

The coverage of the Federal wage system is defined in 5 U.S.C. § 5342. Generally speaking it includes most prevailing rate employees in the executive branch, some in the legislative and judicial branches, and some paid in part from nonappropriated funds. In addition some prevailing rate employees in the executive, legislative, and judicial branches and the District of Columbia government who are exempted from the mandatory coverage of this system by 5 U.S.C. § 5342 may be included in whole or in part at the option of the pay-fixing authorities of the agencies involved. 5 U.S.C. § 5349.

Job grading

Prevailing rate positions under the Federal wage system must be classified in grades in conformance with or consistent with standards published by CSC agencies are authorized to make grade determination subject to review by CSC 5 U.S.C. § 5346; subchapter S6, FPM Supplement 532-1.

Prevailing rate determinations and wage schedules

Statutory requirements for making prevailing rate determinations and establishing regular (5-step) and special wage

schedules, including provisions for hazard and night differential and for the use of rates from other areas (Monroney Amendment), are prescribed by 5 U.S.C. § 5343 and implemented by subpart E, part 532, title 5, C.F.R., and subchapters S4, S5, S8, and S11, FPM Supplement 532-1.

Effective date of wage increases

Wage increases resulting from wage surveys must be made effective not later than the first day of the first pay period which begins on or after the 45th day, excluding Saturdays and Sundays, following the date the wage survey is ordered to be made. 5 U.S.C. § 5344.

Step-increases

Prevailing rate employees paid on regular schedules are advanced at prescribed intervals to the next higher step, provided their performance is satisfactory. 5 U.S.C. § 5343(e)(2) and section 5, subchapter S8, FPM Supp. 532-1

Retained pay

Under certain specified conditions prevailing rate employees who, through no fault of their own, are reduced in grade or reassigned to a position having a lower rate of pay, may retain all or a substantial part of the rate of pay they were receiving immediately before the reduction in grade or reassignment for up to 2 years. 5 U.S.C. § 5345 and subchapter S9, FPM Supp. 532-1.

Crews of vessels

General rule

Generally the pay of officers and members of crews of vessels is fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry. 5 U.S.C. § 5348. However, pay of vessel crews of the Corps of Engineers, Department of the Army, is fixed in accordance with regular prevailing rate procedures. 5 U.S.C. § 5348(c) and B-177645, March 12, 1973.

Public interest

Not only must there be evidence that a pay adjustment is in accordance with prevailing rates and practices in the

maritime industry but there must also be a determination by the administrative office that it is consistent with the public interest. 50 Comp. Gen. 93 (1970).

D. OTHER SYSTEMS, SCHEDULES, AND AUTHORITIES

In addition to the General Schedule and the prevailing rate systems there are numerous other systems, schedules, and authorities for fixing the pay of civilian employees, some of which are established by statute, and others which are established administratively within guidelines or limitations established by statute. In a few instances pay is fixed through collective bargaining.

Illustrative of these other systems are the following: 2 U.S.C. §§ 351 et seq., providing for the adjustment of executive, judicial, and legislative salaries; the Executive Salary Cost-of-Living Adjustment Act, title II, Public Law 94-82, August 9, 1975, 89 Stat. 419; the Executive Schedule, subchapter II, chapter 53, title 5, U.S.C.; the Postal Service system, part II, title 39, U.S.C.: the Government Printing Office system, 44 U.S.C. § 305; the Foreign Service system, chapter 14, title 22 and subchapter I, chapter 53, title 5, U.S.C.; the system of the Department of Medicine and Surgery, Veterans Administration, chapter 73, title 38 and subchapter 1, chapter 53, title 5, U.S.C.; and the authority for fixing the compensation of experts and consultants contained in 5 U.S.C. § 3109 and various other provisions of law. Some other pay fixing authorities are identified in 5 U.S.C. § 5102(c).

See also 5 U.S.C. § 5307 which provides for the adjustment of administratively fixed pay and 5 U.S.C. § 5363 which sets a limitation on such pay.

CHAPTER 2

ENTITLEMENT TO COMPENSATION

A. GENERALLY

There are some basic requisites which must be fulfilled for entitlement to compensation as a civilian employee of the United States or the District of Columbia governments. Generally these include being appointed, taking the oath of office, entering on duty, and executing affidavits relating to loyalty, strikes, and purchase of office.

B. APPOINTMENTS

Definitions

Appointment

An appointment is the act of employing a person for assignment to an authorized position or office in accordance with applicable laws, rules, and regulations. The appointment is made by the head of the department or agency involved or by some other officer or employee of the agency to whom such authority has been delegated under 5 U.S.C. § 302(b). The appointment is evidenced by an official personnel action which should include:

--A citation to the authority under which the appointment is made.

--The title or designation of the office or position to which appointed.

--The grade.

--Rate of compensation.

--Tenure of appointment.

Authorized position

An authorized position is one which has been regularly allocated to one of the grades of the General Schedule in accordance with chapter 51 of title 5, U.S.C. or one which has been established pursuant to other statutory or administrative authority.

Distinguished from classification

The laws relating to the appointment of employees, now codified primarily in chapters 21, 29, 31, and 33 of title 5, U.S.C., and those relating to the classification and compensation in chapters 51 and 53 of title 5, U.S.C., are separate and distinct laws with entirely different scopes and purposes. 17 Comp. Gen. 578 (1938); 18 id. 223 (1938); id. 796 (1939); and 19 id. 160 (1939).

Competitive distinguished from excepted (noncompetitive)

Generally

For definitions of the competitive service and the excepted service see 5 U.S.C. §§ 2102 and 2103 and parts 212 and 213, title 5, C.F.R.

Exceptions must be specific

Appointments may not be made without regard to competitive appointment laws and regulations unless specifically authorized by statute. 17 Comp. Gen. 1114 (1938) and 18 id. 67 (1938).

GAO jurisdiction

Authority to determine whether appointments must be made competitively rests primarily with CSC. 5 U.S.C. §§ 1301 and 1302; 5 C.F.R. § 212.102; 17 Comp. Gen. 786 (1938); and 21 id. 113 (1941). But final authority to withhold compensation of those improperly employed rests with GAO. 5 C.F.R. § 5.4(e) and B-101093, May 10, 1951.

Effective date

Generally

Appointments are effective from the date of acceptance and entrance on duty after the appointing power actually takes action, unless a later date is stated in the appointment. They may not be made retroactively effective to cover services previously rendered. 18 Comp. Gen. 907 (1939) and 20 id. 267 (1940). Cf. 54 Comp. Gen 1028 (1975).

Services prior to appointment

Generally an employee is not entitled to compensation for any period prior to date of appointment, although

during such period he may have actually performed the duties of position and taken oath of office. 4 Comp. Gen. 675 (1975); 20 id. 267 (1940); and B-157876, November 4, 1965. However, see Section F of this Chapter, De Facto Employment.

By the President with advice and consent of the Senate

Generally

The authority of the President to nominate, and by and with the advice and consent of the Senate, appoint various officers is derived from Article II, section 2, clause 2 of the U.S. Constitution and various statutes. See B-183012, February 10, 1976.

Recess appointments

Authority--The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session. Article II, section 2, clause 3, U.S. CONST. of the United States of America. For the implementing statutory provisions see 5 U.S.C. § 5503.

Entitlement to compensation--For recess appointees' entitlement to compensation in various situations see 28 Comp. Gen. 30 (1948), id. 121; id. 238; 35 id. 135 (1955); 36 id. 444 (1956); 52 id. 556 (1973); B-79807, November 4, 1948; and B-150847, B-77963, January 21, 1971.

Effective date

A presidential appointment for a term of years begins to run from the date the commission is issued by the President after Senate confirmation of the nomination unless a statute or the commission specifies otherwise. 35 Comp. Gen. 450 (1956) and 42 id. 495 (1963). Cf. 46 Comp. Gen. 265 (1966).

Power of the President to remove

For a discussion of the power of the President to remove from office an appointee who has been confirmed by the Senate see Wiener v. United States, 357 U.S. 349 (1957).

Restrictions

Attorneys

Unless specifically authorized by statute, an agency other than the Department of Justice may not employ attorneys to conduct litigation. 5 U.S.C. § 3106 and 32 Comp. Gen. 118 (1952). Cf. 53 Comp. Gen. 301 (1973) and 55 id. 408 (1975).

Publicity experts

Appropriated funds may not be used to pay a publicity expert unless specifically authorized by statute. 5 U.S.C. § 3107. But see B-181254, February 28, 1975.

Detectives

Employees of detective agencies may not be employed by the Federal or District of Columbia governments. 5 U.S.C. § 3108; 8 Comp. Gen. 89 (1928); 38 id. 881 (1959); and 55 id. 1472 (1976). Cf. B-32894, March 29, 1943; 26 Comp. Gen. 303 (1946); and 51 id. 494 (1972).

Relatives (nepotism)

A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, a relative to a civilian position in an agency in which the official is serving or over which he exercises control. 5 U.S.C. § 3110. Regarding members of Congress, see B-163773, April 23, 1968. Regarding spouses of relatives, see 47 Comp. Gen. 636 (1968).

Apportionment

Appointments in the departmental service in the District of Columbia must be apportioned among the states, territories, possessions of the United States, and the District of Columbia on the basis of the population ascertained at the last census. 5 U.S.C. § 3306.

Positions restricted to preference eligibles

Appointments to positions of guards, elevator operators, messengers, and custodians in the competitive service are restricted to preference eligibles as long as preference eligibles are available. 5 U.S.C. § 3310.

Members of family

When two or more members of a family are employed in the competitive service, another member of the same family may not be appointed in the competitive service, unless he or she is a preference eligible. 5 U.S.C. § 3319.

Retired members of the armed forces

For restrictions on appointment of retired members of the armed forces to civilian positions in or under the Department of Defense see 5 U.S.C. § 3326.

Positions in grades GS-16, 17, & 18--Unless otherwise authorized by statute, appointment to positions in grades GS-16, 17, and 18 may be made only on the approval of the qualifications of the proposed appointees by CSC. 5 U.S.C. § 3324.

C. OATH OF OFFICE

Generally

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or the uniformed services must take the oath prescribed in 5 U.S.C. § 3331. The oath for the President is prescribed in Article 2, section 1 of the Constitution.

Who may administer

For individuals authorized to administer the oath of office see 5 U.S.C. § 2903. See also B-67888, August 1, 1947; 29 Comp. Gen. 386 (1950); and id. 519.

Effect on compensation

The payment of compensation is not authorized before the oath is taken, but when it is taken it relates back to the date of entrance on duty so as to permit payment of compensation from that date. 21 Comp. Gen. 817 (1947). See also B-159277, June 7, 1966 and B-181294, November 8, 1974. Cf. 40 Comp. Gen. 500 (1961); B-159399, November 30, 1966.

Renewal

Change in status

Renewal of oath is not required on change of status so long as service is continuous in the same agency unless the head of the agency determines it to be necessary in the public interest. 5 U.S.C. § 2905.

Restoration

Employee restored to duty after unwarranted separation is not required to renew oath of office. 28 Comp. Gen. 563 (1949).

D. ENTRANCE ON DUTY

Generally

There must be an entrance on duty under a valid appointment before the payment of compensation is authorized. 20 Comp. Gen. 267 (1940) and cases cited therein. See also B-183440, August 12, 1975.

Exception

Where there is an intervening nonworkday between the date of acceptance of the appointment and date of entrance on duty, compensation is payable for the nonworkday. 24 Comp. Gen. 150 (1944) and 45 id. 660 (1966).

E. AFFIDAVIT REQUIREMENTS

Purchase of office

Within 30 days after effective date of appointment, an officer must file an affidavit that neither he nor anyone acting in his behalf has given, transferred, promised, or paid any consideration for or in expectation or hope of receiving assistance in securing the appointment. 5 U.S.C. § 3332. Compensation may not be paid until the affidavit has been filed. 5 U.S.C. § 5507; 23 Comp. Gen. 391 (1943).

Loyalty and striking

Statutory requirements

As enacted--The current statutory provisions relating to affidavits of loyalty and against striking are contained in 5 U.S.C. §§ 3333 and 7311.

As construed by the courts--The courts have held some of the loyalty and striking provisions of 5 U.S.C. § 7311 to be unconstitutionally broad. Haskett v. Washington, 294 F. Supp. 912 (1968); Stewart v. Washington, 301 F. Supp. 610 (1969); National Association of Letter Carriers v. Blount, 305 F. Supp. 546 (1968), appeal dismissed, 400 U.S. 801 (1971); United Federation of Postal Clerks v. Blount, 325 F. Supp. 879 (1971), aff'd, 404 U.S. 802 (1971).

Affidavits presently required

The appointment affidavits presently required include, in addition to the oath of office and the affidavit as to purchase of office, only an affidavit that the appointee is not participating in any strike against the Government and that he will not so participate while employed by the Government. Standard Form 61, revised September 1970, United States Civil Service Commission.

Effect on compensation

Execution of required affidavits is essential for payment of compensation. 20 Comp. Gen. 924 (1941); 26 id. 134 (1946); and B-91059, January 5, 1950.

Exceptions

Execution of affidavits is not required for emergency employment for less than 60 days, 5 U.S.C. § 3333(b); upon restoration after unwarranted separation, 28 Comp. Gen. 563 (1949); by employees of Government contractors, 26 id. 111 (1946); by employees paid from Federal grants to states, 28 id. 54 (1948); and by independent contractors performing nonpersonal services, id. 296.

F. DE FACTO EMPLOYMENT

Generally

A de facto employee is one who holds an office or position under color of title but because of some defect in his qualifications or in the action placing him in the position or office he does not have legal title to it. An employee in de facto status is entitled to retain compensation previously received but does not have any enforceable right to compensation not received. 8 Comp. Gen. 73 (1928); 28 id. 514 (1949); 30 id. 228 (1940); and 38 id. 175 (1958). But see 52 Comp. Gen. 700 (1973) and 55 id. 109 (1975).

Applications of the general rule

Erroneous personnel actions discovered by CSC

Erroneous administrative personnel actions discovered by CSC on post audit may bestow de facto status on affected employees so as to permit them to retain compensation received prior to time error is discovered. 28 Comp. Gen. 514 (1949) and B-183328, April 16, 1976.

Expiration of term of office

Where there is no statutory authority for an officer to hold over at the expiration of his term, his incumbency ceases at the end of his term and for the period while so holding over he is a de facto officer and as such has no legal claim for the salary of the office, but if it has been paid it cannot be recovered. 8 Comp. Gen. 73 (1928). See also 42 Comp. Gen. 495 (1963).

Physically unqualified

The compensation received by an employee prior to demotion to his former position when he was found physically unqualified for promotion may be retained under the de facto rule. 36 Comp. Gen. 73 (1956).

Failure to meet professional license requirement

Physician who was appointed to Veterans Administration Medical Department before required state medical license was issued may be considered a de facto employee and retain compensation paid since claimant rendered services

in good faith and administative officials were lax in processing appointment. B-111684, October 8, 1952. See also B-159325, August 1, 1966.

Annuitant improperly reemployed

Employee who applied for reemployment and concealed fact that he had filed application for retirement, and when fact became known was separated because of lack of required special qualifications for positions for reemployment of annuitants, may retain compensation paid, as de facto employee, for period before fact became known but must refund amount equal to annuity allocable to period and is not entitled to any compensation for period after de facto status was known. 22 Comp. Gen. 300 (1947) and B-120320, August 20, 1954.

Falsification of educational qualifications

In cases where falsification of education information at the time of employment would be an absolute bar but not a statutory prohibition to employment, the employee who performs services prior to disclosure of the record falsification is in a de facto status which entitles the employee to retain compensation previously received but does not give rise to any enforcable right to compensation not received. 38 Comp. Gen. 175 (1958). See also B-160282, November 15, 1966 and B-185443, August 2, 1976.

Unauthorized continuation after compulsory retirement age

A person who is continued on the rolls of an agency without Presidential extension after reaching compulsory retirement age occupies the status of de facto employee and may retain compensation actually paid, but has no legal claim for unpaid compensation. 31 Comp. Gen. 262 (1952).

Rule inapplicable

Citizenship requirement

Erroneously appointed alien is not de facto employee and may not retain compensation received where statute specifically prohibits payment of compensation to any person not meeting citizenship requirements. 18 Comp. Gen. 815 (1939).

Appointment or promotion in violation of statute

Postal Service employee promoted to the next higher salary grade contrary to the specific statutory provision setting forth a prescribed period of service as a prerequisite for advancement to the higher grade is not to be regarded as a de facto employee and entitled to retain compensation received prior to the time the error was brought to the attention of the administrative officials. 29 Comp. Gen. 75 (1949).

An employee promoted in violation of the minimum service service requirements of the Whitten Rider may not be regarded as in a de facto status so as to retain the additional salary. 31 Comp. Gen. 564 (1952) and 36 id. 230 (1956).

Retired member of the uniformed services employed as a civilian who is discovered to have been appointed in contravention of the prohibition in section 2 of the Dual Office Holding Act of 1894 is not entitled to retain the compensation received for services performed under the illegal civilian appointment. The de facto rule may not be applied to nullify the effect of a statutory provision. 45 Comp. Gen. 330 (1965).

Payment in excess of statutory rate

The de facto employee rule does not apply to permit the retention of compensation received in excess of a rate fixed by statute, and a postmaster who was paid compensation based on postal receipts which did not exclude "outside sales" of postage, as required by 39 U.S.C. § 56, may not invoke the rule to avoid refunding the excess, even though he was without fault in the matter. 29 Comp. Gen. 334 (1950).

Saved rate not authorized by statute

Wage board employee who after a downgrading received saved salary benefits due to an erroneous interpretation of the administrative regulations may not be regarded as in de facto status in the absence of a saved salary statute of general application to wage board employees similar to that applicable to classified employees. 42 Comp. Gen. 697 (1963).

Nonexisting positions

Employees appointed or promoted to positions which have not been authorized or established may not be regarded as in a de facto status, and such employees may not retain the compensation received prior to discovery that appointment or promotion was to a nonexisting position. 45 Comp. Gen. 482 (1966).

De facto pay not highest previous rate

Employee erroneously promoted from GS-7 to GS-9, then demoted to maximum salary step in GS-7 instead of step in grade GS-7 formerly held, upon discovery of error must refund salary payments received in maximum step of GS-7 in excess of step formerly held in that grade at time of erroneous promotion, even though employee is entitled to salary paid while in de facto status in GS-9, since rate attained on erroneous promotion may not be considered highest previous salary rate. 36 Comp. Gen. 73 (1956).

Deductions not recoverable, no leave accrual

Employee in de facto status and not entitled to unpaid compensation may not recover deduction made for retirement and savings bonds from amounts previously paid. Employee in de facto status does not accrue annual leave. 31 Comp. Gen. 262 (1952); 38 id. 175 (1958); and B-116403, September 2, 1954.

De facto rule construed with waiver statute

Employee who has served in de facto status, in good faith and without fraud, through administrative error discovered before any compensation has been paid, and who would have been entitled to retain any compensation, had it been paid, under both the de facto rule and 5 U.S.C. § 5584 authorizing the waiver of overpayment of pay and the refund of any amounts previously paid back, may be paid for services rendered in de facto status. 52 Comp. Gen. 700 (1973) and 55 id. 109 (1975).

G. WAIVER OF COMPENSATION (VOLUNTARY SERVICES)

Generally

No officer or employee of the United States shall accept voluntary service for the United States or employ personal services in excess of that authorized by law, except in cases of

emergency involving the safety of human life or the protection of property 31 U.S.C. § 665(b).

This section prohibits the acceptance by the United States of voluntary services--that is, services furnished on the initiative of the persons rendering them without a proper request from or agreement with the United States. It does not however, prevent the acceptance of gratuitous services, if otherwise lawful, when they are rendered by one who, upon being appointed as a Government employee without compensation, agrees in writing and in advance that he waives any and all claims against the Government for such services. 7 Comp. Gen. 810 (1928); 23 id. 272 (1943); id. 900 (1944); 24 id. 314 (1933); 26 id. 956 (1947); B-148302, June 30, 1975; 30 Ops. Atty. Gen. 51 (1913); and id. 129.

Compensation fixed by law

In the absence of statutory authority, an original appointee to a position in the Federal service may not legally waive his ordinary right to the compensation fixed by or pursuant to law for the position and thereafter be estopped from claiming and receiving the compensation previously waived. 26 Comp. Gen. 956 (1947) and 54 id. 393 (1974). See also 41 Comp. Gen. 478 (1962).

Experts and consultants

(See also COMPENSATION, Chapter 10). In the absence of a statute specifically fixing the amount to be paid in the particular case, an expert or consultant whose services are procured by contract on a temporary or intermittent basis without regard to civil service or classification laws, in accordance with 5 U.S.C. § 3109, may agree to serve without compensation and thereafter be estopped from asserting any valid claim for compensation on account of services performed. 27 Comp. Gen. 194 (1947).

Retired pay

While a Marine Corps Reserve officer receiving retired pay may not waive his retired pay for the period of his service in public elected office in the absence of a statute so providing, no checks representing retired pay, need be drawn until requested by the officer and the forwarding of checks may be resumed whenever he so desires. 28 Comp. Gen. 675 (1949).

CHAPTER 3

BASIC COMPENSATION

SUBCHAPTER I--COMPUTATION

A. HOURS OF WORK, DUTY

Basic 40-hour week and work schedule

Generally

5 U.S.C. § 6101 and 5 C.F.R. Part 610 direct the establishment of a 40-hour administrative workweek to be performed within a period of not more than 6 of any 7 consecutive days for all full-time employees of the Federal Government, as defined in § 6101. Also see 5 C.F.R. § 610.111. Except where an organization would be handicapped, officers and employees shall have: or

--tours of duty scheduled in advance over periods of not less than 1 week,

--a basic 40-hour workweek scheduled in 5 days--Monday through Friday wherever possible, and the 2 days outside the basic workweek shall be consecutive,

--the same working hours in each day in the basic workweek,

--a basic non-overtime workday not to exceed 8 hours,

--a designated basic workweek unaffected by the occurrence of holidays,

--and shall not have breaks in working hours of more than 1 hour scheduled in the basic workday.

Uncommon tours of duty

The establishment of the first 40 hours of duty as the basic workweek of Government quality control inspectors due to the release from work of contractor employees when unpredictable interruptions and delays occur in the checkout of missiles prior to launch-countdown was in accord with 5 U.S.C. § 6101 and 5 C.F.R. § 610.111, which authorize uncommon tours of duty to maintain efficient operations and prevent cost increases. Therefore, the determination of an arbitration board under

Executive Order No. 10988 that the new work schedule was in violation of the collective bargaining contract need not be implemented. Moreover, the Executive Order provides that arbitation "shall be advisory in nature with any decision or recommendation subject to the approval of the agency head." 50 Comp. Gen. 708 (1971).

B. BIWEEKLY PAY PERIODS

Generally

5 U.S.C. § 5504 provides that the pay period for an employee covers 2 administrative workweeks and that, for pay computation purposes, the annual rate of basic pay established by or under statute is deemed payment for employment during 52 basic administrative workweeks of 40 hours.

Computation of pay

Under section 5504, when converting an annual rate of basic pay to a basic, hourly, weekly, or biweekly rate, the following rules apply:

--To derive an hourly rate, divide the annual rate by 2,080.

--To derive a daily rate, multiply the hourly rate by the number of daily hours of service required.

--To derive a weekly or biweekly rate, multiply the hourly rate by 40 or 80, as the case may be.

Rates are computed to the nearest cent, counting one-half and over as a whole cent. 5 U.S.C. § 5504(b).

C. MONTHLY PAY PERIODS

The rules for computation of pay for an individual in the service of the United States whose pay is monthly or annual is set forth in 5 U.S.C. § 5505.

D. WORK LESS THAN FULL TIME

Employees subject to 5 U.S.C. § 5504 who work less than full time should be compensated on an hourly rate. 25 Comp. Gen. 121 (1945). For fractional pay periods for any cause, including separations, retirements, and leave without pay, pay will be computed for the number of hours of duty performed during the biweekly period. See Salary Tables issued by CSC. For

additional material concerning hours of duty, pay, and leave see Federal Personnel Manual, FPM Supplement 990-2.

E. WORK LESS THAN 40 HOURS

Government Printing Office

The establishment of a workweek of less than 40 hours for all Government Printing Office employees, whose wages are fixed pursuant to the Kiess Act, 44 U.S.C. § 305, and the payment of overtime for any hours of work in excess of the shorter workweek may be accomplished by the Public Printer under said act. 36 Comp Gen. 163 (1956).

Classification Act employees

In the absence of an express authorization by Congress, a workweek of less than 40 hours may not be established for employees in the Office of the Superintendent of Documents whose compensation is fixed in accordance with the Classification Act of 1949. 36 Comp. Gen. 163 (1956).

F. DATE OF DEATH

Pay status through date of death

Payment may be made to the one legally entitled thereto of the compensation due a deceased employee of the United States up to and including the date of death, but payment may not be made to include any date later than that on which the employee was last known to be alive. 9 Comp. Gen. 111 (1929); 16 id. 384 (1936); and 43 id. 503 (1964).

Nonpay status prior to date of death

Compensation is payable for the day of death where the employee was in a pay status immediately prior to his death. Where an employee was in a non-pay status immediately preceding his death because of absence not covered by leave, there arises no substantial basis upon which it may be assumed that he would have been in a pay status on the date of death. Therefore, payment of compensation for that day would not be authorized. 25 Comp. Gen. 366 (1945).

SUBCHAPTER II--ESTABLISHMENT OF COMPENSATION INCIDENT TO CERTAIN PERSONNEL ACTIONS

A. NEW APPOINTMENTS

Minimum rate for new appointments

Under 5 U.S.C. § 5333(a) new appointments shall be made at the minimum rate of the appropriate grade, including the minimum rates set by 5 C.F.R. Part 530.

Superior qualifications appointment

The head of an agency under the provisions of 5 C.F.R. § 531.203 may make an appointment to a position in GS-11 or above at a rate above the minimum rate of the appropriate grade. Prior approval of CSC is required except for Library of Congress positions.

Higher rates for supervisors of wage board employees

Under 5 U.S.C. § 5333(b) and 5 C.F.R. §§ 531.301-305 an agency is authorized to make a special adjustment in the pay of a supervisor in a General Schedule position, to the nearest rate of his grade which exceeds the highest rate of basic pay (excluding night differential) paid to any wage board employee for whom the supervisor regularly has responsibility for supervision.

Special rates of recruitment and retention

Agencies may for shortage category positions pay a special rate established under 5 U.S.C. § 5303 and the implementing regulations found at 5 C.F.R. §§ 530.301-307.

Employment of specifically qualified scientific and professional personnel

Under the authority of 5 U.S.C. § 3104 the agency heads listed may establish scientific or professional positions to carry out agency research and development functions which require the services of specifically qualified personnel. An agency head under the authority of 5 U.S.C. § 5361 sets the pay rate at not less than the minimum of GS-16 nor more than the maximum of GS-18 for positions established under 5 U.S.C. § 3104. Department of Defense may establish such positions and similarly set such rates under the authority of 10 U.S.C. § 1581.

B. POSITION OR APPOINTMENT CHANGES

Generally

The rate of basic pay to which an employee is entitled is governed by CSC regulations prescribed in conformity with chapters 51 and 53, title 5 U.S.C. and 5 U.S.C. § 5334. See also this chapter, highest previous rate rule, infra.

Reappointments

From unclassified position

Employee who was separated from an unclassified position who was reemployed in a classified position at the minimum rate of grade 3, and who was subsequently promoted to grade 4, may be paid the rate of the sixth step in the grade based on the highest rate attained in the unclassified position, since the rate received in the ungraded position is equivalent to the rate for the sixth step in grade 4, and the rate fixing provisions do not require that prior position be classified. 26 Comp. Gen. 530 (1947); B-113524, March 3, 1953; and B-118245, February 24, 1954.

From legislative or judicial branch

The 1958 amendments to section 802(a) of the Classification Act of 1949, 5 U.S.C. § 5334, with respect to individuals with prior employment in the legislative and judicial branches of the Government are construed as enlarging CSC's authority to regulate the compensation rates, including the application of the highest previous salary rate rule to legislative and judicial employees upon appointment to positions under the Classification Act. The enactment of a new subsection (c) to section 802, 5 U.S.C. § 5334(c), authorizing the use of the highest previous salary rate rule to legislative and judicial employees who after 2 or more years of service transfer to Classification Act positions is construed as authority to use the rule without regard to CSC's regulations. Therefore, the application of the highest previous salary rate rule by an agency upon the promotion, subsequent to the 1958 amendments, of an employee who had less than 2 years of legislative service when she was appointed to the executive branch was proper under 5 U.S.C. § 5334. 41 Comp. Gen. 389 (1961).

Consultants

A consultant employed on a when-actually-employed basis under 5 U.S.C. § 3109, and later appointed to a classified position in grade GS-15, is entitled only to the minimum step of the grade. The previous employment as a consultant may not be considered the "first employment" for the purposes of 5 U.S.C. § 3109. 30 Comp. Gen. 375 (1951). See also 42 Comp. Gen. 114 (1962) and 5 C.F.R. § 531.203(d)(2).

C. PROMOTIONS AND TRANSFERS

Effective date

Generally

The effective date of salary changes resulting from administrative action exclusively is the date the action is taken by the administrative officer vested with the proper authority, or a subsequent date specifically fixed. 21 Comp. Gen. 95 (1941). See also 5 C.F.R. § 511.701(a). The general rule is that a personnel action may not be made retroactively effective so as to increase the right of an employee to compensation. 40 Comp. Gen. 207 (1960).

Exceptions to general rule

Administrative error

Statute or regulation

An administrative error in failing to make the proper notation so that a wage board employee would receive a periodic step-increase on the date he became eligible for the increase, pursuant to regulations and which do not require any administrative determination after the employee meets the service requirements, may be retroactively corrected without violating the general rule which prohibits increases in compensation based on retroactive administrative determinations. 37 Comp. Gen. 774 (1958).

Nondiscretionary agency policy

Where, incident to the appointment of a former Foreign Service officer to a position under the Classification Act of 1949, an administrative error was made in fixing his salary at the minimum instead of at the

highest rate he had previously earned, contrary to the policy of appointing former Federal employees at the highest salary rate previously attained, retroactive salary adjustment may be made. 34 Comp. Gen. 380 (1955).

Original intent effected

While, as a general rule, an administrative change in salary may not be made retroactively effective, we have permitted retroactive adjustments in salary rates in cases where through clerical error a personnel action was not effected as originally intended. B-168683, January 22, 1970.

Back Pay Act of 1966--Most of the decisions allowing retroactive salary adjustments in cases of administrative error listed above predated the enactment of the Back Pay Act of 1966, 5 U.S.C. § 5596, and, although we have continued to follow the earlier decisions, we have recognized that the 1966 Act provided additional authority to make retroactive salary adjustments and have recognized that the erroneous actions involved in the earlier decisions would also constitute "unjustified or unwarranted personnel action[s]" under 5 U.S.C. § 5596, and consequently be remediable by the payment of backpay. Since 5 U.S.C. § 5596 provides broad statutory authority to rectify erroneous personnel actions by providing backpay to employees injured by such actions, it effectively covers those cases which previously could only be handled under our "administrative error" exceptions to the prohibition against retroactive salary payments. 55 Comp. Gen. 836 (1976). See also COMPENSATION Chapter 7.

Employee organization agreements--A collective-bargaining agreement provided that certain Internal Revenue Service career-ladder employees would be promoted effective the first pay period after 1 year in grade, but promotions of seven employees covered by the agreement were erroneously delayed for periods up to several weeks. Since the provision relating to effective dates of promotions became nondiscretionary agency requirement, if properly includable in bargaining agreement, GAO did not object to retroactive promotions based on an administrative determination that employees would have been promoted as of revised effective dates but for failure to timely process promotion in accordance with the agreement. 55 Comp. Gen. 42 (1975).

Highest previous rate rule

Generally

Subject to 5 C.F.R. §§ 531.204, 531.515, 539.201 and 5 U.S.C. § 5334(a), when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate. If such rate falls between two rates of his grade, the agency may pay him at the higher rate. The rule may be applied when an employee's type of appointment is changed in the same position. For the applicable regulations see 5 C.F.R. § 531.203(c).

Administrative discretion

Minimum rate--An employee has no vested right upon transfer or reemployment to receive the highest salary rate previously paid to him. It is within the administrative discretion to fix the initial salary rate at the minimum salary of the grade to which appointed. 31 Comp. Gen. 15 (1951) and B-140790, November 13, 1959.

Abuse of--In setting a pay rate under the authority of 5 C.F.R. § 531.203 an agency may not require an employee to terminate agency and court actions initiated by him to resolve grievances with the agency in exchange for the employee receiving the benefit of the highest previous rate. Such agency action constitutes an abuse of its discretion and a rate set at the minimum of the grade under such circumstances may be adjusted retroactively to the highest previous rate to accord with agency recommendation for correction. 54 Comp. Gen. 310 (1974).

Administrative regulations--Where internal administrative regulations restricted use of the highest previous rate rule and an employee was reemployed at the highest previous rate in contravention of such regulations, a retroactive adjustment lowering the pay rate to less than the highest previous rate so as to conform to administrative regulations was proper. Appointment at the highest previous rate was was not an administrative waiver of agency restrictions on use of the highest previous rate rule. 51 Comp. Gen. 30 (1971).

Prior position not within Classification Act

Initial salary may be fixed at a rate within the appropriate grade which does not exceed the highest rate previously

received regardless of whether the prior employment was within the Classification Act. 26 Comp. Gen. 530 (1947) and id. 601 (1947); 28 id. 71 (1948).

Availability of funds

Source of funds--The initial salary rate of employees in Classification Act positions to which transferred, promoted, demoted, reinstated, or reemployed may, within available funds, be fixed at a rate within the range of salaries in the grade to which transferred, etc., up to the highest rate attained in any prior classified or unclassified position in an agency, legislative or executive, generally subject to the Classification Act, regardless of the source of the funds from which the compensation was paid. 28 Comp. Gen. 71 (1948).

Availability at later date--The highest previous rate rule may be applied only so far as appropriations or funds are available. Thus, in the case of an employee who, because of limited funds, has been transferred, promoted, demoted, reinstated, or reemployed in a classified position at a rate of pay less than that attained by him in a prior position in the executive branch of the Government, administrative action may not be taken at some later date as funds become available to increase the rate of pay of such employee within the salary range provided by law for the position, although such increased compensation would not exceed the highest rate of pay attained by him in any prior position in the executive branch of the Government. 27 Comp. Gen. 550 (1948). However, where an administrative error was made in fixing the employee's initial salary at less than the highest rate he had previously earned contrary to the policy of the employing agency which provided for establishment of salary rates at the maximum permissible rate, a retroactive salary adjustment may be made. 39 Comp. Gen. 550 (1960).

Legality of previous rate

The highest previous rate rule which permits an employee who is demoted to be paid at any schedule rate which does not exceed the highest previous rate received is not applicable if the previous rates or positions were not legally earned or attained by the employee. 36 Comp. Gen. 73 (1956).

Rule applies to salary rate not grade

The highest previous rate rule has reference to the salary rate rather than the step within the grade so that in converting an employee from the CPC schedule to the GS schedule position, there is no authority to fix the employee's salary rate in excess of the highest previously attained salary rate. 34 Comp. Gen. 691 (1955).

Reassignment but duties unchanged

An employee who was reassigned from the position of voucher examiner to payroll clerk for the purpose of restoring the highest salary rate previously attained in order to retain her services, but who continued to perform only the duties of voucher examiner, may not have the reassignment considered effective to be legally entitled to the additional salary authorized for reassignments under the highest previous rate rule. 36 Comp. Gen. 798 (1957).

Nonappropriated fund activites

Since employees of the Army and Air Force Motion Picture Service--a nonappropriated fund activity--are not subject to the Civil Service Act, the Civil Service Retirement Act, the Classification Act of 1949, or the Annual and Sick Leave Act of 1951, they are not entitled upon subsequent employment in a department or agency in the executive branch to such Federal employee rights and privileges as the highest previous salary rate rule, service credit for annual leave accrual purposes, and transfer of sick leave. 37 Comp. Gen. 671 (1958).

Foreign Service

Employees of the Department of Agriculture who completed service in overseas positions under 22 U.S.C. § 2385(d)(1) and who are entitled to the same benefits as provided by 22 U.S.C. § 928 for persons appointed to the Foreign Service Reserve, upon reinstatement to their former positions, may have their salaries set under the highest previous rate rule in accordance with 5 U.S.C. § 5334(a) and 5 C.F.R. § 531.203(c) rather than on the basis they are only eligible to receive the step-increases that they would have earned had they remained in the positions in which regularly employed, as the highest previous rate rule has never been construed as excluding salary rates attained in the Foreign Service. 51 Comp. Gen. 50 (1971).

Transfers to Federal Government

International agency

Previously employed by

The highest previous rate rule is not applicable where an employee is transferred from a position with the United Nations Relief and Rehabilitation Administration, an international, rather than a Federal agency, to a classified position. Instead, the employee is to be regarded as a new appointee entitled only to the minimum salary of the grade in accordance with applicable provisions of the Classification Act of 1923, as amended. 28 Comp. Gen. 433 (1949).

On loan to

An employee loaned to an international agency retained his status as a Federal employee and, therefore, was entitled to the benefit of the highest previous rate rule. B-152641, January 9, 1964.

District of Columbia--The initial salary rate of a classified employee of the District of Columbia who failed to receive the $330 per annum salary increase given Federal employees generally by the Postal Rate Revision and Federal Employees Salary Act of 1948, due to the exclusion provisions of section 304 thereof, may, upon transfer to a position under the Federal Government in the same classification act grade, be fixed to correspond with the rate received in the former position, plus the $330 statutory increase. 28 Comp. Gen. 504 (1949).

Error in rate determination

An employee, due to an administrative error, was appointed to a position at the minimum of the grade rather than at the highest rate previously earned. GAO will not object to retroactive correction to make payment at the maximum rate, if funds are available, providing there existed no administrative practice, regulation, or policy which would deny such adjustment and provided there was no intent to restore the employee at a salary rate lower than that which the employee had previously attained. 39 Comp. Gen. 550 (1960) and 26 id. 368 (1946).

Basic Pay

Hazardous duty pay--Additional hazardous duty pay may be regarded as part of basic compensation for purpose of determining the highest previous salary rate in applying the initial salary rate in cases of transfer from ungraded to classified positions. B-122971, April 25, 1955.

Overseas tax benefits--The effect of the tax additive which is allowed to United States citizen employees serving in the Canal Zone is to restore to such employees a rate of compensation equivalent to that paid for the same or similar Government work in the continental United States. Therefore, the highest previous salary rate rule being based on United States rates, the tax factor may be added to the basic Canal Zone rate (exclusive of tropical differential) and the aggregate rate thus obtained used as the highest previous rate in establishment of the rate of compensation upon transfer to a position in the United States. 39 Comp. Gen. 409 (1959).

Tropical differential--The rule which permits previous rates of compensation to be used in fixing initial salary rates upon transfer, reinstatement, promotion, demotion, etc., has been applied in terms of rates prevailing in the United States so that the tropical differential paid to employees who served in the Canal Zone, even though regarded as basic compensation, results in an increase of Canal Zone rates over United States rates and, therefore, is not for consideration in fixing the compensation of former Canal Zone employees upon transfer to positions in the United States. 39 Comp. Gen. 409 (1959).

Conversion versus transfer

In establishing pay rates for wage board employees in Hawaii and Guam whose positions are converted to the General Schedule, 5 C.F.R. Part 539, which provides for setting an employee's General Schedule salary at a rate closest to his basic Wage Board rate prior to conversion is applicable. However, when employees transfer to General Schedule positions, their salaries are determined pursuant to the "highest previous rate rule" in 5 C.F.R. Part 531. 52 Comp. Gen. 695 (1973).

Promotion subsequent to demotion

In applying the highest previous rate rule, it will not be considered material that the employee, after occupying the highest previous salaried position, occupied one or more positions at a lower salary rate or without compensation before being considered for the position in which the salary currently is under consideration. 26 Comp. Gen. 368 (1946).

Periodic step-increase

An employee who, prior to a demotion, completed a full periodic step-increase waiting period, but did not receive the step-increase because at the time he held a temporary limited appointment, is entitled, upon subsequent repromotion to his former grade and within administrative discretion, to a one-step increase, there being no requirement in 5 U.S.C. § 5335 or the regulations that the waiting period be served immediately prior to the date on which the step-increase is granted. Therefore, an administrative error in failing to include the step-increase in computation of the highest previous rate due the employee may be corrected retroactively to the date of the repromotion. 39 Comp. Gen. 211 (1959).

Retroactive salary increases

Where an agency has a policy to extend the benefit of the highest previous rate rule prescribed in 5 U.S.C. § 5334(a), the salary of an employee who left the Post Office Department during the retroactive period between enactment of the Postal Reorganization Act and its effective date may be adjusted to reflect the increase authorized by the act. In the absence of specific language to the contrary, the rule is that retroactive salary increases apply as if the increase had been in force and effect at the time of the change of status of the employee. 50 Comp. Gen. 414 (1970).

"Two step-increases" rule

Generally

Under the provisions of 5 U.S.C. § 5334(b) and 5 C.F.R. § 531.204(a), an employee who is transferred from one General Schedule position to a higher General Schedule position, or an employee who is promoted from one General Schedule grade to a higher General Schedule grade, is

entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. If the employee so promoted or transferred is receiving basic pay at a rate in excess of the maximum rate of his grade and there is no rate in the higher grade which is at least two step-increases above his existing rate of basic pay, the employee is entitled to the maximum rate of the higher grade or his existing rate of basic pay, whichever is greater. If the employee so promoted or transferred is receiving basic pay at a rate saved to him under 5 U.S.C. § 5337 on reduction in grade, he is entitled to basic pay at a rate two steps above the rate he would be receiving if section 5337 were not applicable or his existing rate of basic pay, whichever is greater.

Within-grade advancement

An employee who is promoted or whose position is reallocated to a higher grade on the same date he becomes eligible for a within-grade advancement is entitled to have the within-grade advancement included in his existing rate of basic compensation in fixing his basic rate of compensation for the higher grade. 31 Comp. Gen. 207 (1951) and id. 62 (1951).

Retroactive salary increases

Former General Schedule employees of the Post Office Department who transferred to higher General Schedule positions in another agency between the date of enactment of the Postal Reorganization Act, which provides approximately an 8-percent salary increase, and the effective date of the act, are entitled to have the "not less than two step-increases" authorized in 5 U.S.C. § 5334(b) for employees who are promoted or transferred, computed on the revised General Schedule rate of the Post Office Department. In the absence of specific language to the contrary, the rule is that retroactive salary increases apply as if the increase had been in force and effect at the time of the change of status of the employee. 50 Comp. Gen. 414 (1970).

Simultaneous actions

Generally

Under 5 C.F.R. § 531.203(f), if an employee is entitled to two pay benefits at the same time, the employing agency

shall process the changes in the order which gives the employee the maximum benefit. See 36 Comp. Gen. 217 (1956).

General salary increase acts

The principle expressed at 36 Comp. Gen. 217 (1956) and 5 C.F.R. § 531.203(f), to the effect that when two salary benefits occur at the same time they may be processed in the order which will give the employee the maximum benefit, is precluded by those provisions in the Federal Employees Salary Increase Act of 1960 which grant increases in salary on the basis of basic compensation received "immediately prior to the effective date of this section." Thus, the general salary increase, under the plain language of the 1960 Act, was given effect prior to promotions received on the same effective date by reason of new classification standards approved by CSC. 40 Comp. Gen. 184 (1960).

D. CLASSIFICATION AND RECLASSIFICATION

Generally

Chapter 51 of title 5, U.S.C. and 5 C.F.R. Part 511 provide a system whereby positions in the Federal Government are grouped and identified by classes and grades in accordance with their duties, responsibilities, and qualification requirements. The rate of basic pay which an employee will receive is based upon the principle of "equal pay for substantially equal work." Variations in rates of basic pay paid to different employees are to be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of employees to efficiency and economy in the service. 5 U.S.C. § 5107 provides individual agencies with authority to place positions in appropriate classes and grades in conformance with standards published by CSC. Under 5 U.S.C. §§ 5110-5112, CSC reviews agency classifications and may revoke or suspend the agency's classification authority. The procedure by which an employee may appeal his classification is found at 5 C.F.R. §§ 511.603 et seq.

Jurisdiction

CSC and employing agency

Generally--Statutory authority to establish appropriate classification standards and to allocate positions subject

to the General Schedule rests with the agency concerned and CSC. Therefore, GAO has no authority to settle claims on any basis other than the agency or CSC classification. B-183103, June 2, 1975.

Administrative action--authority--An agency reclassification of a position to grade GS-5 after certification of the position as grade GS-4 by CSC and the demotion of the incumbents with retention rights pursuant to 5 U.S.C. § 5337 was not within the scope of the agency's authority to classify positions originally, or to reclassify such positions. Since the agency lacked authority to reclassify positions classified by CSC, the action taken was without legal effect to deprive the employees of their statutory right to retained salary and they should be restored to the saved pay status. The employees promoted to the GS-5 grade on the basis of the administrative reclassification action, although required to be downgraded to GS-4, may be prospectively restored to the steps of the grade they would have attained without regard to the erroneous promotion. 42 Comp. Gen. 521 (1963).

Allocation versus reallocation--The allocation of a position is made upon the basis of the duties and responsibilities which are assigned to it. The responsibility for assigning, changing or withdrawing these duties rests with the administrative office. Thus, a position allocated originally in a particular Classification Act grade may be reevaluated and allocated to a different grade upon the basis of changed duties and responsibilities, subject to postaudit by CSC. However, a reallocation is a corrective action where the original allocation was erroneous. It is not based upon change of duties and responsibilities. 26 Comp. Gen. 573, at page 576 (1947).

GAO

Bound by CSC determinations--Since CSC determinations on classification appeals are binding on GAO under 5 U.S.C. § 5112(a), GAO has no authority to modify such actions. B-183120, February 21, 1975.

Discrimination--intentional misclassification--Position description and classification of civil service employees is not within the jurisdiction of GAO. If the employing agency and/or CSC should determine that an employee's

position has been illegally and deliberately misclassified due to discrimination because of race or sex, then the matter would be for consideration by GAO for the purposes of payment of any adjustments in salary found to be due but not for review of any findings on the question of classification. 50 Comp. Gen. 581 (1971) and B-173831, September 27, 1971.

Effective date

Generally

Employees of the Federal Government are entitled only to the salaries of the positions to which they are actually appointed regardless of the duties they perform. When an employee performs duties at a grade level higher than that in which his position is classified and is successful in obtaining reclassification of his position and promotion, no entitlement exists for compensation at the higher grade level prior to the date the necessary administrative actions are taken to effect the promotion. 52 Comp. Gen. 631 (1973) and 39 id. 583 (1960).

Administratively fixed

The effective date of changes in salary due to allocations or reallocations of positions is the date on which the action is taken by the administrative office to allocate or reallocate the position or such later date as may be administratively fixed. 30 Comp. Gen. 156 (1950). Amplified by 37 Comp. Gen. 492 (1958) to provide that such later date must be within a reasonable time. The time frame for a "reasonable time" is prescribed in 5 C.F.R. §§ 511.701 and 511.702. Thus, when a position is reclassified to a higher grade, an agency must either promote the incumbent, if qualified, or remove him not later than the beginning of the fourth pay period after the date of the reclassification action. 52 Comp. Gen. 216 (1973).

Retroactive pay adjustments allowed

Unavailability of funds--An employee's position was reclassified from GS-6 to GS-7, but due to the unavailability of funds the promotion was not effected within a reasonable period of time. The unavailability of funds was not sufficient justification for denying the employee the promotion to the reclassified position to which she was otherwise entitled. Therefore, a retroactive promotion was allowed. B-165307, November 4, 1968.

Discrimination--intentionally misclassified--An employee was found, pursuant to the Office of Economic Opportunity's equal employment opportunity procedure, to have been discriminated against in initially classifying her position as a GS-9 rather than a GS-11 upon appointment. A corrective action in such circumstances is not viewed by GAO as a retroactive promotion such as is ordinarily prohibited by law but as an intentional illegal appointment or misclassification. Therefore, a retroactive correction of the personnel action and adjustment in pay was allowed. 50 Comp. Gen. 581 (1971).

Reallocations downward

See, this Chapter, "Downgrading and Saved Pay," infra.

Reallocations upward

See also, this Chapter, "Promotions and Transfers," supra.

Considered promotion

Allocations of positions to higher grades are considered promotions within the purview of the Classification Act of 1949. Therefore, an employee whose position is reallocated to a higher grade is entitled to have his salary rate fixed at the lowest rate in the higher grade which exceeds his previous rate in the lower grade from which advanced by at least two steps. 31 Comp. Gen. 266 (1952).

Appeal from downgrading

Where an employee appealed the downgrading of his position from grade GS-8 to GS-7, it was determined that the position should be reclassified as grade GS-9. The employee is entitled to retroactive correction only to the extent of restoration to the level of the grade from which demoted, and restoration to grade GS-9 constitutes a promotion which can be effective only from the date of the administrative action. 35 Comp. Gen. 153 (1955).

Simultaneous with within-grade promotion

An employee whose position is reallocated to a higher grade on the same date he becomes eligible for a within-grade advancement is entitled to have the within-grade advancement included in his existing rate of basic compensation in fixing his basic rate of compensation for the higher grade. 31 Comp. Gen. 62 (1951).

Position change during military service of incumbent

Reallocation of a position to a higher grade during an incumbent's absence in the military service entitles him to restoration in the reallocated grade plus within-grade advances from the date of reallocation. However, if the position is allocated to the higher grade upon the basis of increased duties and responsibilities, it is a new position and the returning veteran is entitled to similar within-grade advancements only if the increased duties and responsibilities attached to the position prior to his entry into the military service. B-95776, August 10, 1950.

Detail to unallocated position

An employee detailed to an unallocated position prior to the effective date of a downward allocation of his position may retain the grade and salary of his regular position until the position to which he is detailed is allocated. B-93003, March 21, 1950.

Erroneous allocation

The compensation of an employee whose position was temporarily allocated to a higher grade and later allocated back to the original grade should be computed at the rate the employee would have attained had the position been properly allocated in the first instance. 32 Comp. Gen. 135 (1952).

E. DOWNGRADING AND "SAVED PAY"

Generally

The authority for salary retention benefits incident to reductions in grade is derived from 5 U.S.C. §§ 5337 and 5338 and 5 C.F.R. §§ 531.501 et seq. The general rule is that certain qualified employees who are reduced in grade are entitled to receive basic pay, subject to the limitation of 5 U.S.C. § 5337(b), at the rate to which they were entitled immediately before the reduction in grade (including increases in rate provided by statute). A qualified employee remains in this "saved pay" status for a period of 2 years from the effective date of the reduction in grade, provided: (a) the employee continues in the same agency without a break in service of 1 workday or more; (b) is not entitled to a higher rate of basic pay under chapter 51 or subchapter III of chapter 53 of title 5 U.S.C.; and (c) is not demoted or reassigned

(i) for personal cause, (ii) at the employee's request, or (iii) in a reduction in force due to lack of funds or curtailment of work. In order to qualify for salary retention, the employee who is reduced in grade must: (a) hold a career or career-conditional appointment in the competitive service, or an equivalent tenure in the excepted service or in the government of the District of Columbia; (b) have served in the same agency in a grade or grades higher than the grade to which demoted for 2 continuous years immediately prior to the reduction in grade; (c) have performed his work during the 2-year period at a satisfactory or better level; and (d) not have been reduced in grade due to (i) personal cause, (ii) his request, (iii) a reduction in force due to lack of funds or curtailment of work, or (iv) with respect to a temporary promotion, a condition of the temporary promotion to a higher grade.

Entitlement to "saved pay"

Detailed employees

The condition that the position which is downgraded by reclassification be held by the employee for a period of 2 years, requires that the employee actually hold the official position for 2 years. Although a period of detail preceding formal reassignment to the position which is subsequently downgraded may not be included in the 2-year period, a period of detail to another position within the 2-year period and without a change in the employee's official position may be included for eligibility for the salary retention benefits, provided that the duties and responsibilities of the official position have not changed. 37 Comp. Gen. 718 (1958).

Personal cause

The demotion of an employee upon determination by CSC that the employee was not qualified to fill the position to which he was assigned due to an administrative misinterpretation of the qualification standards prescribed by CSC for the particular position is not a demotion for personal cause as defined in the Federal Personnel Manual, because it was not based on conduct, character, or inefficiency, nor was it based on "capacity," which term was intended to denote an employee's physical inability to perform the duties of the assigned position and not an employee's legal qualifications. Therefore, upon demotion

the employee was entitled to salary retention benefits. 39 Comp. Gen. 193 (1959).

Demotion at employee's request

Where a GS-12 employee requested a reduction in grade to GS-11 in order to facilitate transfer to San Francisco District Office of the Internal Revenue Service because of his wife's ill health and the advice of her doctor to seek a warmer climate, saved pay is specifically precluded by 5 U.S.C. § 5337(a)(3). B-174997, April 21, 1972.

"Saved pay" period

Reassignment--not for personal cause

An employee who, at the time of a reduction in force and acceptance of a lower grade position in another building in a different location, requested an assignment to the building in which her former duties were performed, upon assignment to the former building is not to be regarded as having been reassigned at her personal request so as to be denied salary retention benefits. 39 Comp. Gen. 193 (1959).

Temporary promotion

An employee demoted from GS-5, step 9, to GS-4, step 10, with salary retention pursuant to 5 U.S.C. § 5337, who accepts a temporary promotion and then returns to the same grade to which initially demoted has not forfeited entitlement to the salary retention. The retention period commences on the date of demotion, and the temporary promotion did not affect the running of the salary-retention period, as the employee by virtue of the temporary promotion is not considered as having become "entitled to a higher rate of basic pay by operation of" the classification law within the meaning of 5 U.S.C. § 5337. 50 Comp. Gen. 82 (1970).

Furlough status

It is well established that the temporary, as distinguished from permanent or indefinite, employment of an employee who has been placed in a furlough status from his permanent position does not terminate his furlough status. During the existence of the furlough status the employee continues to hold the position from which furloughed.

Salary retention, therefore, would not comence until the day following the expiration of the furlough period and would continue for 2 years from that date in the absence of the occurrence of one of the terminating factors specified in the statute. B-159992, June 21, 1967.

Special salary rates

Decrease during "saved pay" period

The special rate under 5 U.S.C. § 5303(d) selected for a demoted employee as the rate he will receive at the end of the 2-year "saved pay" period, is not affected by the fact that the special rate is decreased or discontinued during the retention period. The special rate is the rate to which the employee will revert at the expiration of the retention period, and it is the rate that he will continue to be entitled to as long as he remains in the same position or until he becomes entitled to a higher rate. Therefore, a GS-13 employee demoted to GS-11 with the retained special rate of $18,945, for whom GS-11, step 10, at the special rate of $18,088 was selected, a rate subsequently decreased to $16,604, is entitled at the end of the retention period to $18,088 for as long as he remains in the same position or until he is entitled to a higher rate. 51 Comp. Gen. 53 (1971).

Adjustments

Adjustments in special salary rates under 5 U.S.C. § 5303(d) resulting from a general increase in statutory pay schedules are not increases in the rate of basic pay provided by statute within the meaning of 5 U.S.C. § 5337(a). Therefore, the retained rate may not be adjusted to reflect the increase in the special salary rates established under 5 U.S.C. § 5303. 51 Comp. Gen. 53 (1971) and B-167671, September 17, 1969.

More than one downgrading

A second reduction in grade action for an employee who, incident to a prior demotion, is receiving saved pay for a 2-year period which has not expired will be regarded as immediately beginning a new 2-year salary retention period. The rate of compensation payable for the new 2-year period will be the rate of basic compensation the employee would have been receiving but for the "saved pay" resulting from the first demotion. 41 Comp. Gen. 764 (1962).

SUBCHAPTER III--PERIODIC STEP-INCREASES

A. GENERAL SCHEDULE

Generally

5 U.S.C. § 5335 provides that GS employees occupying permanent positions be advanced to the next higher within-grade rate at the beginning of the next pay period following completion of specified waiting periods, provided:

--the employee did not receive an equivalent increase in pay from any cause during the period; and

--the work of the employee, except a hearing examiner appointed under 5 U.S.C. § 3105, is of an acceptable level of competence as determined by the head of the agency.

5 U.S.C. § 5336 provides that an agency may within CSC regulations grant an additional step-increase in recognition of high quality performance. Such increases are not equivalent increases under 5 U.S.C. § 5335. Only one quality step-increase may be given within any 52-week period. CSC regulations are found for both sections 5335 and 5336 of title 5, U.S.C. at 5 C.F.R. §§ 531.401-413.

Applicability

Periodic step-increases provided in 5 U.S.C. §§ 5335 and 5336 apply to full-time and nonfull-time employees who occupy permanent positions subject to the General Schedule and who are paid on an annual basis. 5 C.F.R. § 531.401.

Waiting period

In accordance with CSC instructions giving effect to 5 U.S.C. § 5335(a), which prescribes a waiting period of 156 weeks in step 7 before an employee may be advanced to step 8 of his grade, and to section 5336(b), which provides that a quality increase is not an equivalent increase in pay within the meaning of section 5335(a), an employee who was advanced, on January 2, 1966, to step 6 of grade GS-13, and who received a quality increase on July 3, 1966, to step 7, had not received an equivalent increase under section 5336(b) and did not start a new waiting period to qualify for step 8. However, the employee is required to serve, not the 104-week waiting period prescribed for step 6, but the 156 weeks prescribed

for step 7, which period runs from January 2, 1966, the date of his advancement to step 6. 48 Comp. Gen. 150 (1968). See also 5 C.F.R. § 531.403.

Creditable service

Under 5 C.F.R. § 531.404(b) time in a nonpay status in excess of specified amounts shall not be considered creditable service for the purpose of periodic step-increases. Thus, an employee who was separated in a reduction in force on August 31, 1973, did not receive her periodic step-increase because her eligibility was delayed until September 2, 1973, by excess use of leave without pay (LWOP). She may not have annual leave substituted for LWOP for the purpose of accelerating the effective date of her periodic step-increase and increasing severance pay since she had been advised of the consequences of the use of excess LWOP. Annual leave may be substituted retroactively for LWOP only where LWOP was charged as a result of a mistake of law or fact. B-180870, August 27, 1974.

Equivalent increase

An employee was demoted to GS-2, step 10 from GS-9, step 2. After he served in the latter position for 10-1/2 months, he was repromoted to his former position receiving an actual increase of $2,830. He is not entitled to have the 10-1/2 months added to the time after the repromotion in determining his eligibility for his next periodic step-increase since the qualifying language of 5 U.S.C. § 5335(a)(3)(A) "did not receive an equivalent increase in pay from any cause during that period," is interpreted to refer to the time limits expressed in the statute for periodic step-increases, and not to time served in grade. Therefore, the employee did receive an "equivalent increase" on the date of repromotion, and the new waiting period commenced at that time. B-176492, October 26, 1972 and see 43 Comp. Gen. 507 (1964).

Work of an acceptable level

Claim for additional compensation for the period during which a periodic step-increase was withheld following a negative acceptable level of competence determination by the agency may not be allowed since the negative determination was sustained by both the agency on reconsideration and by CSC Board of Appeals and Review.

Decisions of the Board are final and conclusive in such matters and there is no basis for further administrative review. B-180706, August 7, 1974. See also 5 C.F.R. § 531.407.

Effective date

A periodic step-increase is effective on the first day of the first pay period following completion of the required waiting period and when a periodic step-increase and the effective date of a personnel action occur at the same time, the actions are processed in the order that gives the maximum benefit to the employee. 5 C.F.R. § 531.408.

Quality increase

An employee who was advanced on January 2, 1966, to GS-13, step 6, and received a quality increase on June 3, 1966, to step 7, has not received an equivalent increase, since 5 U.S.C. § 5336(b) provides that a quality increase is not an equivalent increase in pay within the meaning of 5 U.S.C. § 5335(a). Therefore, he does not start a new waiting period to qualify for step 8. However, he is required to serve not the 104-week waiting period prescribed for step 6, but the 156-week period prescribed for step 7, which period runs from his January 2, 1966, date of his advancement to step 6. 48 Comp. Gen. 150 (1968). See also 5 C.F.R. §§ 531.410-413.

B. PREVAILING RATE SYSTEM

See COMPENSATION, Chapter 11, Subchapter II.

CHAPTER 4

ADDITIONAL COMPENSATION FOR CLASSIFICATION ACT POSITIONS

INTRODUCTION

5 U.S.C. § 5536 provides that:

> "An employee * * * whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty, unless specifically authorized by law and the appropriation therefor specifically states that it is for the additional pay or allowance."

Since there are certain instances in which the same or similar laws govern the premium pay entitlements of classified and wage board employees, this Subchapter will also include specific reference to several decisions concerning wage board employees where the identical rule is applicable to both classified and wage board employees. For additional material concerning wage board employees, see COMPENSATION, Chapter 11.

SUBCHAPTER I--PREMIUM PAY--OVERTIME

A. STATUTORY AUTHORITY

Employees may be entitled to overtime compensation under either 5 U.S.C. § 5542 as amended, or the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., as amended. If an employee is entitled to overtime compensation under both laws, he is entitled to receive compensation under whichever law provides him with the greater benefit. 54 Comp. Gen. 371 (1974).

5 U.S.C. § 5542

Under this section an employee is entitled to overtime compensation on the following basis:

"(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

"(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

"(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10, and all that amount is premium pay.

"(3) Notwithstanding paragraphs (1) and (2) of this subsection for an employee of the Department of

Transportation who occupies a nonmanagerial position in GS-14 or under and, as determined by the Secretary of Transportation.

"(A) the duties of which are critical to the immediate daily operation of the air traffic control system, directly affect aviation safety, and involve physical or mental strain or hardship;

"(B) in which overtime work is therefore unusually taxing; and

"(C) in which operating requirements cannot be met without substantial overtime work;

the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

"(b) For the purpose of this subchapter--

"(1) unscheduled overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration; and

"(2) time spent in a travel status away from the official duty station of an employee is not hours of employment unless--

"(A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or

"(B) 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."

Fair Labor Standards Act

Under the FLSA, overtime compensation is provided for as follows:

> "* * * no employer shall employ any of his employees * * * for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

However, any employee employed in a bona fide executive, administrative, or professional capacity is exempt from the FLSA's overtime protection in section 207(a)(1). 29 U.S.C. § 213(a)(1).

B. OVERTIME UNDER 5 U.S.C. § 5542

What are compensable hours of work

Actual work requirement

Generally--The general rule applicable to both classified and wage board employees is that since the authority for payment of overtime compensation contemplates the actual performance of duty, an employee may not be compensated for overtime work when he does not actually perform work during the overtime period. 42 Comp. Gen. 195 (1962); 45 id. 710 (1966); 46 id. 217 (1966); and 55 id. 629 (1976).

Violation of labor-management agreement--Where the employee is denied overtime work in violation of a mandatory provision in a negotiated labor-management agreement the employee may receive backpay for the overtime work not performed. 54 Comp. Gen. 1071 (1975); 55 id. 405 (1975); and id. 629 (1976).

Authorized leave during basic workweek--Authorized leave with pay during the basic workweek including time absent on legal holidays, nonworkdays, and compensatory time off is considered to be employment and will not reduce the amount of overtime compensation otherwise due during the administrative workweek. 25 Comp. Gen. 254 (1945).

Absence on sick leave during overtime period--Section 201 of the Federal Employees Pay Act of 1945, now 5 U.S.C. § 5542, authorizes payment of overtime compensation "for all hours of employment, officially ordered or approved, in excess of 40 hours in any administrative workweek." This contemplates the actual performance of required duty during the prescribed overtime period. While an employee might be granted sick leave during the basic 40-hour week

to seek treatment for injury incurred in the line of duty or otherwise, no sick leave can be granted for an overtime day and, accordingly, no compensation is payable for time absent from duty during the scheduled number of overtime hours on an overtime day due to injury incurred or time spent in seeking treatment for such injury. 25 Comp. Gen. 344.

Military and court leave--Under 5 U.S.C. §§ 6323(a) and 6322, respectively, an employee is entitled to receive the same compensation he otherwise would have received but for the fact that he was absent on military or court leave. 27 Comp. Gen. 353, 357 (1947) and 49 id. 233 (1969). In order for overtime work to be compensable with respect to an employee on military or court leave, the overtime duty must have been regularly scheduled which would have required the employee concerned to work overtime had he not been away on military leave or jury duty. B-159835, March 11, 1976.

Two-thirds rule--An employee of the Department of Agriculture claimed overtime compensation for periods he would normally be eating or sleeping during several 24-hour periods he was on duty. It has long been the established rule that time available for, or spent, sleeping and eating is noncompensable even where the employee is required to be on the employer's premises. The exception to this rule, not applicable to the employee in the instant case, is where substantial labor is performed in the time set aside for sleeping and eating. B-173235, November 22, 1971.

Regularly scheduled

Defined--The term "regularly scheduled overtime" refers to work which is duly authorized in advance and scheduled to recur on successive days or after specified intervals as distinguished from overtime which is scheduled on a day-to-day or hour-to-hour basis and where the amount varies with no discernible pattern. 48 Comp. Gen. 334 (1968); 52 id. 319, 322 (1972); and 53 id. 264, 268 (1973).

Secret Service agents temporarily assigned to the Sky Marshall Program claimed time and one-half overtime for "in-flight" duty beyond normal duty hours. The airlines, rather than the employing agency, prepared the flight schedules for agents 1 to 4 weeks in advance. Since the overtime work was scheduled in advance and recurred at frequent intervals it may be considered "regularly scheduled" and is compensable at time and one-half rates under 5 U.S.C. § 5542. B-151168,

May 25, 1976. See also 37 Comp. Gen. 1 (1957), and this Subchapter, concerning unscheduled call-back overtime, infra.

Compared to irregular or occasional--An employee receiving premium pay under 5 U.S.C. § 5545(c)(2) who was assigned by her supervisor to perform 2-1/2 hours overtime work in connection with a training course is not entitled to overtime compensation under 5 U.S.C. § 5542 since the overtime was not scheduled to recur on successive days or after specified intervals. B-164689, March 26, 1976.

A Foreign Service officer whose basic pay exceeded the highest rate of grade GS-10, claims overtime pay in lieu of compensatory time for 5 hours of overtime worked on 2 successive days. 5 U.S.C. § 5543(a) allows an agency to give compensatory time in lieu of overtime pay to an employee who works irregular or occasional overtime and whose basic pay exceeds the highest rate of grade GS-10. Since the overtime was rarely performed, it was occasional, and compensatory time in lieu of overtime compensation is appropriate. B-180142, August 6, 1975.

5 U.S.C. § 5545(c)(2) requires an employee's hours of duty "generally" not be subject to administrative control. However, that does not convert irregular or occasional overtime to the additionally compensable category of "regularly scheduled overtime" when circumstances occasionally require directed overtime for short periods of time. B-168048, August 19, 1970.

While traveling

Commuting--Normal commuting time between an employee's residence and his duty station is not "time spent in a travel status away from the official duty station" and is not compensable traveltime. 41 Comp. Gen. 82 (1961) and B-169178, May 12, 1970.

This rule is applicable to both wage board and classified employees. 55 Comp. Gen. 1009 (1976).

Moreover, where an employee's regularly scheduled duties involve assignments to which he commutes daily from his headquarters or residence, the travel to and from home to perform those regularly scheduled duties is not considered an imposition upon his private life significantly different from the travel required of the employee to report to a permanent duty station, and such travel is not regarded as

overtime hours within the meaning of 5 U.S.C. § 5542(b)(2). 52 Comp. Gen. 446 (1973).

Performance of work while traveling

Generally--The travel of Border Patrol agents who drive 35 to 37 miles from their headquarters to checkpoints where they perform 8 hours of work, may be considered as work compensable under 5 U.S.C. § 5542(b)(2)(B)(1) since their duties during such travel involve the search for and apprehension of illegal aliens. 52 Comp. Gen. 319 (1972).

Escorts and couriers--Employees of the Atomic Energy Commission who are designated as escorts to protect security shipments and who perform continual, long-distance, 24 hours-a-day travel, are in a "work while traveling" status within the contemplation of 5 U.S.C. § 5542(b)(2)(B)(i). The escorts are entitled to payment of regular compensation for 8 hours and overtime compensation for 8 hours for each full day of travel. The 8 hours of the day attributable to eating and sleeping is noncompensable. 47 Comp. Gen. 607 (1968).

On the record, GAO cannot object to Department of State's definition of diplomatic couriers' hours of work as time spent with diplomatic pouch in hand plus time spent performing assigned administrative duties. Therefore, couriers' time spent in travel status not involving performance of work, i.e., not protecting or transporting diplomatic pouch or performing assigned administrative duties, is not "hours of work" for purposes of computing overtime pay. B-181237, April 15, 1975.

Couriers compared to others--A courier is one whose duties include carrying information, mail, supplies, etc., work which to a large extent can be performed only while traveling and which would be compensable under subsection 5544(a)(i). A courier's return travel after the delivery of information or supplies would be compensable under subsection 5544(a)(ii) of said subsection as incident to travel which involves the performance of work while traveling. In many instances of travel, a Government employee will necessarily transport supplies or equipment and to this extent incidentally serve as a "courier." We have expressly held, however, that the fact that incident to the purpose of travel, files, documents, supplies, etc. are transported, does not change the character of travel. Whether the transportation of equipment is merely incidental to the employee's travel or is itself the

employee's primary function is for determination by the administrative agency. B-178458, June 22, 1973 and B-181632, April 1, 1975.

An attorney who traveled away from his permanent duty station to obtain the affidavit of a witness, and returned to headquarters after the end of his normal tour of duty, may not be paid overtime compensation or allowed compensatory time under 5 U.S.C. § 5542(b)(2)(B) for the return trip home, even though the initial travel qualified as hours of employment, since his duties as an attorney are primarily to perform legal functions and not to transport documents. The fact that the transportation of the affidavit was necessary to the performance of his duties did not convert the return trip to hours of employment within the meaning of 5 U.S.C. § 5542(b)(2)(B)(i), which authorizes the payment of overtime compensation for time spent in a travel status only when the travel involves the performance of work while traveling. 51 Comp. Gen. 727 (1972).

Reviewing papers--An employee of the Department of the Air Force who spent time en route reviewing contract specifications, plans, and communications requirements, while traveling to perform temporary duty, is not entitled to overtime compensation since the performance of overtime work was not officially ordered or approved and there was no showing that the work could only be performed while the employee was traveling. B-146288, January 3, 1975.

Incident to travel that involves the performance of work while traveling--An employee required to travel outside his regularly scheduled workweek to the point where he was to board a ship to perform a TDY assignment is not entitled to overtime compensation for such travel since the ship must be regarded as the employee's TDY station and actual travel must be regarded as ending when the ship is boarded. Despite the fact work was performed while the ship was moving, duty performed on the ship was neither work while traveling within contemplation of 5 U.S.C. § 5542(b)(2) nor travel incident to performance of work which may be counted as "hours of employment" for purpose of overtime compensation. B-179520 April 10, 1974.

Arduous conditions

Generally--Whether an employee's travel is performed under arduous conditions must be determined upon the facts in each individual case. For example, travel over unusually adverse terrain or during severe weather conditions--as distinguished

from travel over hard surfaced roads or when no unusually adverse weather conditions are encountered, or travel by rail or other common carrier--is travel under arduous conditions and is compensable. 41 Comp. Gen. 82 (1961) and B-163654, June 22, 1971.

Travel of an employee by passenger-carrying vehicles under nonemergency conditions in connection with temporary duty does not, in itself, constitute performance of work or travel under arduous conditions for purposes of overtime compensation. 24 Comp. Gen. 456 (1944); 30 id. 72 (1950); 31 id. 362 (1952); 40 id. 439 (1961); and B-160928, April 16, 1970.

Extended period of travel--An extended period of travel without a break, such as 30 hours, does not qualify as being arduous within the meaning of 5 U.S.C. § 5542(b)(2)(B)(iii). B-168119, May 25, 1971 and B-179003, August 24, 1973.

Piloting planes--Air safety investigators who pilot private, rented, or agency-owned aircraft to proceed to the scene of an accident, or use commercial airlines, are not entitled to overtime compensation for travel outside their regular workweek since the travel is not inseparable from the work performed, and the mode of travel does not constitute an arduous mode of transportation. Griggs v. United States, November 24, 1967, Ct. Cl. No. 336-65, holds that overtime for investigators is payable only for overtime work performed during on-site accident investigations and when occupying the "jump-seat" in the aircraft cockpit while traveling on commercial airlines. 52 Comp. Gen. 702 (1973).

Resulting from an event which could not be scheduled or controlled administratively

Event--In applying 5 U.S.C. § 5542(b)(2)(B)(iv), which authorizes the payment of overtime when travel after the end of a normal tour of duty "results from an event which could not be scheduled or controlled administratively," the term "event," although including anything which necessitates an employee's travel, requires the existence of an immediate official necessity in connection with the event requiring the travel, and if the necessity is not so immediate as to preclude the proper scheduling of the travel, the time in travel does not qualify as hours of employment, and the phrase "could not be scheduled" contemplates more than the fact that administrative pressures make scheduling in accordance with 5 U.S.C. § 6101(b)(2) difficult or impractical.

Events considered beyond administrative control are discussed in FPM Supplement 990-2. 51 Comp. Gen. 727 (1972). B-179003, August 24, 1973 and B-179035, October 4, 1973.

In view of the policy expressed in 5 U.S.C. § 6101(b)(2) that to the maximum extent practicable travel should be scheduled within the regularly scheduled workweek of an employee, per diem costs which might be necessary to comply with the policy are not considered unreasonable. However, should an uncontrollable event necessitate an employee's travel, notwithstanding that there is sufficient notice to permit the scheduling of the travel during his regularly scheduled duty hours where such scheduling would result in the payment of at least 2 days additional per diem, the travel may be required during off-duty hours and compensated for at overtime rates. 51 Comp. Gen. 727 (1972).

Although pursuant to 5 U.S.C. § 6101(b)(2) travel should not be scheduled at times outside of an employee's regularly scheduled workweek as the section does not require or permit the payment of compensation for such travel, at the same time an employing agency has the discretionary authority to determine when it is impracticable to schedule official travel within the employee's workweek and to order travel that is noncompensable as overtime. However, the official requiring the noncompensable travel is required to comply with 5 C.F.R. § 610.123 and record his reasons for ordering the travel and furnish a copy of his statement to the employee, who in turn would not be justified in refusing to perform the properly ordered travel. 51 Comp. Gen. 727 (1972).

Scheduled or controlled administratively--In the administration of inspection and grading programs, when events are not within the control of the Department of Agriculture, and an Agricultural Commodity Grader is required to travel 8-1/2 hours on Sunday to report for duty at 8 a.m. on Monday to inspect and checkload a shipment of peanut butter being purchased by the Department, the travel is compensable at the overtime rates prescribed in 5 U.S.C. § 5542(b)(2)(B), as the travel could not have been scheduled within the employee's regular hours. The fact that the Government is reimbursed for all the costs incurred in providing the inspection and checkloading services has no bearing on the employee's entitlement to the payment of overtime for the services performed. 50 Comp. Gen. 519 (1971).

An employee of the Dairy Division of the Division of Consumer and Marketing Services of the Department of Agriculture is ordered to travel on Sunday to attend two national milk hearings scheduled during the week, one on Monday morning and the other on Friday. The requirement in the Administrative Procedure Act, 5 U.S.C. § 554(b), which provides that the convenience of participants should be considered in fixing the time and place for hearings, does not remove the scheduling of hearings from the Department's control. While the provision imposes a rule of reasonableness upon the agency's freedom in scheduling the hearings, it does not require the hearings to be scheduled at any particular time. Therefore, the traveltime of the employee is not traveltime within the meaning of 5 U.S.C. § 5542(b)(2)(B), and is not compensable as overtime. 50 Comp. Gen. 519 (1971).

A Department of Agriculture employee returning from performing the temporary duties of an Agricultural Commodity Grader, whose flight was delayed, is entitled under 5 U.S.C. § 5542 to compensation for the "usual waiting time" for the interrupted travel that is prescribed by the FPM, which means the time necessary to make connections in the ordinary travel situation, consistent with the performance of travel as expeditiously as possible, with an extension of time for heavy holiday traffic and inclement weather, minus time for eating and rest. As traveltime that cannot be scheduled or controlled qualifies as hours of work, the employee whose regular tours of duty is 8 a.m. until 4:30 p.m., having traveled from 3:10 a.m. to 10:30 a.m. on Thanksgiving Day, is entitled to payment at his overtime rate from 3:10 a.m. to 8 a.m. and at the holiday premium pay rate from 8 a.m. to 10:30 a.m. 50 Comp. Gen. 519 (1971)

Under 7 U.S.C. § 1622, the Department of Agriculture is required to perform inspection and grading services when products are shipped or received in interstate commerce. Thus, the required services are not within the control of the Department to enable the scheduling of an inspector's travel during his regular duty hours. Therefore, an Agricultural Commodity Grader whose travel could not be scheduled during his regular duty hours is entitled to be compensated for his traveltime at the overtime rates prescribed by 5 U.S.C. § 5542(b)(2)(B). 50 Comp. Gen. 519 (1971). The traveltime of a Food Inspector in the Consumer Protection Program of the Division of Consumer and Marketing Services of the Department of Agriculture, performed from 9 p.m. Sunday until 4 a.m. Monday--hours outside his regular tour

of duty--in order to relieve an inspector who had been granted nonemergency annual leave, is not compensable as overtime since in scheduling the annual leave the need for a relief inspector should have been considered and the travel of the relief inspector scheduled within his regular duty hours. Also, the return travel of the relief inspector outside his regular tour of duty was not required by an event that could not be scheduled or controlled administratively. Therefore, the return traveltime from the inspection site is not compensable under 5 U.S.C. § 5542(b)(2)(B) as overtime. 50 Comp. Gen. 519 (1971) and B-177468, B-177461, March 28, 1973. Likewise, an Army employee who traveled on Saturday and Sunday in connection with his appearance as a Government witness in a court case on Monday is not entitled to overtime pay for his traveltime since the Army could have arranged his travel during regular duty hours, and his travel did not result from an event which could not be scheduled or controlled administratively as set forth in 5 U.S.C. § 5542(b)(2)(B)(iv). B-179430, November 25, 1974.

A Department of the Air Force employee who traveled on Sunday incident to his attendance at a Monday meeting away from his official station, is not entitled to overtime compensation in connection with travel resulting from an administratively uncontrollable event since the meeting was scheduled by his agency and could have been changed by it. Therefore, the travel was not made in connection with an event which could not be scheduled or controlled administratively. B-146288, January 3, 1975.

Where the event necessitating travel is uncontrollable, specifically travel to render technical assistance in investigation of an air accident, the fact that employees were in standby status to render immediate assistance if requested, does not make the travel result from an administratively controllable event. Such travel during nonduty hours is compensable under 5 U.S.C. § 5542(b)(2)(B)(iv). B-186005, August 13, 1976.

Where the event necessitating travel is uncontrollable and travel was requested "as soon as possible" to render technical assistance in an investigation of an air accident, the fact that the agency set the employees' departure time, which complied with the request for immediate travel, does not make the travel the result of an administratively controllable event. Such travel during nonduty hours is compensable under 5 U.S.C. § 5542(b)(2)(B)(iv). B-186005, August 13, 1976.

A Federal Aviation Administration flight test pilot claimed overtime compensation for traveling to a flight test site. Since the travel was required to take part in a snow qualification test which may only be conducted when snow conditions favorable for such tests prevail and since weather conditions are not within FAA's control, the travel to ensure the pilot's presence at the flight test site while conditions were favorable for the snow qualification test is viewed as having been occasioned by an event which could not be scheduled or controlled administratively within the meaning of 5 U.S.C. § 5542(b)(2)(B)(iv). B-168726, January 28, 1970.

Travel to extinguish a fire constitutes travel which cannot be scheduled or controlled administratively. B-169419, August 26, 1970.

A group of wage board employees traveled on a nonworkday to a temporary duty station for the purpose of immediately repairing the gun port shields of a ship that had deteriorated due to exposure to the sun so that the ship could meet a sailing deadline. The required repair to the gun mounts was not due to a sudden emergency or catastrophe, and the damage having occurred gradually over a period of time, scheduling the repair was within administrative control and, therefore, the traveltime is not compensable as overtime under 5 U.S.C. § 5544(a)(iv). 49 Comp. Gen. 209 (1969).

A Department of Agriculture grading inspector was assigned on a rotational basis for 90-day periods to provide grading services at various plant locations in and around his official duty station. Such plant assignments constituted his regular duties and he performed only occasional administrative functions at headquarters. The employee's travel is not regarded as an imposition upon his private life significantly different than the travel required of an employee in reporting to his permanent duty station, and his travel was subject to control (scheduling) even though it resulted from an event which was not controllable. Therefore, such travel does not constitute overtime hours of work within the meaning of 5 U.S.C. § 5542(b)(2). 52 Comp. Gen. 446 (1973) and 50 Comp. Gen. 674 (1971).

Where there is notice of the event--There must not be such notice of the event as will permit scheduling of the travel. B-169078, April 22, 1970; B-170683, November 16, 1970; 50 Comp. Gen. 674 (1971); and B-163654, July 26, 1973.

There must exist an immediate official necessity in connection with the administratively uncontrollable event requiring travel. 49 Comp. Gen. 209 (1969); 50 id. 674 (1971); and B-163654, April 19, 1968, and July 26, 1973. Assuming there is advance notice for the travel and an official necessity is present, if the employee's travel during regularly scheduled hours would result in payment of at least 2 days of additional per diem in lieu of subsistence for off-duty days prior to the beginning of the scheduled event, travel may be required during off-duty hours and be regarded as resulting from an uncontrollable event. 50 Comp. Gen. 674 (1971) and B-172671, November 19, 1974.

Return travel--Although initial travel may fall within one of the conditions of 5 U.S.C. § 5542(b)(2)(B) to qualify as as hours of employment, the return travel must itself fall within one of those conditions in order to qualify the time involved as hours of employment. 50 Comp. Gen. 519 (1971) and 50 id. 674 (1971).

Firefighters' travel to a fire would be compensable as it is travel which cannot be scheduled or controlled administratively, and return travel from the fire outside normal work hours may be compensable depending upon the reason for such travel. Among the factors to be considered are living conditions at or near the fire camp. Where motel, hotel, or comparable facilities are utilized by firefighters at the fire camp area, we would agree that return travel is administratively controllable as in the case of non-firefighter personnel. However, in cases where no such comparable facilities are available and the alternatives open to firefighting personnel are either bedrolls and perhaps tents for another night or return travel during off-duty hours, such return travel, is not to be viewed as administratively controllable. B-169419, August 26, 1970.

Inherent part of and inseperable from work--The time spent by detention officers of the Immigration and Naturalization Service, who guard and transport alien detainees in specially equipped Government vehicles, to return the vehicle to the garage facility, refuel and tidy the vehicle, and complete the reports pertinent to the trip, at which time the officially ordered duties are considered completed, is hours of employment under 5 U.S.C. § 5542 and compensable as overtime. The work status of each officer continues through the return of the specially equipped vehicle to the garage, servicing the vehicle, and completing the

required reports, and is not merely incidental to the personal transportation of the employee back to his official station but is an essential part of his assigned duties as in the case of a chauffeur, bus operator, or truck driver. 43 Comp. Gen. 273 (1963).

Air safety investigators who pilot private, rented, or agency-owned aircraft to proceed to the scene of an accident, or use commercial airlines, are not entitled to overtime compensation for travel outside their regular workweek since the travel is not inseparable from the work performed, and the mode of travel does not constitute an arduous mode of transportation in view of Griggs v. United States, November 24, 1967, Ct. Cl. No. 336-65, which holds that overtime for investigators is payable only for overtime work performed at on-site accident investigations and when the "jump seat" in the aircraft cockpit is occupied while traveling on commercial airlines. 52 Comp. Gen. 702 (1973). Mine inspectors' travel, which due to the nature of the mine inspection work is found to be an inherent part of and inseparable from their work, is compensable as regular or overtime work. 55 Comp. Gen. 994 (1976).

To and from terminal--Where an employee's travel results from an uncontrollable event and immediate official necessity and he spends more than 1 hour traveling (1) from his place of business or residence to the common carrier terminal, and/or (2) from the common carrier terminal serving the temporary duty station to either the temporary duty station or his temporary duty residence, and/or (3) from the common carrier terminal at his permanent duty station to either his residence or his place of business, that time may be compensated for at overtime rates. B-175082, April 20, 1972.

Waiting at carrier terminals--Payment may be made for the usual waiting time spent at a common carrier terminal which interrupts travel. In considering a waiting period which had been extended because of heavy holiday traffic and inclement weather, it would not be unreasonable to allow up to 3 hours beyond an employee's regular tour of duty as usual waiting time. However, usual waiting time would not include time at the common carrier terminal prior to the scheduled departure time. B-175082, April 20, 1972.
A Department of Agriculture employee performing return travel, occasioned by an uncontrollable event, from temporary duties, whose flight was delayed, is entitled under 5 U.S.C. § 5542 to compensation for the "usual waiting time" for the interrupted travel that is prescribed by the FPM, which means the time necessary to make connections in the

ordinary travel situation, consistent with the performance of travel as expeditiously as possible, with an extension of time for heavy holiday traffic and inclement weather, minus time for eating and rest. As traveltime that cannot be scheduled or controlled qualifies for work, the employee whose regular tour of duty is 8 a.m. until 4:30 p.m., having traveled from 3:10 a.m. to 10:30 a.m. on Thanksgiving Day, is entitled to payment at his overtime rate from 3:10 a.m. to 8 a.m. and at the holiday premium pay rate from 8 a.m. to 10:30 a.m. 50 Comp. Gen. 519 (1971). But see B-170409, October 15, 1970.

Travel to training--5 U.S.C. § 4109(a)(1), which prohibits payment of premium compensation to employees during periods of training (except when specifically authorized by CSC), does not prevent payment of overtime compensation to employees traveling to and from places of training. B-165311, November 12, 1968.

Beyond the official duty station--Agencies may not defeat an employee's entitlement to overtime compensation for travel beyond the employee's official duty station by redefining what will be considered to be the employee's official duty station in a manner inconsistent with the definition provided in FPM Supplement 990-2, Book 550, subchapter S1-3. B-175608, June 19, 1972.

First-40-hour employees--Mine inspectors who work first-40-hour workweeks may be compensated for time spent in travel on official business during their first 40 hours. Time spent in travel after the first 40 hours may be compensable under the conditions of 5 U.S.C. § 5542(b)(2)(B). 55 Comp. Gen. 994 (1976).

Travel may not be compensable--Congress has not provided a remedy by way of compensation where an employee travels on a nonworkday but the circumstances of his travel do not fall within the purview of 5 U.S.C. § 5542(b)(2); B-172671, April 21, 1976; and B-163654, January 21, 1974.

Standby duty

At employee's duty station--While an employee who is "on call" at home may in fact be found to have spent his time predominantly for his own benefit, Congress has made the determination, reflected by enactment of 5 U.S.C. §§ 5542

and 5545, that where a Federal employee is required to remain at his duty station and away from his home his time is necessarily spent for the benefit of his employer. B-170264, December 21, 1973.

At home--Telephone work of Passport Office employees performed while they are on standby duty at home, varying from a minimum of 7 hours 35 minutes to a maximum of 21 hours of overtime per week, which is performed outside their regular tours of duty may be regarded as overtime work under 5 U.S.C. § 5542 and is compensable. B-169113, March 24, 1970.

However, where an employee of the Veterans Administration Hospital is assigned to standby duty as Administrative Officer of the Day, and such duty basically entails being available to answer official telephone calls in his own residence, the employee is not entitled to overtime compensation for periods of standby duty since such duty does not constitute hours of work as required by law. B-180927, August 20, 1974 and B-141846, June 30, 1970.

A former Medical Technical Assistant of Department of Justice who while serving as duty officer was required to be available by telephone or beeper with range of 10-15 miles, either at his residence or elsewhere within one-half hour's drive to work, is not entitled to overtime compensation for standby duty since standby duty at employee's residence when no work is required is not "hours of work" within the meaning of 5 U.S.C. § 5542 so as to be compensable. B-182207 January 16, 1975. See also B-180036, May 20, 1974.

A Department of Army lockmaster was confined to lock reservation of several acres for standby duty and responded to calls during his standby duty. Even though employee's residence was on reservation, employee's duty was standby duty as contemplated by 5 U.S.C. § 5544(a), and is compensable because his activities and movements were extremely restricted and he was on ready alert. Decisions of October 17, 1974, and December 15, 1972, B-176924, overruled. B-176924, September 20, 1976.

On vessels--The service of a civilian employee aboard a vessel for the purpose of conducting vibration surveys to determine the feasibility of equipment for operation in the vessel does not constitute standby time to entitle the employee to the overtime authorized in 5 U.S.C. § 5542, notwithstanding Navy regulations providing that an employee

on a trial trip to test equipment is considered to be in a standby status. The regulations are invalid because they define standby status in terms of the type of trip rather than the criteria established in FPM Supplement 990-2, Book 610, subchapter S1-3d, to the effect that "standby time consists of periods in which an employee is officially ordered to remain at or within the confines of his station, not performing actual work but holding himself in readiness to perform actual work when the need arises or when called." 52 Comp. Gen. 794 (1973).

Two-thirds rule--An employee of the Department of Agriculture claimed overtime compensation for periods he would normally be eating or sleeping during several 24-hour periods he was on duty. It has long been the established rule that time available for, or spent, sleeping and eating is noncompensable even where the employee is required to be on the employer's premises. The exception to this rule, not applicable to the employee in the instant case, is where substantial labor is performed in the time set aside for sleeping and eating. B-173235, November 22, 1971.

Relation to other premium pay

Under 5 U.S.C. § 5545(c)(1)--Firefighter claimed overtime compensation for watch work performed during periods he said were set aside for sleeping during his normal standby hours. This watch duty was rotated with other firefighters. The firefighters were being paid premium pay under 5 U.S.C. § 5545(c)(1) for their standby duty. Premium pay under 5 U.S.C. § 5545(c)(1) is in lieu of other compensation for overtime, night, holiday and Sunday work except irregular unscheduled overtime duty in excess of an employee's regularly scheduled weekly tour. Therefore, there is no authority for allowance of additional compensation where an employee during his regularly scheduled tour of standby duty is required to perform certain duty which is regarded more in the nature of work than the normal standby duty. B-178613, July 6, 1973.

Under 5 U.S.C. § 5545(c)(2)--Employees of the Border Patrol, a component of the Immigration and Naturalization Service, who in addition to performing preliminary and postliminary regularly scheduled duties at headquarters in connection with a regularly scheduled 8-hour tour of duty at traffic checkpoints (which is compensable at overtime rates under 5 U.S.C. § 5542, as is the traveltime to the checkpoints), process cases and handle other enforcement duties after their regularly scheduled 8-hour tours of duty and overtime

have ended, may be paid annual premium pay in addition to the regularly scheduled overtime if the additional work qualifies as administratively uncontrollable under 5 U.S.C. § 5545(c)(2). Payment under both 5 U.S.C. §§ 5542 and 5545(c) is not precluded, as premium compensation and regularly scheduled overtime relate to independent, mutually exclusive, methods for compensating two distinct forms of overtime work. 52 Comp. Gen. 319 (1972).

Preshift and postshift duties

Required performance of duty--Payment of overtime claims presented by past or present members of the Federal Protective Service, General Services Administration, Region III, on the basis of Eugie L. Baylor, et al. v. United States, 198 Ct. Cl. 331, is authorized except that the time for uniform changing should be allowed in accordance with a test determination rather than the time reflected in the holding, and the allowance of an individual claim in excess of 10 minutes per day after set off of duty-free lunch periods, subsequent to the period covered by the court case, depends upon whether the particular guard was required to carry a gun; the location of his locker, control point, if any, and post or posts of duty; the reasonable walking or traveltime between points; and, in the case of supervisors, the particular preliminary and postliminary duties performed, and the method for computing an amount due is made a part of this decision by incorporation. 53 Comp. Gen. 489 (1974)

Past or present General Services Administration, Federal Protective Service members who have presented no evidence to support their claims for preliminary and postliminary duties on the basis of Eugie L. Baylor, et al. v. United States, 198 Ct. Cl. 331, may only by allowed uniform changing time, and then only upon submission of a release of any claim arising out of performance of additional preliminary and postliminary duties commencing from the point in time 10 years prior to the date upon which their claims were received in the GAO, even though the use of releases generally is not favored. However, the use of releases is warranted to insure that claimants present their claims in full at one time and that they do not later claim additional amounts. 53 Comp. Gen. 489 (1974).

Although 53 Comp. Gen. 489 (1974), authorized payment of 15 minutes uniform changing and additional traveltime to guards in Region III, General Services Administration, up to February 28, 1966, guards assigned to Baltimore area may be paid such overtime to December 23, 1970, inasmuch

as the regulation requiring that uniforms be changed at assigned lockers, applicable in Baltimore, was not amended to permit wearing of uniforms to and from work until that date. 54 Comp. Gen. 11 (1974).

Optional performance of duty--Cook at Chanute Air Force Base claimed overtime for early reporting and delayed leaving. Claim is disallowed since record indicates that, although he was required to wear "Mess White" uniforms, there was no requirement for early reporting or leaving since he had option to wear uniform to and from work. B-156407, July 14, 1976 and B-182610, February 5, 1975.

Lunch periods

Guards scheduled for daily duty tours of 8 hours and 15 minutes who have a 30-minute, duty-free lunch period, although required to remain on call in the Government building in which employed to be available in the event of emergencies, are in an actual work status only 7 hours and 45 minutes on each daily tour of duty. Therefore, the guards are not entitled to overtime compensation on the basis of Albright v. United States, 161 Ct. Cl. 356 (1963), in which the court found the guards did not have relieved duty-free lunch periods. 47 Comp. Gen. 311 (1967).

Federal Protective Officer, employed by General Services Administration, who appealed GAO Transportation and Claims Division's denial of his claim for overtime compensation for having worked during his lunch periods, may not be compensated for such periods since his lunches were eaten during his normal 8-hour shift for which he was already compensated. B-182610, February 5, 1975; B-175363, November 26, 1974; and B-185913, August 3, 1976.

A pilot of a patrol boat was required to remain on his boat during lunch periods subject to interruption for duty during such periods. The mere fact that an employee is required to eat lunch on the employer's premises and to be in a duty status and subject to call during such period does not automatically make such period overtime. Since the pilot did not perform substantial duties during such period there is no authority for the payment of overtime. B-179412, February 28, 1974.

The above rule is also applicable to wage board employees under 5 U.S.C. § 5544. B-134864, July 27, 1976.

De minimis

Former General Services Administration guards at Albuquerque, New Mexico, filed claims for overtime compensation for preliminary and postliminary duties. Overtime claims for 32 minutes per day are denied as de minimis since record indicates that guards were allowed to wear uniforms to and from home and that other activites did not exceed 10 minutes per day which is considered de minimis. Also, the record indicates that offset for 30-minute lunch period should be made against 32 minutes claimed. B-167602, August 4, 1976.

Evidence required

Former General Services Administration employee seeks overtime compensation for 40 hours allegedly worked on five separate Saturdays, 8 hours each, which is in addition to overtime already claimed to have been worked on Saturdays in question and for which compensation has been made, and only evidence to support his claim is a list of hours worked. Settlement disallowing claim is sustained since mere listing of time worked is of insufficient probative value to permit payment of claim. Where a claim is of doubtful validity due to a lack of suitable evidence, GAO's practice is to deny claim and leave claimant to remedy in court. Longwill v. United States, 17 Ct. Cl. 288 (1881). B-181632, February 12, 1975 and B-184795, August 5, 1976. See also 53 Comp. Gen. 489 (1974).

Officially ordered or approved

Administrative approval requirement

Former General Services Administration guards at Albuquerque, New Mexico, filed claims for overtime compensation for preliminary and postliminary duties. Prior GAO decision (53 Comp. Gen. 181 (1973)) denying these claims is sustained since claimants have furnished no additional evidence that supervisor, who allegedly ordered overtime, was authorized to do so, or that overtime was actually ordered by him. B-167602, August 4, 1976.

Induced to work

Overtime claim of employee at Sheppard AFB for 15 minutes early reporting time ordered by instruction issued by Base Fire Chief is disallowed since Fire Chief did not

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have authority to order or approve overtime except in emergencies, and Chief Executive Officer, who had authority but was unaware of early reporting requirement, cannot be held to have "tacitly expected" or induced early reporting under standards applicable to authorization and approval in Baylor v. United States, 198 Ct. Cl. 331 (1972). B-179998, May 23, 1974.

Regulations of Agency for International Development allowed area coordinators, office and division chiefs, and their deputies to approve individual authorizations for overtime work. Chief, Requirements Office, in Laos established and approved duty rosters scheduling claimant to work overtime. Claimant performed such overtime with knowledge and approval of agency officials. This constituted administrative acquiescence and endorsement and was tantamount to express authorization so as to require payment of overtime compensation under 5 U.S.C. § 5542. B-175275.05, April 7, 1976.

For a full discussion of the law concerning overtime after Baylor v. United States, 198 Ct. Cl. 331 (1972), see 53 Comp. Gen. 489 and B-174069, September 11, 1974.

Official ordering or approving overtime must be authorized to do so

Federal Protective Officer claims overtime compensation believed due because he was allegedly required to change into and out of uniform after duty hours at his place of employment. The disallowance is sustained, even though claimant may have performed overtime, since even if immediate supervisor required such work, he was not authorized to do so and official who was properly authorized to order or approve overtime work did not require such work and had no knowledge that it was being performed. B-175363, November 26, 1974. See also 53 Comp. Gen. 181 (1973), cited at Chapter 4, Subchapter I, B, De minimis, supra.

Administrative workweek

Back-to-back shifts

The fact that an employee works more than 5 consecutive 8-hour days does not in itself entitle an employee to overtime compensation unless more than 5 such days are worked between the period commencing on Sunday and ending the next Saturday. It is entirely possible for an employee to work 10 consecutive days, 5 in each of 2 administrative

workweeks, and not be entitled to overtime compensation. B-166794, May 23, 1969. The same rule is applicable to wage board employees. B-134864, July 27, 1976.

"Day" defined

An Immigration and Naturalization Service inspector claimed overtime compensation under 5 U.S.C. § 5542 relating to hours of work "in excess of 8 hours in a day" and furnishes certain dates showing, for example, work on November 11, 1967, from 4 p.m. to midnight, with following day, Sunday, showing work schedule from midnight to 1 a.m. and from 5 p.m. to midnight (7 hours) or total of 8 hours in 1 day. No basis exists for payment of overtime compensation since claimant did not perform work in excess of 8 hours daily on any of dates furnished based upon information supplied and definition of calender day--midnight to midnight. B-163549, September 6, 1968.

"Call-Back" overtime

Unscheduled

The word "unscheduled" in what is now 5 U.S.C. § 5542(b), which provides overtime compensation for a 2-hour minimum period of call-back duty, is the antithesis of the word "scheduled" which refers to work scheduled in advance over periods of not less than 1 week. Therefore, call-back work which is announced at the beginning of the workweek for performance during that week must be regarded as unscheduled duty and the employee is entitled to overtime compensation for a minimum of 2 hours regardless of the length of the call-back duty. 37 Comp. Gen. 1 (1957).

An employee who has a regularly scheduled tour of duty from 2:30 p.m. to 11 p.m., Monday through Friday, and who on Monday is notified that he must appear in court as a witness on Tuesday from 9 to 10 a.m., is entitled to be paid for a minimum of 2 hours of overtime under the unscheduled overtime provisions of what is now 5 U.S.C. § 5542(b). 37 Comp. Gen. 1 (1957).

On holidays

An employee who is called back to duty on a holiday and performs continuous duty which covers a portion of his regular daily tour of duty and less than 2 hours overtime is entitled to holiday premium pay for the nonovertime work and

to 2 hours minimum overtime pay for the overtime work. 37 Comp. Gen. 1 (1957).

The 2-hour minimum pay requirement for call-back overtime in 5 U.S.C. § 5542(b)) and the 2-hour minimum pay requirement for holiday work in 5 U.S.C. § 5546(c) are coextensive where both overtime and nonovertime work are performed on a holiday, and the payment of 2 hours of overtime compensation where call-back duty on a holiday covers nonovertime duty and less than 2 hours of overtime satisfies the minimum requirement for both sections. 37 Comp. Gen. 1 (1957).

More than 2 hours overtime compensation

The proposed inclusion of a provision in a labor-management agreement that employees be paid a minimum of 4 hours overtime for call-back work is not legally acceptable since 5 U.S.C. § 5542, authorizing 2 hours minimum call-back pay for General Schedule employees, provides the statutory maximum overtime pay in the absence of the performance of duty beyond that time. Neither 5 U.S.C. § 5542 nor the parallel provisions of FPM Supplement 532-1, section S8-4b, applicable to wage board employees, may be enlarged by collective agreements since section 12 of Executive Order No. 11491, October 29, 1959, requires that such agreements be consistent with existing law and regulations. B-175452, May 1, 1972.

Aggregate limitation

See this Subchapter, Compensatory Time, infra.

Greater benefit to employee

An FAA employee with a regularly scheduled workweek of 4 10-hour days, 7 a.m. to 5:30 p.m., Monday, Tuesday, Thursday, and Friday, was called back to work from 8 p.m. Friday to 3 a.m. Saturday. In computing the overtime compensation in this case, the greater benefit is derived by computing overtime on a daily rather than weekly basis. In line with the daily method of computation of overtime hours and as the agency defines "day" as midnight to midnight, GAO concludes that payment for the 3 hours worked from midnight to 3 a.m. Saturday (a separate day), can only be made at the basic rate. The provisions of 5 U.S.C. § 5542(b)(1), relating to call-back time, are not pertinent here because the call-back was for more than 2 hours. B-163730, April 25, 1968.

Training periods

Mine inspectors are prohibited from receiving overtime compensation for any time they spend in training under the Government Employees Training Act, 5 U.S.C. § 4109. 55 Comp. Gen. 994 (1976).

Wage board employees at an Army depot who attended a welders' training program in a nongovernmental facility after regular tours of duty are not, under 5 U.S.C. § 4109, entitled to overtime for the training periods, notwithstanding receipt of travel expenses incident to the training. The fact that the employees would have lost productive time had the training not been held after regular hours does not bring them within the exception to the prohibition against the payment of overtime during training set out in FPM; nor are the employees entitled to overtime on the basis of the benefit to the employing agency--the work-related night courses also gave the employees a qualification of substantial value that is transferable to other organizations. 48 Comp. Gen. 620 (1969).

Relation to other premium pay laws

When employees who are receiving premium pay on an annual basis under 5 U.S.C. § 5545(c)(2) prescribed for irregular, unscheduled overtime, Sunday, holiday, and night duty, are detailed to perform 12-hour shifts of duty on Saturday, Sunday, and Monday, they may be regarded as performing regularly scheduled overtime work entitling them additionally to overtime compensation for the services performed on the detail in excess of 40 hours per week and 8 hours a day, the special work satisfying the term "regularly scheduled work" used in 5 U.S.C. § 5545 with respect to night differential and defined as work which is duly authorized in advance and scheduled to recur on successive days or after specified intervals. However, the hours spent in traveling to the site of the special duty are not compensable as overtime. 48 Comp. Gen. 334 (1968).

Employees of the Border Patrol, a component of the Immigration and Naturalization Service, who, in addition to performing preliminary and postliminary regularly scheduled duties at headquarters in connection with a regularly scheduled 8-hour tour of duty at traffic checkpoints (which is compensable at overtime rates under 5 U.S.C. § 5542, as is the traveltime to the checkpoints), process cases and handle other enforcement duties after their regularly scheduled

8-hour tours of duty and overtime have ended, may be paid annual premium pay in addition to the regularly scheduled overtime if the additional work qualifies as administratively uncontrollable under 5 U.S.C. § 5545(c)(2). Payment under both 5 U.S.C. §§ 5542 and 5545(c) is not precluded as premium compensation and regularly scheduled overtime relate to independent, mutually exclusive methods for compensating two distinct forms of overtime work. 52 Comp. Gen. 319 (1972).

Duty officers

Inasmuch as service by Department of State personnel in standby duty officer status on recurring but irregular basis is not within 5 U.S.C. § 5545(c)(1) or 5 U.S.C. § 5545(c)(2) (because hours of regular duty are controllable administratively) premium compensation on annual basis would not be proper. Since assignments to duty officer status are "irregular and occasional," they fall within provisions of 5 U.S.C §§ 5542-5543, which provide for overtime being compensable either in monetary equivalent of hours worked (percentage compensation) or in compensatory time off, at discretion of Department. Further, 5 U.S.C. § 5542 covers regularly scheduled overtime as well as irregular or occasional overtime, should Department decide to pay same. B-169113, March 7, 1973.

When-actually-employed employees

When-actually-employed employee, with no scheduled hours of duty, whose rate of pay is negotiated with union, rather than fixed by General Schedule, is not precluded from receiving premium pay for overtime work in excess of 8 hours per day or 40 hours per workweek, at rates provided in employment agreement, since purpose of Public Law 92-194, December 15, 1971, which amended 5 U.S.C. § 5542(a), was to extend to General Schedule, part-time, and intermittent employees same right to overtime compensation that was available to employees whose rates of pay were not subject to General Schedule. B-176027, August 8, 1972.

Foreign nationals overseas

A Philippine national, employed as a security guard at U.S. Naval Base in the Philippines, seeks overtime compensation for preshift muster and late relief resulting from use of Government transportation. International agreement and 22 U.S.C. § 889 require U.S. Government, in employing locally

hired foreign nationals, to bring wages and compensation plans into conformity with local practice. The claim is disallowed since Navy survey showed that Philippine firms did not pay guards for muster and transportation time and Navy's wage practices appear to be in conformity with local practice. B-118417, December 3, 1974.

Crossing dateline

In view of the rule that an employee's pay may not be increased or decreased merely because of the crossing of the international dateline, employees who were required to work on days outside their regular workweek may be entitled to overtime pay for such work since, if they had not crossed the international dateline, they would have been so compensated. B-165110, January 20, 1972.

C. OVERTIME UNDER FLSA

Generally

For rules applicable to Federal employees covered by FLSA see the FPM Letter 551 series.

GAO's authority under FLSA

Union head challenges CSC exemption of certain claims representatives and claims examiners from FLSA. Since CSC is designated by law to administer FLSA with respect to Federal employees, CSC has authority to make final determinations as to an employee's exemption status, and GAO will not review such determinations. However, since CSC was not given authority to settle or adjudicate claims under FLSA, GAO retains jurisdiction to finally decide the propriety of payments under FLSA. B-51325, October 7, 1976.

Effect of FLSA

Effective date

Employee of Department of the Air Force, who on Sunday, January 27, 1974, traveled away from official duty station to attend meeting on Monday, is not entitled to overtime compensation based on 1974 amendments to FLSA since those amendments were not effective until May 1, 1974. B-146288, January 3, 1975.

On other overtime laws

CSC interim instructions, requiring agencies to compute overtime benefits under both the Fair Labor Standards Amendments of 1974 and under various provisions of title 5 of the U.S. Code, and to pay according to computation most beneficial to the employee, are not illegal, as Canal Zone Acting Governor contends, but are in accord with statutory construction principle of harmonizing statutes dealing with the same subject whenever possible, and are consistent with congressional intent. 54 Comp. Gen. 371 (1974).

On labor-management agreement

Federal employee was eligible for overtime payments under FLSA but not under union collective bargaining agreement which provides for payment of overtime as double time. Employee should be paid overtime at one and one-half times base pay as provided by FLSA since his entitlement arises under FLSA, not the union agreement. See 54 Comp. Gen. 371 (1974) and B-182575, July 28, 1975.

Regular rate

Federal firefighters with 72-hour weekly tour of duty are entitled to 12 hours overtime compensation for the number of hours worked in excess of 60 hours per week under FLSA in 1975. Their regular rate of pay for computing overtime is determined by dividing their total compensation by number of hours in their tour of duty, 72, there being no basis for the divisor to be limited to number of hours beyond which overtime must be paid, 60. Therefore, since FLSA requires overtime pay at rate of one and one-half times regular rate of pay and firefighters have already been paid regular rate for 12 hours of overtime, extra compensation for overtime is limited to one-half their regular rate of pay. 55 Comp. Gen. 908 (1976).

Exempt employees

Although Fair Labor Standards Act of 1938 has been amended to apply to Federal employees, professional employees are exempted from application of the overtime provisions of the Act. 29 U.S.C. § 213(a)(1). 55 Comp. Gen. 55 (1975).

Traveltime

Generally

Time spent in travel outside of regular working hours by wage grade employee driving military truck on return trip from temporary duty post to permanent duty station constitutes "hours of work" within meaning of FLSA and entitles him to overtime compensation. However, under provisions of title 5, United States Code, and FLSA, overtime compensation is not payable for time spent in travel by employee as passenger in Government vehicle on aforestated return trip as employee performed no actual work during this period. B-183577, November 26, 1975.

Wage board employee who traveled on Saturday may be entitled to overtime compensation under FLSA. If employee was not exempt from FLSA and either drove himself to his destination or traveled as passenger during hours which correspond to his regular work-hours, he would be entitled to overtime compensation under FLSA for those hours of travel which were in excess of 40 hours in week. If employee is entitled to overtime compensation under both 5 U.S.C. § 5544(a) and FLSA, he should receive compensation under whichever of two laws provides greater benefit. B-183493, July 28, 1976.

On vacation leave

Claim for compensation and premium (overtime) pay for period of time during which employee is traveling on vacation leave may not be paid because such time is not compensable official duty time. Further, since FLSA applies only where employee has in fact worked during period for which compensation and premium pay is claimed, FLSA is inapplicable to vacation leave travel. 55 Comp. Gen. 1035 (1976).

Commuting

Employee commuting in a Government vehicle carried essential equipment and supplies for his employer. While commuting time is generally not compensable under FLSA, where commuting employee also transports equipment and supplies for employer, traveltime is compensable overtime even though commuting in Government vehicle is of benefit to employee, since activity is employment under FLSA as it is done in part for benefit of employer. 55 Comp. Gen. 1009 (1976).

D. COMPENSATORY TIME

Statutory authority

Section 5543 of title 5, United States Code, provides that:

> "(a) The head of an agency may--
>
> "(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment for an equal amount of time spent in irregular or occasional overtime work; and
>
> "(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this tile.
>
> "(b) The Architect of the Capitol may grant an employee paid on an annual basis compensatory time off from duty instead of overtime pay for overtime work."

Aggregate salary limitation

Compensatory time granted to employees pursuant to 5 U.S.C. § 5543 for irregular or occasional work, for which overtime compensation is due, is subject to the aggregate salary limitation in 5 U.S.C. § 5547 which prohibits payment of overtime to employees whose rate of basic compensation equals or exceeds the maximum scheduled rate of basic compensation for grade GS-15. 37 Comp. Gen. 362 (1957).

To determine whether any portion of the compensatory time in lieu of overtime must be forfeited on account of the aggregate salary limitation in 5 U.S.C. § 5547, it is necessary to ascertain the number of overtime hours for which the employee is entitled to receive compensation at the overtime rate applicable to his basic salary rate before reaching the prorated aggregate limitation for the pay period in which the overtime work was performed. Such number of overtime hours constitutes the maximum number of hours of compensatory time which may be credited to the employee in that pay period in lieu of overtime compensation. 37 Comp. Gen. 362 (1957).

Employees who take more compensatory time than is proper because of an erroneous credit on account of the aggregate salary limitation are not required to have the excessive compensatory leave automatically converted to annual leave since the granting of annual leave is a matter of administrative discretion. 37 Comp. Gen. 362 (1957).

Irregular or occasional overtime

Regular overtime is work which occurs on successive days or after specified intervals, as opposed to irregular overtime which does not recur in that manner. Occasional overtime work is that which occurs now and then, occurs at irregular intervals, or infrequently. Accordingly, an employee who performs overtime on Sundays and holidays on a regular and recurring basis cannot be considered to have performed either irregular or occasional overtime work. "Occasional" does not have an identical meaning to "irregular" but rather has a separate meaning, that of infrequency. Even though overtime work is not irregular, it may be occasional. Therefore two GS-13 employees of USIA were not entitled to overtime pay in lieu of compensatory time for overtime work even though it was regularly performed twice a year, since USIA's regulations provided only for compensatory time for irregular or occasional overtime performed by an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 and overtime performed only twice a year is infrequent, thus occasional. B-181822, January 3, 1975 and B-180142, August 6, 1975.

Discretionary authority to grant overtime

The provisions of 5 U.S.C. § 5543(a)(2) are discretionary with the head of the agency. Thus, an agency would have authority to pay overtime compensation to some employees and require the granting of compensatory time instead of pay to other employees. B-176118, October 5, 1972.

Failure to use compensatory time

Within authorized period

An agency may prescribe a time limit for the use of compensatory time. The fact that a supervisor exceeded his authority in allowing an employee to take compensatory time after the prescribed time period has expired does not constitute a basis for refund of monies deducted from his final salary payment for compensatory time taken after the expiration of the prescribed time. B-183246, April 10, 1975.

Inasmuch as the option to receive overtime compensation or to elect to be granted compensatory time off in lieu thereof expressly is vested in the employee under 5 U.S.C. § 5543, when proper administrative regulations have been prescribed pursuant to said section, the administrative office generally may not fix a date, retrospectively effective, terminating an employee's right to compenstory time off so as to require him to accept overtime compensation. 26 Comp. Gen. 750 (1947).

Beyond employee's control

Until compensatory time off is granted or is tendered by the agency and refused by the employee, the obligation to pay overtime compensation is not extinguished. B-159597, August 2, 1966.

An employee may be paid overtime pay in lieu of compensatory time which he was unable to use due to reasons beyond his control, such as a shortage of manpower in his office. B-183751, October 3, 1975.

Relation to premium pay under 5 U.S.C. § 5545(c)(2)

Since premium compensation payable by reason of an employee's qualifying for administratively uncontrollable overtime is the only form of premium compensation properly payable for such an employee's irregular or occasional work, there is no authority for granting compensatory time off for irregular or occasional overtime work so long as the employee is receiving premium compensation on an annual basis for administratively uncontrollable overtime. B-164689, March 26, 1976.

Improper use of compensatory time

Employees who improperly used compensatory time instead of receiving overtime pay for regularly scheduled overtime are entitled to the difference between the amount of overtime compensation they should have received and the value of the compensatory time used. 53 Comp. Gen. 264 (1973).

National Guard technicians

Air National Guard technicians, whether they are wage, nongraded, or General Schedule employees, who for a 12-hour workday receive 4 hours compensatory time for work in excess of 8 hours a day or receive compensatory time for an 8-hour Sunday tour of duty,

are not entitled to environmental differential pay, night shift differential pay, or premium pay. 32 U.S.C. § 709(c), in authorizing the Secretary concerned to prescribe the hours of duty for the technicians and to fix their basic compensation or additional compensation, provides for the granting of compensatory time in an amount equal to the time spent in irregular or overtime work, with no compensation for the compensatory time, since the compensatory time is intended to be in lieu of overtime or differential pay for additional hours of work. 50 Comp. Gen. 847 (1971).

Transferred employee

Under 5 U.S.C. § 5543, former employees of the National Housing Agency who were transferred, either voluntarily or involuntarily, to the Office of the Housing Expediter pursuant to Executive Order No. 9820 properly may be credited with the compensatory time off to which they were entitled on the date of transfer. 26 Comp. Gen. 750 (1947).

Separated employee

The date of separation stated in an employee's advance notice of separation due to reduction in force may be administratively extended so as to include periods covered by the compensatory time off earned by the employee pursuant to 5 U.S.C. § 5543. However, where, due to reasons beyond the control of the employee, compensatory time off is not taken prior to separation and no extension of the date is granted, overtime compensation should be paid in lieu of the compensatory time off. 26 Comp. Gen. 750 (1947).

SUBCHAPTER II--OTHER PREMIUM PAY

A. NIGHT PAY DIFFERENTIAL

Statutory authority

5 U.S.C. § 5545 generally provides for night pay differential as follows:

> "(a) Except as provided by subsection (b) of this section, nightwork is regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m., and includes--
>
> "(1) periods of absence with pay during the hours due to holidays; and
>
> "(2) periods of leave with pay during these hours if the periods of leave with pay during a pay period total less than 8 hours.
>
> Except as otherwise provided by subsection (c) of this section, an employee is entitled to pay for nightwork at his rate of basic pay plus premium pay amounting to 10 percent of that basic rate. This subsection and subsection (b) of this section do not modify section 180 of title 31, or other statute authorizing additional pay for nightwork.
>
> "(b) The head of an agency may designate a time after 6:00 p.m. and a time before 6:00 a.m. as the beginning and end, respectively, of nightwork for the purpose of subsection (a) of this section, at a post outside the United States where the customary hours of business extended into the hours of nightwork provided by subsection (a) of this section."

Basic compensation determination

With respect to employees working rotating shifts who are converted from wage board to General Schedule positions, only those employees actually working and being paid for night shift work at the time of conversion may be entitled to the inclusion of night differential as basic pay. 51 Comp. Gen. 641 (1972).

Regularly scheduled night work

An employee who performs occasional overtime work within a regularly scheduled tour of duty falling between the hours of 6 p.m. and 6 a.m., which is not his scheduled tour of duty, is entitled to night pay differential. Thus, where the 24-hour day is divided into three regularly scheduled tours of duty and an employee who normally works the day shift performs occasional work between 6 p.m. and 6 a.m., the employee is entitled to night differential for the occasional overtime between those hours. 34 Comp. Gen. 621 (1955) and B-174338, February 28, 1972.

Absence of fixed hours-of-work pattern of duty

Where in addition to his basic workweek an employee is called upon habitually and recurrently to perform work at night by virtue of the inherent nature of his employment, such nightwork is regularly scheduled work, even though the hours of work are not according to a fixed hours-of-work pattern. 41 Comp. Gen. 8 (1961).

Although a first-40-hour employee's workweek was highly erratic and not entirely subject to administrative control, where he performed nightwork virtually every week, albeit not at predictable times, such nightwork meets the definition of regularly scheduled work. B-181236, April 15, 1975.

Approval requirement

Generally, for nightwork to constitute regularly scheduled work, it must be duly authorized in advance and must be scheduled to recur on successive days or after specified intervals. B-174388, March 22, 1973; 42 Comp. Gen. 326 (1962); and 40 id. 397 (1961).

First-40-hour employee

Diplomatic courier with first-40-hour workweek, which could not entirely be controlled administratively, is entitled to night differential, since he was called upon to perform nightwork virtually every week, albeit not in any predictable manner, and such work was so habitual and recurrent that it could be said to be "regularly scheduled work" at night. B-181237, April 15, 1975.

B. HOLIDAY PAY

Statutory authority

5 U.S.C. § 5546 provides in part that:

> "(b) An employee who performs work on a holiday designated by Federal statute, Executive order, or with respect to an employee of the government of the District of Columbia, by order of the District of Columbia Council, is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not--
>
> "(1) in excess of 8 hours; or
>
> "(2) overtime work as defined by section 5542(a) of this title.
>
> "(c) An employee who is required to perform any work on a designated holiday is entitled to pay for at least 2 hours of holiday work.
>
> "(d) An employee who performs overtime work as defined by section 5542(a) of this title on a Sunday or a designated holiday is entitled to pay for that overtime work in accordance with section 5542(a) of this title.
>
> "(e) Premium pay under this section is in addition to premium pay which may be due for the same work under section 5545(a) and (b) of this title, providing premium pay for nightwork."

Days in lieu of

Sunday

Executive Order No. 11582, February 11, 1971, provides that whenever a holiday falls on a Sunday, employees whose basic workweek includes Sunday shall be excused on the next workday of the employee's basic workweek.

5 U.S.C. § 6103(b), which provides that when holidays fall on Saturday the preceding day may be considered a holiday, is inapplicable to holidays which fall on the regular weekly

nonworkday which is in lieu of Sunday. Therefore, employees who had a regular weekly tour of duty Sunday through Thursday and who had July 3 and July 4, 1959, off, and worked on Sunday July 15, 1959, come under section 4(b) of Executive Order No. 10358 (now section 3(b) of Executive Order No. 11582, supra) which provides that when a holiday falls on a regular weekly nonworkday in lieu of Sunday, the next workday will be considered a holiday, and such employees are entitled to holiday compensation for work on such day. 39 Comp. Gen. 253 (1959).

Saturday

When a holiday falls on Saturday, the preceding day, Friday, is designated as the legal public holiday for employees whose basic workweek is Monday through Friday. 5 U.S.C. § 6103(b).

Inauguration Day

The fact that Inauguration Day, January 20 of each fourth year after 1965, is prescribed in 5 U.S.C. § 6103(c) as a legal public holiday for Federal employees in the District of Columbia and specified adjacent areas does not require regarding Friday, January 19, 1973, as a legal holiday for the purposes of 5 U.S.C. § 6103(b), which substitutes other days as legal holidays for the purpose of statutes relating to the pay and leave of Federal employees for those holidays enumerated in 5 U.S.C. § 6103(a) that fall on nonworkdays, such as the Friday immediately before a Saturday holiday. Not only does the listing of public holidays in section 6103(a) not include Inauguration Day, the legislative history of subsection (c) indicates no additional legal holiday was intended and that only the working situation of employees around the metropolitan area of the District of Columbia would be affected. 51 Comp. Gen. 586 (1972).

Compensatory time effect

Employees who worked on July 3, 1959, and who, pursuant to Executive Order No. 10825, were granted a compensatory day off prior to September 22, 1959, the date of enactment of Public Law 86-362, 5 U.S.C. § 6103(b), which superseded Executive Order No. 10825 and prescribed holiday compensation for work on the days designated as holidays in lieu of Saturday holidays, are entitled to holiday compensation for such work with a charge to annual leave for the compensatory day, provided that current annual leave

is available to be charged, and provided further that no loss in compensation or other benefit results. Under such circumstances, the granting of compensatory time prior to September 22, 1959, need not be changed. However, any compensatory day granted for work on July 3, 1959, after September 22, 1959, the date of enactment of Public Law 86-362, which prescribes holiday compensation for work on the days designated as holidays in lieu of Saturday holidays, is required to be charged to annual leave or leave without pay, and premium holiday compensation must be paid for work on July 3, 1959. 39 Comp. Gen. 393 (1959).

Other than Monday-through-Friday tour of duty

Employees whose regularly scheduled nonworkdays were Sunday and Monday during the period when the holidays of December 24, 1956, and January 21, 1957 (both Mondays), occurred are not entitled to an extra day off for each of the holidays on the basis of an administrative designation that Monday was in lieu of Sunday within the meaning of section 4(b) of Executive Order No. 10358 (now section 3(b) of E.O. 11582), 5 U.S.C. § 6103 note, which permits the designation of a regular weekly nonworkday in lieu of Sunday only when Sunday is a workday in the basic workweek. 37 Comp. Gen. 554 (1958).

Employees regularly scheduled to work Tuesday through Saturday, with "back to back" workweeks--10 duty days, 4 off days--having for the week beginning February 14, 1965, worked Sunday through Thursday, the substitute holiday for Washington's Birthday Monday, February 22) is the last workday (Thursday, February 18) pursuant to 5 U.S.C. § 6103(b), which provides that the workday immediately preceding the regular weekly nonworkday is the designated day in lieu of the holiday for employees scheduled to work other than Monday through Friday, Sunday not being a scheduled workday, Excusing the employees Tuesday, February 23, was not authorized under section 4(b) of Executive Order No. 10358 (now section 3(b) of E.O. 11582), and the employees who worked on Thursday, February 18, are entitled to holiday premium pay for that day and are chargeable with annual leave for absence on Tuesday, February 23. 44 Comp. Gen. 803 (1965).

Resignation effect

An employee whose resignation takes effect at the close of business July 3, 1959, is entitled to compensation even

though excused for that day under Executive Order No. 10825, June 12, 1959. 38 Comp. Gen. 869 (1959).

Observance effect on compensation

There is no requirement that an agency must work an employee on a holiday when the employee's weekly schedule of work includes such a holiday. Therefore, even though the employee prefers to work the holiday, his agency is not illegally depriving him of holiday pay when he is ordered not to work such holiday. The purpose of establishing holidays is to give employees the benefit of time off on such days without loss of regular compensation and not to establish an additional form of compensation represented by premium pay for holidays worked. B-172920, August 11, 1971.

An Alaska Railroad employee whose scheduled tour of duty at beginning of the workweek of Sunday, December 30, 1973, to Saturday, January 5, 1974, was Sunday and Saturday off and work on the other days, and was changed on Wednesday, January 2, 1974, to Monday and Tuesday off and work on the other days, is not entitled to holiday pay for January 2, 1974, which would have been a day off in lieu of January 1, 1974, under new tour since the change in his workweek may not retroactively affect employee's holiday pay entitlement and he had already been paid holiday pay for January 1, 1974. B-181188, February 26, 1975.

Vested right to compensation for holidays

When the employment relationship validly had been terminated by reason of resignation or retirement prior to a holiday, a former employee is not entitled to pay for the holiday. Nor is an employee who is separated and is thereby entitled to a lump-sum payment under 5 U.S.C. § 5551, in an amount equal to the pay he would receive had he remained in the service until the expiration of the period covered by the leave payment, whose period of projected annual leave for the lump-sum payment extended through the close of business on July 3, 1967, entitled to compensation for the July 4 holiday. 47 Comp. Gen. 147 (1967).

Hours of work compensable as holiday pay

An employee who had a regular tour of duty from 8 a.m. to 4:30 p.m. and who performed travel which was work on a holiday from 3:10 a.m. to 10:30 a.m. is entitled to overtime compensation for the work performed between 3:10 a.m. and 8 a.m. and holiday premium pay for the work performed between 8 a.m. and 10:30 a.m. Holiday premium pay is limited to work on a holiday within the

employee's regular tour of duty, and overtime compensation may be paid for any other work done on the holiday. 50 Comp. Gen. 519 (1971); 38 id. 560 (1959); and 37 id. 1 (1957).

An employee who, on a holiday, is called back to work for five separate periods of service within the prescribed daily tour of duty is entitled to holiday compensation for at least 2 hours of service under 5 U.S.C. § 922(b) (now 5 U.S.C. § 5546(c)), subject to the limitation in 5 U.S.C. § 922(a) (now 5 U.S.C. § 5546(b)(1)) which precludes payment for holiday work which is not overtime work in excess of 8 hours. 38 Comp. Gen. 560 (1959).

Multiple shifts

Workday defined

The definition of "workday" for holiday purposes in Executive Order No. 10358, June 9, 1952 (now E.O. 11582), does not contemplate a situation where two of the shifts in an employee's basic workweek commence on a holiday and, therefore, the question of which one of the two shifts is to be considered as falling on a holiday is a matter for administrative regulation and determination. 32 Comp. Gen. 191 (1952). See also B-114643, October 5, 1953 and 34 Comp. Gen. 502 (1955).

Three shifts in 24 hours

Proposal to grant holiday benefits to construction project inspectors--employed on a three-shift basis for 24-hour periods, with the shifts at 8 a.m., 4 p.m, and 12 midnight--by considering the three shifts in the 24-hour workday unit as falling on the same calendar day so that the effect would be to allow time off with pay to third-shift employees for work wholly outside a Federal holiday and to deny holiday pay for work by third-shift employees on a shift wholly within a holiday may not be approved. However, there would be no objection to a proposal to change the three tours of duty by a short period (for example: the third shift could be fixed at 11:59 p.m. to 7:59 a.m.) so that holiday time off and holiday pay would be within the scope of sections 6 and 7, Executive Order No. 10358 (now sections 5 and 6 of E.O. 11582). 38 Comp. Gen. 499 (1959).

Training

While 5 U.S.C. § 4109 prohibits holiday pay for time spent in training, three Defense Supply Agency employees who attended

training courses on a legal holiday, November 11, 1969, in non-Government facilities may be paid holiday pay for November 11, 1969. The training comes under the exception to the prohibition against the payment of premium pay exemption in FPM chapter 410, subchapter 6-2b, where the costs of training, premium pay included, are less than the costs of the same training confined to regular work hours. The record shows it would cost less (including premium pay) to have employees attend classes November 11, 1969, rather than make arrangements for them to attend training classes during regular work hours. B-168528, January 2, 1970.

Holiday pay for travel

Time spent in travel on a holiday which meets the requirement of 5 U.S.C. § 5542(b)(2)(B) would qualify as work within the meaning of U.S.C. § 5546(b) and would be compensated at holiday premium pay rates. 50 Comp. Gen. 519, 524 (1971) and B-168726, January 28, 1970.

First-40-hour employees

Employees whose basic workweek consists of the first 40 hours worked during any administrative workweek since they have unpredictable and uncertain daily work tours, are not covered by (5 U.S.C. § 6103(b)), or Executive Order No. 10358 of June 9, 1952 (now E.O. 11582), which provide holiday benefits when a holiday occurs on either Saturday or Sunday. Neither section 6103(b) nor the Executive Order apply to other than employees having regularly scheduled duty hours and days and regularly scheduled weekly nonworkdays. Absent clarifying legislation, first-40-hour employees having no regular hours of duty or regular nonworkdays may not be given holiday benefits during each week in which a holiday occurs without regard to the day on which the holiday falls or the days on which the employee works by authorizing 40 hours of pay for 32 hours of work or allowing 8 hours holiday compensation after 40 hours or more work. 44 Comp. Gen. 167 (1964).

A first-40-hour employee who works 8 hours on a Wednesday which is a holiday is entitled to 8 hours holiday compensation, except that no holiday compensation may be paid for any hours of work compensable as overtime. 44 Comp. Gen. 167 (1964).

When a holiday falls on Saturday and the preceding Friday is the "designated holiday," pursuant to 5 U.S.C. § 6103(b), a first-40-hour employee who works the final 8 hours of his 40-hour week

on the Friday being observed as a holiday in lieu of the holiday falling on Saturday is entitled only to his regular basic rate of compensation for his services on such Friday. 44 Comp. Gen. 167 (1964).

Having completed only 32 hours of work before a Friday observed as a holiday in lieu of a Saturday holiday under 5 U.S.C. § 6103(b), a first-40-hour employee is not entitled to 8 hours compensation without charge to leave if he does not work on Friday unless he is prevented from working on that day because the office is closed, and should the employee work on Saturday he would be entitled either to holiday pay or overtime pay depending upon whether he was paid for the preceding Friday. 44 Comp. Gen. 167 (1964).

A first-40-hour employee who has no fixed days or hours of duty in his basic workweek is not subject to the provisions of Executive Order No. 10358, June 9, 1952 (now E.O. 11582), which is limited in application to employees having regularly scheduled workdays with definite duty tours, and consequently a first-40-hour employee who works 8 hours on a Monday designated a holiday in lieu of a holiday falling on Sunday, pursuant to the Executive Order, is entitled only to straight time compensation for the work on Monday. 44 Comp. Gen. 167 (1964).

New appointees

The entitlement of a new appointee to pay for a holiday on which he performs no service is dependent, in the first instance, upon whether at the time of the occurrence of such holiday he in fact holds a position under the United States. The appointment alone does not vest him with the position. Before an employment relationship is established there must have been an acceptance of the appointment. The acceptance may be made by verbal affirmation, taking the oath of office, assumption of the duties of the position, or by some other overt act. If in fact there is evidence which establishes that any particular employee actually accepted the tendered appointment, either verbally or otherwise on Sunday, then he would be entitled to pay for the Monday holiday, notwithstanding that he did not take the oath of office and report for duty until Tuesday, and there would be no administrative discretion to deny him pay for the Monday. 45 Comp. Gen. 660 (1966).

Temporary employees

Temporary employees, those appointed for limited periods of not in excess of 1 year, are not regular employees within the meaning

of 5 U.S.C. § 6104 and are not entitled to their regular compensation when prevented from working on holidays. 32 Comp. Gen. 177 (1952) and 34 Comp. Gen. 235 (1954). This rule applies only to regular employees whose compensation is fixed on a rate per day, per hour, or on a piecework basis, and has no application to employees whose compensation is fixed on a per annum basis. 25 Comp. Gen. 877 (1946). Accordingly, an employee appointed on June 5, 1972, for a temporary period not to exceed August 31, 1972, to the position of operations research analyst, GS-13, step 6, at the per annum salary rate of $21,862, is entitled to pay for the July 4 holiday on which he performed no work. B-177093, November 9, 1972. See also 19 Comp. Gen. 337 (1939); 31 id. 565 (1952); and 32 id. 304 (1952).

Per diem employees/experts and consultants

Experts and consultants employed on a per diem basis are not entitled to compensation for holidays not worked in the absence of a contractual provision so providing. B-131259, January 23, 1976 and 28 Comp. Gen. 727 (1949).

An expert contended that he was employed on an annual basis and claimed pay for holidays not worked. Although the expert's Standard Form 50 showed both annual and daily rates, he was employed on a per diem basis since the annual rate was entered on his SF-50 for payroll computer purposes only and the SF-50 contained no provision for payment for holidays not worked. Accordingly he is not entitled to payment for holidays not worked. B-131259, January 23, 1976.

Consecutive time-limited appointments totaling a period of employment in excess of 1 year without a break in service are not extensions of the original appointment so as to constitute regular employment and entitle an expert employed on a when-actually-employed basis, with regular established tour of duty, to compensation for holidays on which no work was performed under the rule enunciated in 32 Comp. Gen. 177, that an employee serving under an indefinite appointment--not limited to 1 year or less--is to be regarded as a regular employee within the meaning of 5 U.S.C. § 6104. 33 Comp. Gen. 371 (1954).

Customs employees

For the purposes of 19 U.S.C. §§ 267 and 1471, which provide premium pay for Customs employees, days which are declared by Executive order to be holidays for Government employees are not to be considered holidays. Accordingly, Customs employees who were paid holiday pay for a holiday declared by Executive order

have received an erroneous payment of pay. B-153107, October 30, 1969 and 26 Comp. Gen. 848 (1974).

C. SUNDAY PREMIUM PAY

Statutory authority

Pay for Sunday work is provided by 5 U.S.C. § 5546(a) as follows:

> "An employee who performs work during a regularly scheduled 8-hour period of service which is not overtime work as defined by section 5542(a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay."

"Sunday" defined

An Air Force employee whose tour of duty included the period from 2400 hours Sunday to 0830 Monday and who claimed Sunday premium pay on the basis that the Air Force's administrative workweek was established as the period between 0001 Sunday and 2400 the following Saturday was properly denied Sunday premium pay since 5 U.S.C. § 5546(b) (1964 ed. Supp. IV), defines period for which Sunday premium pay is authorized as "period commencing at midnight Saturday and ending at midnight Sunday," and Air Force regulation on departmental workweek cannot operate to change established definition of day "Sunday" in statute authorizing Sunday premium pay. B-168592, February 25, 1970.

It is noted that although 5 U.S.C. § 5546(a), the Sunday pay law presently in effect, does not contain the explanatory language, "period commencing at midnight Saturday and ending at midnight Sunday," the above-cited decision would appear to be still valid since the subsequent change in language was merely made to restate the law without substantive change.

Regularly scheduled Sunday work

Employee whose workweek is Monday through Friday but who is on one occasion scheduled for Sunday through Thursday is entitled to premium pay for Sunday duty. The term, "regularly scheduled 8-hour period of service," as used in 5 U.S.C. § 5546(a) is intended to relate to the 40-hour weekly tour of duty generally established for Federal employees, normally 5 working days of 8 hours each. B-178401, June 6, 1973.

Full-time classified and wage board employees whose regularly scheduled tour of duty includes a period of service less than 8 hours, any part of which falls between midnight Saturday and midnight Sunday, are entitled to premium pay for the number of hours worked that are not in excess of the number of hours regulary scheduled for the period, as the words, "eight-hour period of service," used in subsection 5546(a) are a limitation upon the number of hours for which premium pay may be made for the period of service and not a requirement that an employee have a regularly scheduled 8-hour period of duty on the day for which the premium compensation is payable. 46 Comp. Gen. 337 (1966).

Employee's official hours were 12 midnight to 8 a.m. Monday but she worked unofficial hours of 11:30 p.m. Sunday to 7:30 a.m. Monday. Because unofficial hours do not satisfy criteria of "regularly scheduled work" required by 5 U.S.C. § 5546(a) governing Sunday premium pay, employee is not entitled to Sunday pay and settlement is sustained. B-185022, January 2, 1976.

Leaves of absence

Annual leave

An employee on an 8-hour regular shift of duty, which included 2 a.m. on the last Sunday in April when standard time was advanced 1 hour to daylight saving time, who was placed on annual leave for 1 hour so 1 hour of pay would not be lost, may not be paid Sunday premium pay for the 1 hour of annual leave since 5 U.S.C. § 5546 does not authorize premium pay for a leave status during any part of a regularly scheduled tour of duty on Sunday. 53 Comp. Gen. 292 (1973).

Military duty absence

Classified and wage board employees whose regularly scheduled workweek includes Sunday and who are on military leave as authorized by 5 U.S.C. § 6323 are entitled to Sunday premium pay while on military leave. B-160622, January 13, 1967.

Part-time employees

Only full-time employees are covered by 5 U.S.C. § 5546(a); thus, part-time employees are not entitled to premium pay thereunder for Sunday work. 46 Comp. Gen. 337 (1966).

First-40-hour employees

NASA employee was assigned to first-40-hour duty tour during period February 27 through November 19, 1966, when he and three others manned a console on a 24-hour basis, 7 days per week, after an administrative determination was made that it was impractical to establish regularly scheduled tours of duty. The voucher covering night differential and Sunday premium pay may be certified for payment since night work and Sunday services were performed regularly by employee according to a fixed work plan (8-hour periods of duty) set up by supervisors, and it is not unreasonable to view such night and Sunday duty as having been "regularly scheduled" within the meaning of the controlling statutes (5 U.S.C. § 5545, covering night differential, and 5 U.S.C. § 5546, providing for Sunday premium pay). B-162347, September 15, 1967.

Employees in Moslem countries

Overseas employees who regularly work on Sunday in a country that observes Friday as its day of rest and worship and who have Friday and Saturday off from duty are nevertheless entitled to premium pay for work on Sunday under 5 U.S.C. § 5546(a) which specifically authorizes premium pay for any regularly scheduled work performed between midnight Saturday and midnight Sunday. Entitlement to Sunday premium pay is not affected by the customs of the country in which the service is performed. 46 Comp. Gen. 660 (1967).

D. STANDBY PREMIUM PAY

Statutory authority

5 U.S.C. § 5545(c)(1) provides that the head of an agency, with the approval of CSC, may provide that an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of chapter 55, subchapter V, of title 5 of the United States Code, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour.

Administrative approval requirement

Employee claimed premium pay for standby duty at his home. Although an employee's home may be designated as his duty station

for standby purposes and although the employee in question was on call after normal duty hours, since the employee's home was never designated as his duty station and since the head of his agency never authorized, nor did CSC approve, the payment of annual additional compensation as required by 5 U.S.C. § 5545(c)(1), he is not entitled to any premium pay under that provision. Where the head of an agency has not exercised his discretion to make the necessary determination that the hours of duty of a position are uncontrollable for premium pay purposes GAO has no authority to allow the claim for premium pay under 5 U.S.C. § 5545(c)(1). B-182207, January 16, 1975.

Basic compensation determinations

Standby premium pay is a part of base pay for the purpose of retirement and life insurance deductions 47 Comp. Gen. 694 (1968).

Standby premium pay allowed firefighters under 5 U.S.C. § 5545(c)(1) in lieu of other extra compensation for overtime, night or holiday duty is not regarded as basic compensation and, therefore, is not included in applying the dual compensation limitation in 5 U.S.C. § 5532(b), when making the required adjustment in the retired pay of members of the uniformed services employed as civilian firefighters. 46 Comp. Gen. 200 (1966).

Excused absence from standby duty

The practice of withholding premium compensation for standby duty absences, whether or not the absence is for personal reasons, and of substituting unscheduled overtime as "fill-in" time for the lower rate standby duty absences may be changed to provide for the payment of all unscheduled overtime duty at applicable overtime rates, thus eliminating the substitution of unscheduled overtime duty for unserved scheduled standby duty. Also it may be provided that regardless of agency need employees will receive compensation for regularly scheduled standby services, except when during an absence for personal reasons there is a specific need for their standby services. The regulations require no strict adherence to a fixed weekly or other periodic standby schedule if it is predictable in advance that the standby tours are unnecessary. However, percentage rates of premium compensation should be determined from weekly average standby hours and any question as to an appropriate percentage rate should be submitted to CSC. 42 Comp. Gen. 426 (1963).

Duty officers entitlement

An employee in a standby status is not entitled to standby premium pay because his home was never designated as his duty

station. Even if his home were designated as his duty station, since he did not have to remain at home, but could use a "Bell Boy" type summoning device with an effective range of 25 miles, neither his whereabouts nor his activities were so severely restricted as to make his standby duty hours compensable under 5 U.S.C. § 5545(c)(1). B-173783.116, April 1, 1975.

"Sunday work" defined

Sunday work is an element to be considered in establishing rates of premium pay payable for regularly scheduled standby duty. Firefighters worked 24-hour tours of duty, the last 8-hour portion of which occurred on a Sunday and was allocated for sleeping. That period may be considered Sunday work for purposes of computing standby premium pay under 5 U.S.C. § 5545(c)(1), since Sunday work includes any period on Sunday during which the employee is regularly required to remain at or within the confines of his station, including the above-described sleeping period. B-162599, October 31, 1967.

E. PREMIUM PAY FOR ADMINISTRATIVELY UNCONTROLLABLE OVERTIME

Statutory authority

Generally

5 U.S.C. § 5545(c)(2) provides that the head of an agency, with the approval of CSC, may provide that an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of chapter 55, subchapter V, of the United States Code, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty.

Payment possible under both 5 U.S.C. § 5542 and § 5545(c)(2)

An employee may be paid for regularly scheduled overtime under 5 U.S.C. § 5542 and for administratively uncontrollable overtime under 5 U.S.C. § 5545(c)(2) but not for the same work. Payment under both laws is not precluded, as premium compensation for administratively uncontrollable overtime and compensation for regularly scheduled overtime relate to independent, mutually

exclusive methods for compensating two distinct forms of overtime work. 52 Comp. Gen. 319 (1972).

Employee improperly paid for same work under both 5 U.S.C. § 5542 and § 5545(c)(2)

In the case in which an employee has been improperly paid premium compensation under 5 U.S.C. § 5545(c)(2) for overtime work found to be regularly scheduled and not administratively uncontrollable, the employee may be paid overtime compensation under 5 U.S.C. § 5542. However, if the administratively uncontrollable duties which the employee has performed are then found upon reexamination either not to qualify for a premium compensation under 5 U.S.C. § 5545(c)(2) or to justify a lower rate of premium pay than that which has been paid, the resulting excess amounts received as compensation for administratively uncontrollable overtime should be setoff against regular overtime compensation which is found payable. 52 Comp. Gen. 319, 325 (1972).

Substantial amount of irregular unscheduled overtime duty

While 5 U.S.C. § 5545(c)(2) does not specify a minimum number of irregular unscheduled overtime duty hours as a prerequisite to premium pay, it does require "substantial amounts" thereof. CSC is authorized by law to issue guidelines under the law. Moreover, premium pay under the law is contingent upon the approval of CSC. Accordingly, CSC has not exceeded its authority by deciding that an average of at least 6 hours a week was the dividing line. B-160165, January 6, 1967.

Employee on extended leave with pay

Although CSC regulations provided that an agency shall continue to pay an employee premium pay on an annual basis, this should not be interpreted as requiring payment of premium compensation to an employee on leave with pay unless there are present all essential requirements to entitlement, including a reasonable expectancy that the need for his overtime service will continue in the future. 43 Comp. Gen. 376 (1963). Accordingly, when this reasonable expectancy ceases to exist, due to the employee taking extended sick or other leave with pay, the annual premium pay also ceases. B-175788, June 1, 1972.

Suspended employee

An employee who normally qualified for premium pay for administratively uncontrollable overtime under 5 U.S.C. § 5545(c)(2) is not entitled to such premium pay for the period he is suspended

without pay, since CSC regulations require that an employee be in a basic pay status in order to receive premium pay for administratively uncontrollable overtime. B-184981, August 20, 1976.

Discretionary authority

Considering whether CSC has authority to provide by regulation that Customs security officers (about 2,000 assigned as security guards aboard aircraft) shall receive annual premium pay under 5 U.S.C. § 5545(c)(2) for overtime services incident to flight assignments under Federal "Anti-Skyjacking Program," this Office sees no basis for objection, assuming determination is made and approved pursuant to section 5545(c)(2) which gives head of agency responsibility for determining whether hours of duty of position are uncontrollable for premium pay purposes, subject to CSC approval. B-151168, April 6, 1971.

F. HAZARDOUS DUTY DIFFERENTIAL

Generally

An employee who performs irregular or intermittent duty involving unusual physical hardship or hazard is entitled to a pay differential of up to 25 percent of his normal pay for the period the employee is exposed to such hazard. The differential does not apply to employees whose pay classification takes into account the degree of physical hardship or hazard involved in the performance of the employee's duties. 5 U.S.C. § 5545(d).

Entitlement

Administrative approval--GAO review

The authority to determine whether aircraft propeller mechanics are performing duty sufficiently hazardous to entitle them to environmental differential pay authorized by Appendix J of FPM Supplement 532-1 is primarily vested in the agency concerned. The agency determined that such pay was not warranted. GAO will not substitute its judgment for that of the agency in the absence of clear and convincing evidence that the agency's determination was arbitrary and capricious. B-181498, January 30, 1975.

Administrative determination

Since the Canal Zone Government has the authority to fix the compensation of its employees, claims by leprosarium

employees for hazardous duty pay should have been considered by Canal Zone Government prior to adjudication by GAO. Accordingly, settlement issued by GAO is vacated and the matter is referred to the Canal Zone Government. Claimants may have the agency action reviewed by GAO if dissatisfied with the agency determination. B-180962, May 14, 1975.

Outside of regular duty requirement

Disallowance of a claim for hazardous duty pay is sustained since such duty was neither irregular nor intermittent and the hazard involved appears to have been considered in fixing the pay grades and determining the necessary qualifications for the positions. B-177580, August 21, 1973.

Interpretation of regulations

Wage board employees--The denial by the Army of a claim by a wage board employee for hazardous duty differential on the basis that the differential applies only to classified employees was incorrect since FPM Supplement 532-1, Appendix J, authorizes payment of such differential to wage board employees. B-180864, June 4, 1975.

Hazards defined by regulations--An employee who performed flights to and from an aircraft carrier incident to a period of temporary duty may be paid hazardous duty pay for the days on which such flights were performed since these flights come within the purview of the regulations permitting a differential for flights involving launch and recovery aboard an aircraft carrier. B-165337, December 24, 1968.

An employee's claim for hazardous duty pay on the basis of a hazard not specified in 5 C.F.R. Part 550, Appendix A, may not be paid since the hazard for which payment is claimed is not a hazard for which payment is authorized under the regulations. B-181843, November 19, 1974.

Premium pay in lieu of

An Air National Guard technician assigned to a 24-hour tour of duty at a National Aircraft Control and Warning Site who receives the 12 percent annual premium pay under 32 U.S.C. § 709(g) prescribed for unusual tours of duty, irregular duty, or additional duty, and work on days not normally workdays, when exposed to

duty in a hazardous category, is not entitled to environmental differential pay since the 12 percent premium pay is authorized in lieu of additional compensation, including differentials and overtime compensation. 50 Comp. Gen. 847 (1971).

G. CLASS OF EMPLOYEES SPECIFICALLY NAMED

There are certain classes of employees specifically named in various laws which provide those employees with overtime compensation benefits distinct from those found in 5 U.S.C. § 5542. The following is a list of the provisions that have been considered by GAO.

Immigration and Naturalization Service

Immigration and Naturalization Service employees also receive overtime compensation under 8 U.S.C. § 1353a.

Part-time employees

Part-time immigration inspectors who are employed on an intermittent basis at hourly rates regardless of the day or time of day they are required to perform service and who are paid overtime compensation for work performed in excess of 8 hours in a day under 5 U.S.C. § 5542(a), having no regular hours of duty, are not eligible for the extra compensation prescribed by 8 U.S.C. § 1353a for work between 5 p.m. and 8 a.m. However, the inspectors are entitled to 2 days' extra pay for Sunday and holiday duty pursuant to section 1353a, but since they have no regular tour of duty, they may not receive their regular pay in addition to the extra pay. 49 Comp. Gen. 577 (1970).

Standby and traveltime

Where liability for payment of extra compensation for overtime services of Immigration and Naturalization Service employees attaches to carriers pursuant to 8 U.S.C. § 1353b, continuation of the administrative definition of "time on duty" to include standby and traveltime outside an employee's regularly established tour of duty is not objectionable, even though traveltime outside a regular tour of duty is not payable as overtime under 5 U.S.C. § 5545, the overtime provisions of which were made applicable to such employees by the proviso in the Department of Justice Appropriation Act, 1948. 27 Comp. Gen. 102 (1947).

Ports of entry

Immigration inspection stations established outside the continental United States may not be designated as "ports of entry," which term is defined as places within the continental United States for the arrival of goods and persons from foreign countries. Therefore, the exception in 8 U.S.C. § 1353b, which relieves scheduled carriers from payment for overtime services performed at designated "ports of entry," does not relieve them from payment of overtime for services performed at foreign stations. 36 Comp. Gen. 166 (1956).

Inspection services performed by employees of the Immigration and Naturalization Service at offices in foreign countries other than Canada and Mexico may not be regarded as services performed in connection with the examination of passengers arriving in the United States from a foreign port for which overtime compensation is authorized by 8 U.S.C. § 1353a. 36 Comp. Gen. 166 (1956) and B-148783, September 5, 1962.

Customs Service

Customs officers and employees also receive overtime compensation under 19 U.S.C. §§ 261 and 267.

Part-time employees

Part-time Customs inspectors who are employed on an intermittent basis at hourly rates regardless of the day or time of day they are required to perform service, and who are paid overtime compensation for work performed in excess of 8 hours in a day under 5 U.S.C. § 5542(a), having no regular hours of duty, are not eligible for the extra compensation prescribed by 19 U.S.C. § 267 for work between 5 p.m. and 8 a.m. However, the inspectors are entitled to 2 days' extra pay for Sunday and holiday duty pursuant to section 267a, but since they have no regular tour of duty, they may not receive their regular pay in addition to the extra pay. B-167804(2), March 11, 1970.

Air piracy prevention

Customs inspectors who conduct predeparture inspection of air passengers bound for overseas as a deterrent to skyjacking in accordance with a Presidential program are not

entitled to the payment of overtime compensation under 19 U.S.C. § 267, but rather under 5 U.S.C. § 5542, even though the inspections are necessary for the safety of passengers and for the protection of air carriers against air piracy. The inspection duties involved would not be within the custom duties prescribed by 19 U.S.C. § 267, which are duties performed in connection with lading on Sundays, holidays, or at night, of merchandise or baggage entered for transportation under bond or for exportation with the benefit of drawback, or other merchandise or baggage required to be laden under customs supervision. 50 Comp. Gen. 703 (1971) and B-171781, August 23, 1971.

Holidays

For the purposes of applying 19 U.S.C. §§ 261 and 267, days which are declared to be holidays for Government employees by Executive order are not to be considered holidays. B-153107, October 30, 1969.

Certain Customs Service employees, who are not within the purview of the holiday pay provisions of 19 U.S.C. § 267, worked their regular tour of duty from 12:01 a.m. to 8 a.m. on December 24, 1946, when most Federal employees were excused from duty for one-half day pursuant to Executive Order No. 9810. They are entitled, under 5 U.S.C. § 5546, as amended, to premium pay for holiday work during the latter half of the assigned tour of duty on that day only if proper administrative action had been taken to close the particular offices during the latter half of such tour of duty. 26 Comp. Gen. 848 (1947).

The half-day on December 24, 1946, during which the various Government offices were closed and most employees were excused from duty under the provisions of Executive Order No. 9810, may not be regarded as a holiday within the meaning of 19 U.S.C. § 267, which authorizes the payment of 2 days' extra compensation for services performed by certain Customs Service employees on a holiday. However, if proper administrative action had been taken to close the particular offices during such half-day, payment of holiday compensation to such employees for services performed on that day may be made in accordance with and pursuant to 5 U.S.C. § 5546. 26 Comp. Gen. 848 (1947).

Overtime

Customs employees, who have a regular daily tour of duty other than between the hours of 8 a.m. and 5 p.m., are not

entitled to premium payments of 4 hours "remain on duty" time in addition to actual service time of 4 hours or less beginning between 5 p.m. and 9 p.m. under 19 U.S.C. §§ 267 and 1451 and the regulations in 19 C.F.R. § 2416, which indicate that compensable time cannot be more than the time elapsing between 5 p.m. and the conclusion of service when the employee ceases to "remain on duty." 37 Comp. Gen. 276 (1957).

Night work

In view of the provisions of 19 C.F.R. § 24.16(g), employees whose regular daily tour of duty covers any part of the night (5 p.m. to 8 a.m.)--compensable time for extra compensation purposes under 19 U.S.C. § 267--are entitled to extra compensation computed as though the beginning of the regular tour of duty marked the end of a night period and the close of such tour marked the beginning of another night period, and employees whose regular daily tour of duty is from 4 p.m. to 12 p.m. may be credited with the 4-hour compensable time allowance even though employees on the regular daytime tour (8 a.m. to 5 p.m.) would be entitled only to a 2-hour allowance for reporting to duty between such hours. 37 Comp. Gen. 276 (1957).

Travel

Mere performance of travel immediately prior to 8 a.m. (end of "night") in reporting for duty at the place of inspectional work at 8 a.m. or later may not be included in the time of active service and does not entitle the customs employees to extra compensation for overtime services under 19 U.S.C. § 267 and 19 C.F.R. § 24.16(g). 37 Comp. Gen. 276 (1957).

Commencement of travel from Honolulu, Hawaii, to outlying points--Pearl Harbor and Barber's Point--at which customs inspections take place during the night hours (between 5 p.m. and 8 a.m.) outside of the employee's regular tour of duty hours does not constitute a reporting for duty to entitle the employee to extra compensation under 19 U.S.C. § 267 and 19 C.F.R. § 24.16(g), so as to authorize the inclusion of the traveltime in the compensable time for actual performance of duty in addition to 4 hours or other constructive compensable time under the regulations. 37 Comp. Gen. 276 (1957).

Public Health Service

•Public Health Service employees in the Foreign Quarantine Division also receive overtime compensation under 42 U.S.C. § 267(c).

Standby duty

Employees of the Foreign Quarantine Division, United States Public Health Service, who perform overtime duties during the nighttime may not receive additional compensation for periods of constructive "standy-by or waiting time" under 42 U.S.C. § 267(c), which requires the performance of actual duty during the prescribed overtime periods for entitlement to overtime compensation. There is nothing in section 267(c) which confers any specific authority on the Secretary of Health, Education, and Welfare from which discretionary power to determine what constitutes overtime services could be inferred. 37 Comp. Gen. 723 (1958).

No work to be performed

Employees of the Foreign Quarantine Division of the United States Public Health Service, who have been ordered to overtime duty and report for such duty but do not perform any services because of circumstances beyond their control, may be paid overtime under 42 U.S.C. § 267. Compensatory time not being specficially authorized by the act may not be granted. 37 Comp. Gen. 723 (1958).

In lieu of other compensation

Overtime compensation under 42 U.S.C. § 267 is in lieu of compensation under any other provision of law, and neither per annum nor wage board employees of the Foreign Quarantine Division of the United States Public Health Service may be paid overtime compensation for travel between their headquarters and temporary duty stations. 37 Comp. Gen. 723 (1958).

Duty prior to 6 a.m.

Although the time required to be spent by employees of the Foreign Quarantine Division, Public Health Service, at the barge office, prior to 6 a.m. each day to obtain instructions and assignments before proceeding to inspection points for vessel inspection services,which are performed between 6 a.m. and 6 p.m., when such service is free to

the carriers, may not be considered overtime duty to make either the vessel owner or the Government liable for overtime compensation under 42 U.S.C. §§ 267(c) and (d)(1), and may not be considered unscheduled or unanticipated so as to be compensable as callback overtime under 5 U.S.C. § 5542(b), the time may be regarded as overtime under 5 U.S.C. § 5542(a), if it results in duty in excess of 40 hours a week. However, the traveltime between the barge office and other inspection points which occurs prior to 6 a.m. may not be regarded as duty time. 38 Comp. Gen. 662 (1959).

Provided that the duty performed by employees of the Foreign Quarantine Division of the Public Health Service at the barge office prior to 6 a.m. each day is to obtain instructions and assignments before reporting to the inspection points for performance of vessel inspection duties between 6 a.m. and 6 p.m., when such service is free to the carriers, and is performed pursuant to administrative instructions within the meaning of 5 U.S.C. § 5542(a), there could be no objection to the retroactive payment of overtime compensation for such services. 38 Comp. Gen. 662 (1959).

Agriculture--meat inspectors

Bureau of Animal Industry meat inspectors also receive overtime under 7 U.S.C. § 394 (1970).

Reimbursement from parties in interest

Establishments that received meat and poultry inpsection services on Friday, December 26, 1969, which was declared a holiday by Executive order, notwithstanding the inadequacy of the notice concerning the holiday status of the 26th, may not be relieved of the obligation imposed by 21 U.S.C. § 468 and 7 U.S.C. § 394 to reimburse the Department of Agriculture for the holiday pay received by the inspection employees at the premium rates prescribed in 5 U.S.C. §§ 5541-5549. There is no indication in the legislative histories of the Poultry Products Inspection Act and the Meat Inspection Act of the intent to shift holiday and overtime costs from the industry to the Government. 49 Comp. Gen. 510 (1970).

The long standing interpretation by the Department of Agriculture that the reference in 7 U.S.C. § 394, to reimbursement by the meat industry for the overtime costs incurred by the Government, includes the cost of furnishing

holiday services, is entitled to great weight in the construction of the act. Therefore, the meat establishments that were rendered inspection services on Friday, December 26, 1969, a day declared a holiday by Executive order, may not be relieved of the liability to reimburse the Department for the holiday premium pay that was paid to inspectors. 49 Comp. Gen. 510 (1970).

Sunday work

Work performed by Agricultural Inspection and Quarantine Service employees on Sundays, which fall within their basic 40-hour workweek, may not be defined as overtime work for the purpose of paying them overtime compensation, in the absence of any indication in 7 U.S.C. § 2260 that the long-established definition of overtime as work in excess of 40 hours per week or 8 hours per day was not intended. 43 Comp. Gen. 542 (1964).

SUBCHAPTER III--SEVERANCE PAY AND ALLOWANCES

A. SEVERANCE PAY

Generally

A qualifying employee who has been employed currently for at least 1 year, who is not eligible for immediate retirement, and who is involuntarily separated from the service, other than by removal for cause on charges of misconduct, delinquency, or inefficiency, is entitled to severance pay in regular pay periods, the total amount not to exceed 1 year's pay at the rate received immediately before separation. 5 U.S.C. § 5595.

Entitlement

Valid separation--An employee who continued in a temporary position without a break in service following the termination of his permanent position and who died thereafter was neither receiving nor entitled to receive severance pay at time of his death, since entitlement to severance pay is contingent upon a valid separation. If the employee had lived, he would not have been entitled to severance pay until separation, and if eligible for immediate annuity or appointed to another position without time limit and without a service break, he could not then qualify for severance pay benefits. B-165282, October 14, 1968.

The superintendent-principal of an Air Force Dependents' School, who was employed under 20 U.S.C. § 241(a) for about 10 years, was terminated on the basis of management's prerogative not to renew his annual contract. He is entitled to severance pay, since he held an indefinite tenure appointment, although with limited access to procedural rights, and was involuntarily separated not for cause, delinquency or inefficiency. 52 Comp. Gen. 291 (1972).

Separation for inefficiency--A former air traffic control specialist who was employed by the Federal Aviation Administration and who was removed for his failure to complete a required training program may not be paid severance pay. It is within the agency's discretion to determine what constitutes inefficiency, and separation for inefficiency precludes the payment of severance pay under 5 U.S.C. § 5595(b)(2). B-183157, April 1, 1975.

Nature of appointment--An employee was given an excepted appointment by the Civil War Centennial Commission and occupied such position until the Commission was terminated by law. It was previously determined that he was not entitled to severance pay on the basis that his appointment had a definite time limitation coincident with the life of the Commission. Payment may be authorized since the employee's appointment in itself was without time limitation, and the fact that the appointment was made by a temporary agency is not the determining factor as to the nature of the appointment. B-136051, August 26, 1966.

Resignation prior to separation--An employee who, prior to receipt of official written notice of involuntary separation, resigns in anticipation of separation after being informally advised of his impending separation, is not eligible for severance pay under the regulations prescribed by CSC. 45 Comp. Gen. 784 (1966).

Effect of entitlement to annuity

State retirement system--A National Guard technician who, at the time of his involuntary separation due to his loss of military membership, was immediately eligible for a retirement annuity from the state retirement system in which he had elected to participate, is precluded from receiving severance pay since the phrase "any other retirement statute or retirement system applicable to an employee" contained in 5 U.S.C. § 5595 does not limit "retirement system" to a Federal or federally administered system. 54 Comp. Gen. 905 (1975).

Disability retirement pending--The fact that an employee was separated by reduction in force on the same day he applied for disability retirement affords no basis for withholding severance pay. Even if the employee does not consent after being informed that upon approval of his retirement he will be required to refund any severance pay received, we are aware of no basis for withholding payment of severance pay. 47 Comp. Gen. 719 (1968).

Retired military members--Upon a reduction in force, a civilian employee of the United States who is, a retired member of the uniformed services eligible for or in receipt of military retired pay may not be paid severance pay. This prohibition is applicable without regard to

whether the employee was entitled under the Dual Compensation Act, 5 U.S.C. §§ 5531-34, to receive military retired pay concurrently in whole or in part with the compensation of his civilian office or position. 50 Comp. Gen. 46 (1970).

A National Guard technician who, although ineligible for an immediate civil service annuity, is eligible for immediate military retirement upon a reduction in force, is not eligible for payment of severance pay. 54 Comp. Gen. 212 (1974).

An Army civilian employee who was receiving retired pay because of permanent disability incurred during military service is ineligible for severance pay because of the exclusion in 5 U.S.C. § 5595 of employees who are entitled to an immediate annuity. The fact that the employee had less than 3 years' military service is immaterial. B-181310, September 16, 1974.

Reemployment of separated employee

By nonappropriated fund activity--Upon employment of a separated civil service employee by a nonappropriated fund instrumentality described in 5 U.S.C. § 2105(c), the severance pay of the employee is not required to be discontinued, since the provisions in 5 U.S.C. § 5595(d) prescribing discontinuance apply only to employees reemployed by the Federal Government. Employees of nonappropriated fund activities are not considered employees of the United States for purposes of the laws administered by CSC. 48 Comp. Gen. 192 (1968).

Contract employment--An employee who is entitled to severance pay by virtue of his separation, and who is awarded two consulting contracts, may be paid the full contract price, since the contract awards did not result in dual pay within the meaning of 5 U.S.C. § 5533(a). An employee who is receiving severance pay does not hold a position with the United Stated during the period covered by the severance pay. B-178446, May 4, 1973.

Separation as an unjustified personnel action

The retroactive reinstatement and award of backpay under 5 U.S.C. § 5596 incident to an erroneous separation precludes the award of severance pay for the same period since the rein-

stated employee is deemed, for all purposes, to have performed services during the period covered by the erroneous personnel action. B-178551, January 2, 1976.

Computation of severance pay

Period of entitlement or amount

Under 5 U.S.C. § 5595, severance pay consists of two elements--a basic severance allowance and an age adjustment allowance. The basic allowance shall be computed on the basis of 1 week's basic compensation at the rate received immediately before separation for each year of civilian service up to and including 10 years for which severance pay has not been received and 2 weeks for each year of civilian service beyond 10 years for which severance pay has not been received. The age adjustment allowance shall be computed on the basis of 10 percent of the total basic severance allowance for each year by which the age of recipient exceeds 40 years at the time of separation. Total severance pay received under this section shall not exceed 1 year's pay at the rate received immediately upon separation. 46 Comp. Gen. 664 (1967).

"One year's pay" limitation

The maximum limitation for full-time employees paid under the General Schedule is an amount equal to the pay of 26 biweekly pay periods of 80 hours each. In the case of other full-time employees (wage board, etc.) to whom 5 U.S.C. § 5595(c) and (d) apply, "one year's pay" may reasonably be construed as basic pay for 26 biweekly pay periods. 46 Comp. Gen. 664 (1967).

The maximum entitlement of part-time employees who satisfy the other requirements for severance pay may be computed by multiplying their basic weekly compensation (hours of service times hourly rate) times 52 weeks. 46 Comp. Gen. 664 (1967).

Reemployment--second separation

If an employee receiving severance pay is reemployed once and thereafter again is separated under conditions entitling the employee to severance pay, 52 weeks with no additional days would be credited a second time and the number of days and weeks for which he had previously

received severance pay would be deducted. 46 Comp. Gen. 664 (1967).

Civil service regulations require the computation of severance pay to be based on all creditable service with a reduction for severance pay previously received. Therefore, an employee who received 8 weeks' severance pay incident to his first separation and 4 weeks' severance pay incident to his second separation is entitled to 14 weeks' severance pay on the basis of 12 years total service, regardless of a break in service. The employee may therefore be paid an additional 2 weeks severance pay incident to the second separation. B-175384, April 20, 1972.

Interest not allowable

A former employee is not entitled to interest on severance pay under 5 U.S.C. § 5595, since no provision for interest is contained in that section. It is well settled that the Government is not liable for interest on any unpaid accounts or claims unless interest is specifically authorized in contracts or by statutes. B-165072, May 13, 1969.

B. UNIFORMS

Generally

Employees who are required by regulation or statute to wear a prescribed uniform in the performance of their duties may be paid an allowance or furnished such uniforms in accordance with applicable regulations. The allowance or cost of uniforms may not exceed $125 a year. 5 U.S.C. §§ 5901 et seq.

Promotion to position requiring new uniform

An employee who within 1 year after becoming eligible for and receiving full payment of the initial uniform allowance is promoted to a position requiring the purchase of substantially different uniforms is entitled to the allowance from the date of promotion, notwithstanding the year covered by the initial payment received has not expired. 48 Comp. Gen. 678 (1969).

Successive temporary appointments

While it has been administratively determined that a park ranger employed on temporary appointment for the summer months is

entitled to a uniform allowance for the uniform items required for summer employment, the regulations are not clear regarding entitlement to the allowance for a similar appointment in the succeeding summer. Certainly the employee is not entitled to a second allowance prior to the expiration of 1 year from the date of the first appointment. However, since that year has now expired, we have no objection to reimbursement now for the amount actually expended for uniforms for the second period of summer employment. B-170772, November 6, 1970.

C. QUARTERS

Employee on temporary duty

The primary purpose of 5 U.S.C. § 5911 was to authorize Government agencies to provide quarters and related facilities for civilian employees stationed in the United States. Certain installations provide temporary duty quarters for civilian employees without charge, apparently on the basis that the employee's per diem is reduced when the employee occupies such quarters. It appears that the legislators clearly intended that civilian employees should not be required to occupy such quarters while on temporary duty unless the head of the agency determines that necessary service cannot be rendered or property of the United States cannot adequately be protected otherwise. We believe that this prohibition is intended to cover all Government quarters available for temporary duty of civilian personnel, whether furnished with or without charge. 44 Comp. Gen. 626 (1965).

Permanent duty personnel

5 U.S.C. § 5911 requires that employees assigned quarters at their permanent duty stations pay a reasonable rent for such quarters. B-160587, January 13, 1967 and B-164200, May 24, 1968. The rent charged to such employees should include the reasonable rental value of furnishings, where furnished quarters are provided. B-180515, October 2, 1974.

Floating duty stations

The quarters and subsistence authorized by 5 U.S.C. § 5947 to be furnished aboard vessels without charge to employees of the Corps of Engineers engaged in floating plant operations, may not be procured by contract in lieu of the individual allowance to each employee when the employees are prevented from boarding a vessel because of hazardous weather or because the

vessel is undergoing repairs. The purpose of section 5947 is to substitute an allowance when quarters and subsistence cannot be furnished on board a vessel, and this section does not authorize the provision of quarters and subsistence off the vessel without charge in lieu of the allowance. However, the furnishing of quarters under 5 U.S.C. § 5911 is not precluded. 51 Comp. Gen. 100 (1971).

D. OVERSEAS DIFFERENTIALS AND ALLOWANCES

Authority

5 U.S.C. §§ 5921 et seq., provides the authority for the payment of the overseas differentials and allowances discussed infra to employees officially stationed in foreign areas.

Definitions (5 U.S.C. § 5921)

"United States," when used in a geographical area, means the several States and the District of Columbia.

"Continental United States" (CONUS) means the several States and the District of Columbia, but does not include Alaska or Hawaii.

"Foreign area" means the Trust Territory of the Pacific Islands and any other area outside the United States, the Commonwealth of Puerto Rico, the Canal Zone, and territories and possessions of the United States.

Quarters allowance

Local hires

A United States citizen who traveled to the Philippines to remain with her husband and who secured position with the U.S. Navy as a U.S. citizen locally hired, with no overseas employment agreement negotiated for the purposes of return transportation under 5 U.S.C. § 5722, is not entitled to quarters allowance, post differential, or return transportation at the agreed completion of service, since the Navy determined that the employee's presence in the Philippines was not primarily due to her employment and the Standardized Regulations, section 031.12, require a determination that an employee's presence overseas is fairly attributable to Government employment. B-159995, October 3, 1966.

An American with civil service status who was hired by the U.S. Army in Germany does not meet the criteria of section 031.1, Standardized Regulations, for the payment of quarters allowance, because he was not recruited in the United States and nothing suggests that he was recruited by Government, firm, organization or a foreign government under conditions providing for return to the United States. Moreover, he was not in Germany for travel or formal study. B-171694, February 9, 1971.

Cost-of-living allowances

Post allowance

Extraordinary subsistence expenses--The claim for supplementary post allowance of an overseas employee who, with his dependents, utilized Navy snack bar facilities, considered to be "less expensive eating facilities" within the meaning of subsection 233d of Standardized Regulations, was properly denied, since to qualify therefor, the employee must be unable to utilize less expensive eating facilities. The entitlement is not predicated upon the extent to which family meal costs exceed those incurred at home, but upon the extent to which they exceed the cost of meals at less expensive commercial facilities. B-176979, November 17, 1972.

Transfer allowances

Hotels in U.S.--Hotel or other temporary lodging expenses incurred in the United States by an employee incident to a transfer abroad may not be reimbursed as part of the transfer allowance authorized under 5 U.S.C. § 5924(2). Temporary lodging expenses payable to employees incident to assignments abroad are those authorized by 5 U.S.C. § 5923(1). 53 Comp. Gen. 861 (1974).

Violation of service agreement--Claim of former employee of the Agency for International Development for a home service transfer allowance is denied under paragraph 254.2, Standardized Regulations, since the employee did not remain with AID for a minimum of 6 months after returning to the United States, as required by the regulation. B-184045, March 31, 1976.

Recoupment not required--The former Director of the Commerce Department's U.S. Trade Center, Argentina, whose Foreign Service Reserve appointment terminated when he

returned to his regular Commerce position in the United States may be paid a home service transfer allowance, since it is anticipated that he will be reassigned to a post in a foreign area. B-180852, October 23, 1974.

Separate maintenance allowance

Reinstated employee--Reinstatement as a career civilian employee of the Army in Korea after employment in private industry does not entitle the claimant to post differential or separate maintenance allowance under 5 U.S.C. § 5924. There is no inconsistency in regarding a reinstated employee as a local hire. Eligibility for payment of a separate maintenance allowance is authorized only upon the evacuation of an employee's dependents or in exceptional circumstances provided prior approval is granted by the Secretary of Defense. B-161353, August 7, 1967.

Administrative approval--An employee's claim for a separate maintenance allowance for the period December 15, 1965, through July 24, 1966, on the basis that automatic, mandatory authority for the payment of the allowance in the Philippines had existed since April 17, 1961, is disallowed. A separate maintenance allowance had only been authorized July 25, 1966, when the Deputy Assistant Secretary of Defense issued a memorandum to implementing offices, stating that he was aware of the statute and regulation and of the lack of family housing in the claimant's area. A retroactive payment date was neither expressed nor implied, and claimant was paid only from the date of the memorandum. B-166895, August 1, 1969.

Change in the status of an overseas employee from an alien to a United States citizen does not result in an automatic entitlement to the allowances granted under section 031.12 of the Standardized Regulations. That regulation requires the specific approval of such allowances, and where an authorized approving official has specifically refused approval, GAO is without authority to overrule the decision. B-179972, February 22, 1974.

A separate maintenance allowance could be paid to an employee whose wife could not be accepted on base because the medical facilities were inadequate to treat his wife's cancer. The regulations permit payment of allowance whenever the head of an agency determines that the employee is compelled to maintain a dependent elsewhere because of lack of adequate medical facilities. B-175980, November 28, 1972.

Spouse in armed forces--An employee stationed in Vietnam who was receiving a full separate maintenance allowance based on the additional expense of maintaining his wife elsewhere is not entitled to a full allowance where his wife is an Air Force major receiving quarters and subsistence in her own right. A separate maintenance allowance may be paid to the employee, less a deduction for the amount of his wife's subsistence and quarters allowances. The general intent of the regulations is to preclude the payment of a separate maintenance allowance to both spouses, each of whom may be entitled by virtue of their assignment to different posts of duty. B-160574, June 16, 1970.

Divorced employees--The separate maintenance allowance authorized to be paid to an employee assigned to a post that is dangerous or unhealthful or where the living conditions are adverse, to enable the employee to meet the expenses of maintaining his dependents elsewhere, may be paid to a divorced employee whose children were placed in the joint custody of the employee and the former spouse, since the children are dependents within the meaning of paragraph 040m of the Standardized Regulations. However, the employee must establish that the children would have resided with him but for the conditions warranting payment of the separate maintenance allowance. An affidavit to this effect from the employee's former spouse is sufficient. 52 Comp. Gen. 878 (1973).

Breach in domestic relations--An employee's claim for a separate maintenance allowance on behalf of his wife was denied by the agency for the period during which the employee and his wife were allegedly separated, even though no separation agreement had been signed and neither spouse had instituted legal action, since, at that time, the Standardized Regulations prohibited the payment of the separate maintenance allowance where there existed a "breach in domestic relations." The employee may be paid the separate maintenance allowance for his wife because the Standardized Regulations have been clarified so as to prohibit the allowance only where either legal action had been instituted or a formal separation agreement had been reached. B-178490, July 2, 1975.

Post differential

Entitlement

Administrative authorization--The change in the status of an employee from an alien to a U.S.

citizen does not automatically entitle the employee to differentials and allowances. The Standardized Regulations require specific approval and the authorizing official specifically refused approval of the claimed differentials and allowances. GAO is without authority to overrule the administrative decision. B-179972, February 22, 1974.

Detailed employees--An employee detailed from a nondifferential post to Kinshasa, Zaire, for a 67-day period, may not be paid post differential pursuant to 5 U.S.C. § 5925, for Kinshasa prior to the 43d day of the detail, since section 541 of the Standardized Regulations requires a 42-day eligibility period. Furthermore, the regulations specifically provide that no post differential is authorized for the period required to obtain eligibility. B-181047, November 14, 14, 1974 and 45 Comp. Gen. 583 (1966).

Detail to Vietnam--An employee on temporary duty in Vietnam is entitled to payment of a post differential allowance under 5 U.S.C. § 5925 at the 25 percent rate. The Standardized Regulations at that time provided entitlement to a post differential upon 42 consecutive calendar days service in one or more places in Vietnam. The computation of an employee's entitlement shall be based on full days (as indicated in the regulation, that is midnight to midnight). B-169294, June 11, 1970.

Local hires--Reinstatement as a career civilian employee of the Army in Korea after his employment in private industry does not entitle the claimant to a post differential under 5 U.S.C. § 5925 or a separate maintenance allowance under 5 U.S.C. § 5924, since his eligibility is governed by the Standardized Regulations and not the nature of his appointment. There is no inconsistency in regarding a reinstated employee as a "local hire." B-161353, June 11, 1970.

A U.S. citizen who traveled to the Philippines to remain with her husband and who secured a position with the Navy as a U.S. citizen locally hired, with no overseas employment agreement negotiated, is not entitled to a post differential under 5 U.S.C. § 5924 or either the quarters allowance, or return transportation at the completion of the agreed period of

service under 5 U.S.C. § 5924, since the Navy determined that the employee's presence in the Philippines was not primarily due to her employment. The Standardized Regulations require, for a payment of benefits determination, that an employee's presence overseas be fairly attributable to Government employment. B-159995, October 3, 1966.

Computation

Aggregate pay limitation--Because a post differential under 5 U.S.C. § 5925 is additional pay and not part of an employee's basic salary, it is not regarded as part of the aggregate limitation on basic compensation and is not subject to retirement deductions. B-169294, June 11, 1970 and 37 Comp. Gen. 739 (1958).

Rate determination--Computation by the Agency for International Development of post differential under 5 U.S.C. § 5925 based on a method which involved dividing of the employee's annual rate of pay by 2,080 and multiplying this hourly rate by 80 to derive the biweekly rate of pay was in accordance with GAO instruction. B-173815, August 29, 1973 and B-50870, November 17, 1958.

Lump-sum leave--Employees of the Agency for International Development who were separated from the Federal service in Vientiane, Laos, are entitled to lump-sum leave payments that include post differentials under 5 U.S.C. § 5925 for the period covered by the lump-sum leave payment. 52 Comp. Gen. 993 (1973).

E. MISCELLANEOUS ALLOWANCES

Territorial cost-of-living allowances

Entitlement

Effect of local voter registration--Registering to vote in the local elections in Guam does not deprive a civilian employee of the benefits prescribed for overseas service where neither the acts involved nor their legislative histories indicate an intent to deny an employee benefits because of such registration. 49 Comp. Gen. 596 (1970).

Headquartered in CONUS--A claimant was reemployed by the Department of the Interior after his separation from the

military service in Juneau, Alaska, and was permanently assigned to Oregon. He remained in Juneau on a detail for 2 weeks and resigned after the detail to accept a position in Juneau. He is not entitled to a cost-of-living allowance under 5 U.S.C. § 5941 for the detail, since the position to which he was assigned was in CONUS, for which no cost-of-living allowance is authorized, and the temporary duty assignment was in the employee's place of permanent residence for the employee's personal convenience. B-159507, July 20, 1966.

Alaska Railroad employees--An amount in lieu of the cost-of-living allowances under 5 U.S.C. § 5941 may be paid to Alaska Railroad employees whose pay is fixed administratively, since the statutory provisions limiting their salaries to amounts not in excess of the salaries of specified grades under the General Schedule refer to the basic compensation rates in subchapter I, chapter 53, title 5, United States Code, and not to the allowances authorized by chapter 59 of title 5, United States Code. 55 Comp. Gen. 196 (1975).

Conversion to General Schedule

The cost-of-living allowance authorized by 5 U.S.C. § 5941 is not to be considered in comparing General Schedule and wage board pay levels in setting the rates of pay for employees whose positions are converted without change in duties from wage board to General Schedule since 5 C.F.R. Part 539 and not the "highest previous rate rule" applies. 51 Comp. Gen. 656 (1972).

Temporary duty

An employee hired on a temporary basis to perform services in Alaska on a disaster loan program may not be paid a cost-of-living allowance under 5 U.S.C. § 5941 in addition to per diem in lieu of subsistence. The cost-of-living allowances, which are intended for employees assigned or transferred outside the continental United States or to Alaska are not payable to employees on temporary duty there while they are receiving per diem in lieu of subsistence. 31 Comp. Gen. 499 (1952); 34 id. 370 (1955); and B-165632, May 2, 1969.

Concurrent with temporary quarters allowances

Payments for subsistence while occupying temporary quarters, which have been withheld because they were

considered to duplicate, in whole or in part, amounts concurrently paid as territorial cost-of-living allowances may be allowed. B-168411, July 9, 1970.

Absence from duty post

The administrative determination that the lump-sum leave payment made upon an employee's disability retirement should not include the cost-of-living allowance authorized by 5 U.S.C. § 5941 was not arbitrary or capricious, since it was in accordance with CSC regulations, which require the termination of the cost-of-living allowance upon the date of departure of the employee from Hawaii to the continential United States. B-163041, March 5, 1968.

Tropical differential

Generally

Public Law 85-590, approved July 25, 1958, 72 Stat. 405, authorizes an overseas differential for Canal Zone employees who are citizens of the United States. The tropical differential may not be in excess of 25 percent of their aggregate rate of basic compensation.

Spouse also in area

The April 8, 1974, amendment of 35 C.F.R. § 253.135(b) provides for the payment of a tropical differential to two new categories (1) married women whose spouses are not employed by United States in Canal Zone (they were previously eligible only if their Federal employment could be deemed to be the job which determined the presence of the family in the area) and (2) married employees whose spouses are (a) U.S. military members stationed in the area or (b) employed in the Republic of Panama by the United States and entitled to a living quarters allowance. The differential is authorized to the extent that it exceeds the military housing allowance or civilian living quarters allowance. B-175954, July 8, 1974.

Basis for payment

Claims for the payment of the tropical differential by employees in the Canal Zone are payable only if the positions occupied occupied by the employees are determinative of the family location. In view of the varying factual situations,

each case should be judged individually. 53 Comp. Gen. 203 (1973).

Notary public commission expenses

Cost of commission

Employees who are required to serve as notaries public in the performance of official business may be paid an allowance under 5 U.S.C. § 5945, not to exceed the expense incurred in obtaining the commission, even though the employees also use the notarial powers for private business. 36 Comp. Gen. 465 (1956).

Surety bonds

5 U.S.C. § 5945 authorizes reimbursement for the expense of surety bonds required of notaries by state law, notwithstanding 31 U.S.C. § 1201, which bars the Government from obtaining or requiring surety bonds for employees. B-185909, June 16, 1976.

Seals, stamps, etc., professional dues

Employees required to obtain notary commissions may be reimbursed, pursuant to 5 U.S.C. § 5945, for incidential expenses deemed necessary to perform notarial services including seals, stamps, embossing devices, and recording and filing fees. However, reimbursement may not be made for professional association dues and other expenses not essential to the performance of notarial services. B-185909, June 16, 1976.

Membership fees

Individual membership

In view of the prohibition in 5 U.S.C. § 5946 against payment from appropriated funds of membership fees of officers and employees in societies and associations, the annual membership fees of employees of the New York Ordnance District for the Society for Advancement of Management, the primary purpose of which is to increase the knowledge of the personnel involved with respect to problems encountered in the course of their employment, may not be paid from appropriated funds. 32 Comp. Gen. 15 (1952).

The annual dues an employee is required to pay for membership in a professional organization are not reimbursable to the employee, even though a savings would accrue to the Government from reduced subscriptions rates and notwithstanding the Government would benefit from the employee's development as a result of the membership. 52 Comp. Gen. 495 (1973).

The prohibition against payment of membership fees from appropriated funds does not prohibit the use of the Securities and Exchange Commission's expense appropriation for payment to a law library association of such charges as are necessary to secure access to its library facilities for the official use of the Commission's attorneys, even though such charges take the form of stock purchases and membership assessments. 19 Comp. Gen. 937 (1940).

Agency membership

The prohibition against payment of appropriated funds for the membership fees or dues of any "officer or employee" in any private association does not prohibit the use of Veterans Administration appropriations for payment of the fees for membership of its facilities, as such, in the American Hospital Association, where the prime purpose is to benefit the institution rather than to enable officers and staff members to obtain membership at lower rates or other personal benefits. 24 Comp. Gen. 814 (1945).

The association membership fee payment prohibition does not preclude procurement of membership for the benefit of the Government. The Office of Technical Assessment, Department of Commerce may procure membership in the American Management Association if it is in the interest of the Government and memberships are acquired in the name of the Government and not in the name of, or for the individual benefit of, officers or employees. 33 Comp. Gen. 126 (1953).

While 5 U.S.C. § 5946 prohibits the payment of membership fees of employees in professional associations, notwithstanding such membership would be of primary benefit to the agency rather than the employee, there is no objection to the use of funds for the payment of membership fees in the name of the agency, if the expenditure is justified as necessary to carry out the purposes of the agency's appropriation. 53 Comp. Gen. 429 (1973).

Attendance at meetings

The prohibition against the use of appropriated funds for attendance at meetings, except for expenses incident to the giving or acquiring of instruction or information, does not prohibit the payment of fees for attendance of Department of Agriculture Extension Service employees at a "work conference" (a meeting designed to instruct and inform employees on methods of more efficiently performing the work of the cooperative extension program authorized by law), if it is administratively determined that the expenses of attendance are necessary to further the program. 29 Comp. Gen. 49 (1949).

CHAPTER 5

PAYROLL DEDUCTIONS, DEBT LIQUIDATION, WAIVER OF ERRONEOUS PAYMENTS OF COMPENSATION

SUBCHAPTER I--PAYROLL DEDUCTIONS AND WITHHOLDING

A. GENERALLY

Statutory provisions governing withholding of pay are found at 5 U.S.C. §§ 5511-5520. CSC has prescribed regulations providing for allotments and assignments, pursuant to 5 U.S.C. § 5525, at 5 C.F.R. §§ 550.301-550.371. For general guidance concerning the forms and procedures used in preparing payrolls, see part III of the Department of the Treasury Fiscal Requirements Manual.

B. TAXES

Federal and state income taxes

Generally

26 U.S.C. §§ 3402(a) and 3402(i) require each Federal agency to deduct and withhold Federal income taxes from wages, including incentive and meritorious award payments, paid to any officer or employee.

Backpay

Although GAO withholds Federal income tax in settlement of claims for backpay under the authority of 31 U.S.C. § 71, Federal income tax may not be withheld in settlement of claims for backpay based on final judgments of the Court of Claims, unless so directed by the court, since certified judgments must be for payment in accordance with the terms of the judgment. B-124720, B-129346, August 1, 1961.

Overtime

Employee successfully claimed overtime for work performed over period of several years. Although employee was eligible for income-averaging under 26 U.S.C. §§ 1301 et seq., Federal income tax must be withheld from overtime compensation determined to be due, since withholding of Federal income tax on all remuneration for services performed by an employee for his employer is required and any adjustments resulting from excess withholding are to be made on

employee's income tax return for the year in which the withholding is made. B-169375, June 25, 1970.

Relocation expenses

Generally--An allowance or reimbursement to an employee for moving expenses paid by the employee is not subject to tax withholding if (and to the extent that) the employee may, for income tax purposes, deduct the moving expenses from his gross income. Those moving expenses which may be deducted by the employee (subject to certain conditions), and for which the corresponding allowance or reimbursement is not subject to tax withholding, are reasonable expenses of traveling (including meals and lodging), and of moving household goods and personal effects, from the former residence to the new residence; of traveling (including meals and lodging) for the purpose of searching for a new residence; of meals and lodging while occupying temporary quarters; or constituting qualified residence sale, purchase, or lease expenses. Allowances or reimbursements to employees which exceed the applicable aggregate amounts allowable as deductions, along with reimbursements for any other moving expenses, are subject to tax withholding. See Treasury Fiscal Requirements Manual, section 3-4080.10 (July 1, 1976) and B-176726, January 19, 1973.

Newly hired employees--Upon release from active military duty at Washington, D.C., employee accepted a position with the Veterans Administration at Los Angeles, California. Shipment of household goods to first duty station was authorized under 5 U.S.C. § 5723. Since amounts paid by employer for transporting household goods constitute "wages" for Federal income tax purposes, such taxes must be withheld, unless the employee is eligible to deduct such amounts from his gross income under 26 U.S.C. § 217. B-150723, April 30, 1963 and B-153699, March 30, 1964.

Transfer less than 50 miles--Employee, permanently transferred less than 50 miles from former duty station, questions deduction of $245.32 for Federal withholding tax from $1,248.48 allowed in settlement of his claim for relocation expenses. Deduction was proper since 26 U.S.C. § 217(c) treats relocation allowances for moves of less than 50 miles' distance as wages; therefore, entire amount paid was subject to tax withholding. B-180005, May 20, 1974.

State or territorial income tax

Authority to withhold

5 U.S.C. § 5517 and Executive Order No. 11968, dated January 31, 1977, provide for withholding state income taxes from the compensation of Federal employees if an agreement has been entered into between the Secretary of the Treasury and the proper official of the state.

District of Columbia taxes

Pursuant to 5 U.S.C. § 5516 (47 D.C. § Code 1586g) and Executive Order No. 11968, dated January 31, 1977, the Secretary of the Treasury and the Commissioners of the District of Columbia entered into an agreement for the withholding of the District of Columbia income taxes from the compensation of Federal employees.

Nonresident of state

Under the State Income Tax Withholding Act of July 17, 1952, the Maryland State income tax is required to be withheld from the compensation of a Federal employee who is regularly employed in Maryland, even though he is not a resident of that State. 35 Comp. Gen. 486 (1956).

Nonresident Federal employee who will not return to duty station in Philadelphia upon termination of sick leave status, at which time disability retirement becomes effective, is subject to Pennsylvania income tax imposed on Federal employees by agreement between Federal and state Governments, pursuant to 5 U.S.C. § 5517, and Executive Order No. 10407, for period of sick leave, July 19, 1972, until December 1973, during which time he will remain on agency rolls, since sick leave payments constitute wages for taxation purposes. Accordingly, withholding of Pennsylvania income tax is proper. 52 Comp. Gen. 538 (1973).

Lump-sum payments

Employee whose last duty station was in Pennsylvania, was paid lump-sum payment for accrued annual leave. Deduction for Pennsylvania income tax must be made from payment even though leave balance may include leave carried forward from agencies located in other states and irrespective of present residence of employees. 52 Comp. Gen. 139 (1972).

Severance Pay

Compensation of Federal employees subject to withholding of state income taxes includes severance pay pursuant to 5 U.S.C. § 5595 if paid to the former employee. Severance pay remaining unpaid upon the death of a former employee is not subject to such withholding upon payment to a survivor or survivors. See Treasury Fiscal Requirements Manual, section 3-5010.30 (July 1, 1976).

Fees

Voluntary salary allotments for state and District of Columbia income taxes by employees who are not subject to mandatory tax withholding may be permitted by regulation issued by CSC, provided that in accordance with 5 U.S.C. § 5525, the salary withholding is based upon the written request or authorization of the employee. While a fee or charge for the cost of withholding the tax may not be exacted from the state or District of Columbia, a charge against the employee may be, but is not required to be, made depending on the policy of the employing agency under 31 U.S.C. § 483a or on whether a uniform fee is imposed by Presidential action. 42 Comp. Gen. 663 (1963).

City income or employment taxes

5 U.S.C. § 5520 and Executive Order No. 11863, dated June 12, 1975, authorize the Secretary of the Treasury to enter into an agreement with the proper official of any eligible city for withholding city income or employment taxes from the compensation of Federal employees who are subject to the tax and whose regular place of Federal employment is within the city with which the agreement is made. Title 31, chapter II, subchapter A, part 215 of the Code of Federal Regulations governs the agreements between the Secretary of the Treasury and qualified cities. See Treasury Fiscal Requirements Manual, section 3-4510.10 (February 1976). Notwithstanding the fact that an employee of a Government activity physically located in New York City is not resident of New York City, city income tax must be withheld from his salary, since he is a resident of New York State and 5 U.S.C. § 5520 requires the United States to agree to withhold city income tax from salaries of employees who are residents of the state in which the city is located if the city requests the United States to do so. B-171878.07, December 5, 1974.

C. SOCIAL SECURITY TAX

Statutory requirements

26 U.S.C. §§ 3102 and 3121(a)(1) require each Federal agency to deduct and withhold FICA tax from wages paid to those employees covered by the Federal Insurance Contributions Act.

The Social Security Act, 42 U.S.C. § 410 defines "employment" for purposes of old-age and survivors benefits under title II of the Social Security Act as meaning any service performed after 1950, exclusive of certain specified types of service. Subsection (a)(6)(A) of section 410 excludes service by employees of the United States or an instrumentality of the United States covered by a retirement system established by a law of the United States. Subsections (a)(6)(B) and (C) specify several types of service by Government employees which are excluded from the term "employment," such as employees in the legislative branch and others enumerated therein. Thus, it can be said that the Social Security Act, as amended, covers employees of the Government who are not subject to another retirement act, such as the Civil Service Retirement Act, and who are not specifically excluded by the provisions of the said subsections (a)(6)(B) and (C).

Services excluded from coverage

Service in the employ of the Government Printing Office, and service by the indexers and catalogers of the Congressional Record, constitute service in the legislative branch of the Government, within the meaning of that term as used in Public Law 734, "Social Security Act Amendments of 1950" and therefore such service is specifically excluded from the definition of "employment" contained in that law. B-100991, March 9, 1951.

Appropriation availability for contributions

Statutory provision

Appropriations and funds made available by any act for salaries, wages, or compensation shall also be available for payment of tax imposed on instrumentalities of the United States, on an employer, by the provisions of the Social Security Act Amendments of 1950. 31 U.S.C. § 699a.

National Guard civilian employees

The Army and Air Force National Guard appropriations available for the compensation of National Guard civilian

employees are available for payment of the employer's contribution to the Social Security Old-Age and Survivors Insurance Fund--as part of the compensation of such employees--provided appropriate regulations are promulgated by the Secretaries concerned and the total compensation of employees including such payments does not exceed any limits which otherwise may be imposed by law or regulation. 33 Comp. Gen. 128 (1953).

D. RETIREMENT

Statutory provisions

Coverage

The Civil Service Retirement Act--5 U.S.C. §§ 8331-8348--automatically covers all civilian officers and employees in or under the Federal Government except those specifically excluded by law or by the Civil Service Commission when the tenure of office or employment is temporary or intermittent. 5 U.S.C. § 8331(1).

Authority for and amount of deduction

5 U.S.C. § 8334 provides that there shall be withheld from each employee's basic salary an amount equal to 7 percent, and from each employee designatd as a law enforcement officer or firefighter, an amount equal to 7.5 percent.

Disposition of contributions to the civil service retirement fund

The amounts deducted from basic salary of employees, together with an equal sum contributed from appropriated funds, are for deposit in accordance with procedures prescribed by the Comptroller General in the United States Treasury. 5 U.S.C. § 8334.

Payments excluded from basic salary

Bonuses, allowances, overtime pay, military pay or salary, and pay or compensation in addition to the base pay of the position fixed by law or regulation are excluded from basic salary. 5 U.S.C. § 8331(3).

Creditable service

With certain exceptions credit is given for both military or civilian service in the executive, judicial, and legislative branches of the Federal Government and in the District of Columbia government. See 5 U.S.C. § 8332 and 5 C.F.R. §§ 831.101 et seq.

United States General Accounting Office responsibility

The responsibility of the United States General Accounting Office is to provide procedures so that the amounts deducted for retirement shall be deposited in the Civil Service Retirement and Disability Fund. 5 U.S.C. § 8334(a); 11 Comp. Gen. 464 (1932); and 18 id. 955 (1939). See also 6 GAO Manual for the Guidance of Federal Agencies (1965 ed.).

Salary computation for deductions

Period of suspension or removal

Retirement deductions which are required by 5 U.S.C. § 8334 are to be computed on the basis of the gross compensation due an employee under 5 U.S.C. § 5596(b) for a period of erroneous suspension or removal, prior to deducting, pursuant to the latter act, any amounts which may have been earned by the employee through other employment during such period. 28 Comp. Gen. 563 (1949).

Position conversion

The hourly day rate saved to an employee, whose position has been converted from classified schedule to prevailing wage system, constitutes the basic pay for that wage board shift, and the night rate constitutes basic compensation for the night shift; hence, payroll deductions for retirement and insurance are to be based on the employee's aggregate compensation, excluding overtime, for the employee's regularly scheduled tours of duty for each pay period. 36 Comp. Gen. 37 (1956).

Leave effect

During 5-day week, employee worked 4 10-hour days and was in leave-without-pay status on fifth day. Deduction for retirement should be made at basic rate of pay for 40 hours worked, since time in excess of 8 hours per day should

be substituted for time lost during same workweek in leave-without-pay status to the extent of applying the straight time portion of pay for overtime hours against the leave without pay. 42 Comp. Gen. 429 (1963).

Night work

For wage board employee detailed from day to night shift, "basic salary" defined by Civil Service Retirement Act, 5 U.S.C. § 8331(3), from which percentage is deducted for retirement purposes is straight time night rate prescribed for regular 40-hour workweek, exclusive of overtime. Therefore, employee who receives, for 2 10-hour days he worked, 8 hours at night rate and 2 hours at overtime night rate for each day, followed by 2 days of annual leave and 1 day of leave without pay, should have his retirement deductions based on total of 36 hours straight time: 20 at night rate, exclusive of overtime, and 16 hours at day rate for annual leave. 42 Comp. Gen. 429 (1963).

Overtime effect

Wage board employees who have a 40-hour workweek but uncommon daily tours of duty (for example, 4 10-hour days) and who receive overtime pay for work in excess of 8 hours a day pursuant to 5 U.S.C. § 5544, may have only the basic hourly wage rate for the full 40 hours, excluding the additional half-pay, considered for retirement deductions and for determining the amount of group life insurance to which the employees are entitled, there being no indication in the legislative history of the Work Hours Act of 1962 to change the basic 40-hour workweek concept established under other laws. 42 Comp. Gen. 195 (1962).

Deductions from retirement fund for debt liquidation

Generally

5 U.S.C. § 5511 provides that if an employee indebted to the United States is removed for cause, the pay accruing to him shall be applied in whole or in part to the satisfaction of any claim or indebtedness due the United States. Further, it is well settled that the final salary, retirement deductions, and other funds due employees from the Government may be setoff against debts due the Government by employees upon their separation from service.

39 Comp. Gen. 203 (1959) and B-178595, June 27, 1973. Moreover, although 5 U.S.C. § 8346(a) provides that civil service retirement annuities are not subject to execution, levy, attachment, garnishment, or other legal process, such annuities are subject to setoff for debts due the United States and for counterclaims filed by the Government. 39 Comp. Gen. 203 (1959) and B-177789, January 26, 1973.

Effect of dismissal of criminal charges

Former postal employee who was held responsible for theft of registered mail resulting in a Government loss of $11,916.43, which has been reduced to $9,574.13 by recovery on blanket bond and identical funds and by setoff of final salary and retirement annuity, is not relieved of liability merely because criminal charges against him have been dismissed, since such action has no effect on his civil liability for losses sustained by Government. The United States as creditor may withhold amounts payable to debtor from Civil Service Retirement and Disability Fund. B-150407, December 17, 1962.

Co-obligors

Employee was co-obligor with former husband on debt in the amount of $1,392.99, owed to United States. Upon separation from employment, employee's civil service retirement credit of $918.09 was properly setoff against debt since GAO has the duty to exercise its common law right of setoff where a person is both a debtor and creditor of the Government. B-156650, May 6, 1965.

Relocation expenses

Setoff against final salary, retirement fund, etc., of full amount advanced for relocation expenses to transferred employee who, through administrative error, was not required to sign service agreement and resigned after 6 months, is required under 5 U.S.C. § 5705 and Federal Travel Regulations (FPMR 101-7) para. 1-10.3c(3) (May 1973). See B-178595, June 27, 1973 and B-165995, April 1, 1969.

Nonappropriated fund activity

Employee was removed for cause for involvement in robbery of officers club, a nonappropriated fund activity. Since

contracts of such activity do not bind the Government, debts due such activity are not debts due the United States and no authority exists to setoff such debts against unpaid compensation due former employee nor against amount to employee's credit in retirement fund. B-170400, September 21, 1970 and B-170400, February 2, 1971.

E. FEDERAL EMPLOYEES GROUP LIFE INSURANCE

Statutory authority

Appointive or elective officers or employees in or under the executive, judicial, or legislative branch of the Government, and of the municipal government of the District of Columbia are eligible for coverage under regulations prescribed by CSC. 5 U.S.C. § 8701. For employees excluded from the operation of the act, see chapter 870, subchapter 2, of the Federal Personnel Manual and 5 C.F.R. § 870.201.

Premium contributions

Where retired Federal employee elected to continue his optional life insurance coverage but, through administratiave error, premiums were not deducted, later collection of premium is proper since employee continued to be covered by insurance and 5 U.S.C. § 8714a(d) requires collection of premium during period of coverage. See 34 Comp. Gen. 257 (1954).

F. FEDERAL EMPLOYEES HEALTH BENEFITS

Generally

See 5 U.S.C. §§ 8901 et seq.

Election of coverage

Any employee, may at such time, in such manner, and under such conditions of eligibility as CSC may by regulation prescribe, elect to enroll in an approved health benefits plan provided by the act either as an individual or for self and family. 5 U.S.C. § 8905.

Withholding

The act authorizes withholding from the salary of an employee the amount specified by CSC as the individual's contribution. When an employee elects such coverage the Government also

contributes an amount specified by CSC. See 6 GAO Manual for the Guidance of Federal Agencies 16.3 and 20. (1965 ed.)

Employee organization health plans

Since only those deductions from the salaries of Government personnel which are specifically authorized by law may be withheld through automatic payroll deductions, the authority in 5 U.S.C. § 8906, for withholding the employees' share of the cost of health benefits, including those employee organization health plans which are approved by CSC under 5 U.S.C. § 8903(3), may not be regarded as authority for permitting payroll deductions for benefits other than health, such as life insurance, income protection, automobile insurance, etc., which are offered by various employee organizations in package plans together with health benefits. 39 Comp. Gen. 573 (1960).

G. SAVINGS BONDS

Generally

Executive Order No. 9135, dated April 16, 1942, established the Voluntary Payroll Savings Plan for purchase of United States savings bonds by Federal employees by means of payroll allotments. Treasury Department Circular 530 contains Treasury regulations covering United States savings bonds. Department Circulars 653 and 905 provide information on, respectively, series E and series H bonds. See generally Treasury Fiscal Requirements Manual sections 3-6010 et seq.

Appropriation chargeable and disposition of deductions

The total of deductions for this purpose is a proper charge to the appropriation from which the salary is paid and is to be credited to "special deposits".

Payroll deductions

Amount deducted on each payroll voucher will be either the purchase price of a bond of specified denomination or a fractional part of such purchase price.

H. ALLOTMENTS AND ASSIGNMENTS OF COMPENSATION

Generally

5 U.S.C. §§ 5525, 5527 authorizes the head of each department to establish procedures to permit each civilian employee of

the department to make allotments and assignments of amounts out of his compensation for such purposes as the head of the department deems appropriate, subject to the regulatory authority given the President which has been delegated to CSC by section 2(b) of Executive Order No. 10982 of December 25, 1961. Also, see 6 GAO Manual for the Guidance of Federal Agencies 18.

CSC has prescribed regulations governing allotments at 5 C.F.R. §§ 550.301 et seq.

Union dues

Propriety of collection

A regulation permitting the collection of union dues by payroll deduction at the request of employees would be proper under 5 U.S.C. §§ 5525 and 5527, which permit the allotment and assignment of compensation for such purposes deemed appropriate by the department head, subject to regulations issued by the President. 42 Comp. Gen. 342 (1963).

Service charge

The imposition of a service charge against Government employee unions for collection of union dues by payroll deduction is consistent with 31 U.S.C. § 438a, which not only authorizes the heads of Federal agencies to prescribe fees for public services but directs that such fees shall be as uniform as practicable. Therefore, if the President determines that a uniform fee should be charged, such a determination would be within the purpose of that section. 42 Comp. Gen. 342 (1963). See also 5 C.F.R. § 550.324.

Erroneous overpayment to union--arbitration award

Agency erroneously deducted union dues from employee's pay and paid them over to union but, upon discovering error, reimbursed employee for erroneous deduction and deducted amount from current union collections. When union filed grievance, labor relations arbitrator held that Government could not deduct prior overpayments to union from current payment of dues and ordered Government to make full payment. Such overpayment to union may not be made, inasmuch as no authority exists to make payments in excess of amount actually due, notwithstanding arbitration award. Deduction of overpayment from current payment of union dues was proper. 54 Comp. Gen. 921 (1975).

Allotment revocation

Discontinuation of payroll allotment for membership dues in favor of employee organizations is subject to 5 U.S.C. § 5525 as implemented by civil service regulations at 5 C.F.R. § 550.322. Pursuant to that regulation, allotments may be revoked only twice annually. In order to be effective, revocation must be received in appropriate payroll office by the fixed date. Thus, where revocations were received in payroll office 10 days after deadline, employees had no basis to question continuance of allotment until next 6-month revocation date. B-166914, June 6, 1969.

Employee who has resigned union membership during 6-month revocation period must wait until next biannual revocation date to effect revocation of allotment, despite fact of termination of membership. Whether employee has claim against employee organization for dues paid subsequent to date he resigned his membership is a matter for resolution between the employee and the organization. 49 Comp. Gen. 97 (1969).

State income tax where withholding not mandatory

Voluntary salary allotments for state and District of Columbia income taxes by employees who are not subject to mandatory tax withholding may be permitted by regulation issued by CSC, provided that in accordance with 5 U.S.C. § 5525, the salary withholding is based upon the written request or authorization of the employee. While a fee or charge for the cost of withholding the tax may not be exacted from the state or District of Columbia, a charge against the employee may be, but is not required to be, made depending on the policy of the employing agency under 31 U.S.C. § 483a or on whether a uniform fee is imposed by Presidential action. 42 Comp. Gen. 663 (1963).

Banking-savings facilities for deposit

Financial organizations

The option for Federal civilian employees and military personnel to be paid by credit to accounts in financial organizations is made available pursuant to 31 U.S.C. § 492. Regulations governing these payments appear in Treasury Department Circular No. 1076 (second revision),

dated October 23, 1973. (See 3 Treasury Fiscal Requirements Manual sections 3-9010 et seq.)

Savings accounts

The option for an allotment of pay for savings to Federal civilian employees, in the form of a recurring payroll deduction, is made available pursuant to 31 U.S.C. § 492. Regulations governing these payments appear in Treasury Department Circular No. 1076 (second revision), dated October 23, 1973. (See also Treasury Fiscal Requirements Manual sections 3.9010 et seq.)

Any Federal civilian employee whose place of employment is within the United States (the 50 states and the District of Columbia) may authorize an allotment of pay for savings, provided (1) the allotment is a fixed amount, in whole dollars (no cents) to be deducted from payroll on a recurring basis, (2) no more than two such allotments per employee shall be in effect at the same time, and (3) savings allotments are not available to the employee under 5 U.S.C. § 5525.

For more detailed information concerning operational policies and procedures, see Treasury Fiscal Requirements Manual, sections 3-9010 et seq.

Charity, health funds, etc.

See 5 C.F.R. §§ 550.351-353.

Overseas or extended temporary duty

See 5 C.F.R. § 550.371.

I. GOVERNMENT-FURNISHED QUARTERS

Generally

The head of an agency may provide an employee stationed in the United States with quarters or facilities, when conditions of employment or of availability of quarters warrant such action. 5 U.S.C. § 5911.

Necessity to accept

In enacting 5 U.S.C. § 5911, Congress clearly intended that civilian employees on temporary duty should not be required

to occupy Government-furnished quarters, whether furnished with or without charge, unless the head of the agency determines that the necessary service cannot be rendered or that property of the United States cannot otherwise be adequately protected. 44 Comp. Gen. 626, (1965). See also 5 U.S.C. 5911(e).

Proportionate costs

Meals

When an employee on official business away from his headquarters is required to purchase a meal he would otherwise obtain from the Government in kind, it is proper to reduce the deduction from his compensation by the cost of the individual meal representing the proportionate part of the value of the subsistence furnished in kind as a condition of the contract of employment. 21 Comp. Gen. 919 (1942).

Absences from duty

No deduction is required to be made from compensation paid pursuant to 5 U.S.C. § 5596 during a period of erroneous removal or suspension. Also, deductions are not required during period of absence on official business or military leave, provided quarters normally occupied are vacated for other occupancy. 29 Comp. Gen. 153 (1949).

Failure to consider value of quarters

The practice of the Canal Zone Government in furnishing living quarters rent free to the district judge, district attorney, and the marshal, whose salaries have been fixed without regard to the free quarters, is contrary to laws which prohibit the receipt of compensation or perquisites beyond the salaries allowed by statute, thus making mandatory the application of Budget Circular A-45 which establishes rental rates for quarters supplied to Federal employees. 34 Comp. Gen. 445 (1955).

J. LIABILITY FOR GOVERNMENT PROPERTY LOST OR DAMAGED

Administrative regulations

When the head of a Federal department or establishment--in order to protect the interests of the United States--has issued regulations pursuant to law which provide for the charging of Government losses occurring under certain circumstances to an employee found to be responsible therefor, such regulations

may be regarded as a part of the contract of employment. 25 Comp. Gen. 299 (1945). In the absence, however, of a regulation which would impose liability on individuals, there is no authority for the assessment of charges against employees for losses sustained by the Government as a result of neglect or errors in judgment. The usual means of disciplining for errors is by adjustment of efficiency rating or by demotion. 25 Comp. Gen. 299, supra and 52 Comp. Gen. 964, 967 (1973).

Nonavailability of retirement fund

There is no authority to withhold any part of the salary deductions to the credit of an employee in the retirement fund to cover a pecuniary loss sustained by the Government as a result of error in judgment or neglect of duty on his part--whether or not a prima facie case of liability be established--in the absence of specific administrative regulations issued pursuant to law providing for the assessment of charges against employees under such circumstances. 25 Comp. Gen. 299 (1945).

SUBCHAPTER II--DEBT LIQUIDATION

A. GENERALLY

The current compensation or pay (as distinguished from the final compensation or pay) due a civilian employee of the Government or a member of the armed forces may not be withheld without his consent in the absence of specific statutory authority for such action. 29 Comp. Gen. 99 (1949).

B. ACCOUNTABLE OFFICERS

Liability and debt collection

No money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the Treasury all sums for which he may be liable. 5 U.S.C. § 5512. The United States General Accounting Office cannot authorize an administrative department to withhold from application the mandatory provisions of 5 U.S.C. § 5512. 19 Comp. Gen. 312 (1939).

5 U.S.C. § 5512 does not apply to an ordinary debtor. It applies only to accountable officers, i.e., those accountable to the United States for public funds. 23 Comp. Gen. 555 (1944) and 37 id. 344 (1957). Its application is not limited to "contractors or disbursing officers," but applies to enlisted members and officers of the military services and civilian employees to whom public funds are duly entrusted and who fail to account for such monies satisfactorily. 42 Comp. Gen. 83 (1962).

Availability of Civil Service and Disability Retirement Fund

Under 5 U.S.C. § 5512, which prohibits payment to employees who are in arrears to the United States, the salary and the contributions the employee makes to the Civil Service Retirement and Disability Fund are available for setoff to satisfy the debt. 38 Comp. Gen. 731 (1959).

Availability of military retainer pay

The fact that an employee who is in arrears to the United States for Government funds obtained by fraudulent means receives compensation from two Government sources simultaneously--compensation as a civilian employee and retainer pay as a former Navy member transferred to the Fleet Reserve--does not preclude the withholding of both amounts under 5 U.S.C. § 5512, which

provides that "no money" shall be paid to a person who is in arrears to the United States for compensation. 38 Comp. Gen. 731 (1959). This rule is limited to accountable officers from whom arrearages are recoverable under 5 U.S.C. § 5512.

C. REMOVAL FOR CAUSE

Generally

Generally, the earned pay of an employee removed for cause may not be withheld or confiscated. 5 U.S.C. § 5511(a).

However, any pay, salary, or emoluments accruing to such an employee at the time of removal shall be applied in whole or in part to the satisfaction of any claim or indebtedness due the United States. 5 U.S.C. § 5511(b). Further, the rule set forth in 5 U.S.C. § 5511 is not applicable to a person who obtained employment through fraud. Because the contract of employment in such a case is void ab initio, such a person is at most a de facto employee and, although he may retain pay already received, he has no enforceable right to compensation not paid. 16 Comp. Gen. 775 (1937). Where, however, the employment is not procured by fraud, 5 U.S.C. § 5511 does not, in the absence of a claim or debt due the Government, provide authority for withholding compensation from an employee dismissed because of a misrepresentation such as would render his contract of employment voidable only. 16 Comp. Gen. 775, supra.

The rule in 5 U.S.C. § 5511 does not have the effect of rendering illegal an administrative action suspending an employee from duty without compensation or withholding compensation for nonworkdays for disciplinary reasons while the employee remains on the roll. 23 Comp. Gen. 541 (1944).

Commission of criminal offense

Employee not separated

Where Government employees were administratively suspended subsequent to their arrest as result of sworn complaint by FBI charging them with theft of Government property and final action has not been taken by Federal grand jury, salary checks issued but not delivered to employees may not be withheld, since current salary payments may not be withheld without consent of officers or employees concerned. However, if prompt action is taken to finally separate employees, amounts due could be setoff against

employees' debts under 5 U.S.C. § 5511. B-156356, April 13, 1965.

Military retainer pay

Retainer pay of fleet reservist arrested and indicted for mail theft while employed as career substitute postal carrier is not subject to administrative setoff under 5 U.S.C. § 5511, which authorizes involuntary withholding of civilian employee's salary upon removal for cause, general rule being that retired or retainer pay is not subject to administrative setoff without debtor's consent. Therefore, section 5511 is applicable only to final pay due former member in his civilian position. 47 Comp. Gen. 400 (1968).

Other acts

Although mail carrier was found criminally liable only for embezzlement of funds he received for delivery of COD package, Post Office determined that he embezzled $417.49 from collections on seven other parcels. Liquidation of indebtedness by applying $256.44 in accrued salary and terminal leave payments, and $161.05 in retirement fund was proper, since Post Office investigation established prima facie case of employee's liability. Burden of proof is on employee to overcome prima facie case, and under common law and 5 U.S.C. § 5511, Government has right to setoff against employee's funds in Government hands at time of employee's separation to liquidate his indebtness to United States. B-155160, November 9, 1964.

Political activities

Officer or employee removed from Government service because of political activities prohibited by Hatch Act, 5 U.S.C. § 7324, may not be compensated for services rendered prior to separation, by reason of 5 U.S.C. § 7325. Because there is no distinction between compensation and lump-sum leave payments, for Hatch Act purposes, lump-sum amounts for accrued leave may not be paid. 44 Comp. Gen. 781 (1965).

D. ERRONEOUS PAYMENTS

Authority to collect

Failure to report for administratively required duty

An employee who unjustifiably refuses to work on a regular workday is not entitled to compensation for that day and the agency is not required to charge the absence to annual leave. This rule is applicable to holidays on which an employee unjustifiably refuses to work. Agency, then, properly placed employee in leave-without-pay status and deducted compensation for failure to be available for duty on the holiday. 44 Comp. Gen. 274 (1964); and B-118417, August 26, 1969.

Refusal to work

Employee, after attending brief memorial services, including 30-minute film run during services between noon and 1 p.m., took 1/2-hour lunch period at desk, refusing to work, notwithstanding it was understood 1-hour period included usual lunch hour. After refusal to sign for 1 hour of annual leave, employee was charged with being absent from duty without permission for 1/2 hour and Department of Housing and Urban Development deducted $1.93 for time covered by refusal to work, designating it leave without pay. Fact that employee is at work site when refusal to work occurrs is not material. Deduction was not improper. B-170566, October 12, 1970.

Unauthorized reimbursement of relocation expenses

Unauthorized payment in the amount of $1,722.79 was made to employee as reimbursement of real estate expenses incurred incident to transfer. Absent any legal authority for waiver under 5 U.S.C. § 5584, and absent grounds for compromise or termination of collection action by agency under Federal Claims Collection Act, the overpayment constitutes a valid debt to the United States, of which recovery is required. The fact that the employee may have saved the Government money in the performance of past services does not provide a legal basis for waiver or compromise. B-180674, April 2, 1974 and B-180674, November 25, 1974.

Employee as third-party tortfeasor

Although 42 U.S.C. § 2651 gives to the United States the right to recover from third-party tortfeasors the cost of medical and hospital care furnished to injured persons, the pay of an employee may not be withheld under the act by reason of an administratively ascertained indebtedness. No authority to withhold pay exists under the act because it (1) is silent as to recovery from the current pay of tortfeasor, (2) prescribed a judicial remedy for determining liability, and (3) only authorized the Government to intervene or join in any action brought by the injured person, or independently to institute suit against the tortfeasor to enforce its right of subrogation or assignment, or both. The determination of the legal liability of the tortfeasor is a judicial and not an administrative function. Absent the essential means of the administrative tribunal established under 37 U.S.C. § 1007(c) arriving at a just and correct determination of liability between private individuals in personal injury cases which would guarantee due process of law, the pay of an employee may not be withheld. 44 Comp. Gen. 601 (1965).

Collection procedure

Installment deduction

5 U.S.C. § 5514 provides that under regulations established by the administrative agency concerned, collection of indebtedness by reason of erroneous payment may be made by deducting reasonable amounts, not to exceed two-thirds, from current pay accounts of indebted employees, but amount may be increased in event of retirement, resignation, or termination.

Insufficiency of final salary

The exercising of the common law right of the Government to apply moneys due a debtor from the Government in liquidation of a Government indebtedness is not dependent upon the debtor filing a claim for the moneys otherwise due, and, should the debtor's final salary as a former Government employee not be sufficient for complete liquidation, request should be made upon CSC for application of the amount to his credit in the retirement fund, in whole or in part as the case might be, in further liquidation of the indebtedness. 16 Comp. Gen. 962 (1937). See also 39 Comp. Gen. 203 (1959).

Erroneous payment by other than collecting agency

An employee was erroneously paid an amount which he was not entitled to and a charge was raised in the certifying officer's account. Since the employee was no longer employed by the agency, under 5 U.S.C. § 513, the executive presently employing him is required to withhold from his salary in order to recover the overpayment, irrespective of whether the employing agency has issued regulations pursuant to the act. 34 Comp. Gen. 170 (1954).

GAO informal inquiry

5 U.S.C. § 5513, which provides for the withholding of compensation from Government personnel for purposes of effecting reimbursement of indebtedness to the United States, applies only when a charge has been raised upon the statement of the account of the certifying officer involved. Therefore, the withholding of compensation as the result of the issuance of an informal inquiry by GAO auditors is premature and not legally authorized. 32 Comp. Gen. 101 (1952).

Bankruptcy procedings

Where the United States is both a debtor and creditor of an employee at the time he files a Chapter 13 (11 U.S.C. §§ 1001 et seq.) Wage Earner's Plan, absent a judicial determination to the contrary, the Government may assert its priority, pursuant to 31 U.S.C. § 191, in either a composition or time extention plan. Further, the Government may assert its claim by means of a setoff accomplished in accordance with 4 GAO Manual for the Guidance of Federal Agencies, section 79 (1967 ed.). The filing of a Wage Earner's Plan constitutes prima facie evidence of in solvency, for purposes of setoff.

E. NONAPPROPRIATED FUND ACTIVITY INDEBTEDNESS

Employee was removed for cause for involvement in robbery of officers club, a nonappropriated fund activity. Since contracts of such activities do not bind the Government, debts due such activities are not debts due the United States. Accordingly, no authority exists to setoff such debts against unpaid compensation due former employee. B-170400, September 21, 1970 and B-170400, February 2, 1971.

F. ALIMONY AND CHILD SUPPORT

The State of Washington sought to garnish, by means of an administrative garnishment order served on an Air Force finance officer, the pay of an Air Force civilian employee. The garnishment was sought under the authority of 42 U.S.C. § 659 to collect child support. That law, which is the only authority currently available that permits garnishment of the salary of Federal employees, is limited to the enforcement of legal process for payment of alimony and child support. The Air Force refused to effect the garnishment on the ground that an administrative order was not "legal process" within the meaning of the statute. In light of the purpose of the statute and lack of any limiting language, "legal process" is sufficiently broad to permit garnishment by an administrative order under Washington procedure. GAO did not object to Air Force payments under the State administrative order. 55 Comp. Gen. 517 (1975).

G. FEDERAL CLAIMS COLLECTION ACT OF 1966

Generally

Although the agencies are required to take aggressive action to collect the claims of the United States, 31 U.S.C. § 952(b) authorizes the head of an agency to compromise a claim or to terminate or suspend collection action when the amount in controversy does not exceed $20,000 and (1) no person liable on the debt has the present or prospective financial ability to pay any significant sum thereon or (2) the cost of collecting the claim is likely to exceed the amount of recovery. However, no compromise can be effected other than by the Attorney General with respect to a fraudulent or false claim, a claim based in whole or part on a violation of the antitrust laws, or where there is a misrepresentation on the part of the debtor or any other party having an interest in the claim. Regulations implementing the Act, are found at 4 C.F.R. §§ 101 et seq.

Liability of accountable officer affected by debtor's compromise

Compromise offer of $445.12 was accepted in full settlement of Government's claim against editor-publisher of newspaper which was underassessed $1,780.46 by Postmaster for postage for second-class transient mailings. Postmaster is relieved of accountability for uncollected amount of deficiency, inasmuch as 31 U.S.C. § 952(c) provides that no accountable officer

shall be liable for any amount paid or for value of property lost, damaged or destroyed where recovery may not be had because of compromise with person primarily responsible. B-170841, December 5, 1972.

Application of act to overpayments made to employees

Generally, 31 U.S.C. § 952 does not provide authority to compromise a claim or terminate collection of overpayments to persons currently employed by the Government, since such overpayments may be collected by setoff pursuant to 5 U.S.C. § 5514. See 4 C.F.R. § 102.5.

Effect of private relief bill

When a private relief bill has been introduced, a Department of the Army collection action of retired pay overpayments should not be suspended, absent specific request therefor by bill sponsor or appropriate congressional committee and administrative determination that circumstances warrant suspension pursuant to 4 C.F.R. § 104.2, since under 1966 Federal Claims Collection Act, jurisdiction over indebtedness not referred to GAO rests primarily with agency concerned. Although it is GAO policy generally to suspend collection action upon congressional request until current session of Congress considers of private relief bill, should no action then be taken on bill, reintroduction in future Congresses should not in itself form basis for continuing suspension, since Government's right of action against disbursing officers and their sureties must be preserved. B-168579, February 17, 1970.

SUBCHAPTER III--WAIVER OF ERRONEOUS PAYMENTS OF COMPENSATION

A. STATUTORY AUTHORITY

5 U.S.C. § 5584 provides authority for the waiver of a claim of the United States against a person which arises out of an erroneous payment, made on or after July 1, 1960, of pay and allowances other than travel and transportation allowances and relocation expenses payable under 5 U.S.C. § 5724a. This authority may be exercised by the Comptroller General of the United States, or by the head of an agency where the claim is less than $500 and is not the subject of an exception by the Comptroller General in the account of an accountable officer.

Waiver is permitted only when the collection of the claim would be against equity and good conscience, and not in the best interests of the United States. Waiver may not be made if there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining the waiver. Further, waiver may not be made if the application therefor is received more than 3 years after the erroneous payment was discovered.

Regulations implementing this provision and prescribing standards for waiver are found at 4 C.F.R. §§ 91 et seq.

B. PERSONS DEEMED EMPLOYEES

Generally

The term "employee" as used in 5 U.S.C. § 5584 means an individual defined as an "employee" in 5 U.S.C. § 2105. 50 Comp. Gen. 329 (1970).

Emergency appointments

The Department of Agriculture recruited "casual" firefighters on an emergency basis after a fire began. The firefighters were not issued a contract of employment or a formal appointment. Since the Department had authority to hire "casual" firefighters and because the persons so employed were performing a Federal function under Federal supervision, such firefighters are employees for purposes of 5 U.S.C. § 5584. B-152040, B-158422, May 27, 1969.

Aliens

Philippine citizens were employed by the United States in foreign areas under labor agreements negotiated with the Philippine government. Such persons are "employees" within the meaning of 5 U.S.C. § 5584 if properly appointed, performing a Federal function, and under Federal supervision. The fact that a person is not a United States citizen has no bearing on his status as an employee. 50 Comp. Gen. 329 (1970).

Civil service annuitant

Retired employee received overpayment of civil service annuity. Overpayment may not be waived because the payment was not made to the individual as an employee of an executive agency, but as an annuitant--a former employee who has qualified for an annuity under the retirement laws. B-165979, February 10, 1969.

C. WHAT CONSTITUTES COMPENSATION

Generally

For definitions of "pay" and "allowances," see 4 C.F.R. § 91.2.

Leave

Generally

Waiver of an erroneous payment for accumulated and accrued leave is appropriate when, as the result of a later adjustment to an employee's leave account, it is shown that the employee has taken leave in excess of that to which he was entitled, thereby creating an overpayment which may be subject to waiver. However, where an employee's leave account is adjusted to correct a previous error and the employee has sufficient leave to his credit to cover the adjustment, then there is no overpayment of pay and correction of the error is effected by reducing the employee's leave balance accordingly. B-176020, August 4, 1972.

Positive leave balance

Generally, there is no authority for waiving correction of administrative errors in connection with overaccumulations of leave balances. Thus, where an employee was

erroneously placed in an 8-hour rather than in a 6-hour leave-earning category, there is no basis to sustain employee's claim that since recomputation reduced yearly accrued leave by 25 percent, the leave used should be similarly reduced. Since employee had positive leave balance, he was entitled to receive the compensation which was paid to him while on leave. There is, therefore, no overpayment of pay which may be waived under 5 U.S.C. § 5584. B-171092, December 1, 1970.

Negative leave balance

Where, however, employee has a negative leave balance, he has received pay to which he is not entitled, because he was not entitled to the leave during which he received compensation. In such a situation, waiver may be appropriate. An employee was paid while being carried in annual and military leave status. When it was determined that he was not entitled to either annual or military leave, waiver was properly applied since the overpayment of pay resulted from an erroneous continuation of the employee in a pay status. B-169088, March 20, 1970.

Lump-sum payments

An employee who, upon retirement from the Foreign Service on August 31, 1968, received lump-sum payment for accrued annual leave with projected leave period ending March 3, 1969, and who on January 21, 1969, obtained reemployment with Passport Office, Department of State, was requested to refund that portion of the payment which represented the period between date of reemployment and expiration of lump-sum period (March 3, 1969). Notwithstanding his unawareness of refund requirement for unexpired portion of annual leave, employee is not entitled to waiver of liability since there was no erroneous payment because the lump-sum payment was proper when made. B-171325, February 2, 1971.

Advance sick leave

Civilian employee who was advanced 6 weeks sick leave but before outstanding sick leave was liquidated, submitted resignation and was required to reimburse Government for advance sick leave is not eligible for relief from indebtedness under 5 U.S.C. § 5584, since at time sick leave was granted there was no erroneous payment of pay, because salary payments made during period covered by advance

were legal and proper at that time. B-165989, February 5, 1969.

Travel, transportation, and relocation expenses

Dependent's travel

Transferred employee is not entitled to traveling expenses of children over 21 years of age at time of transfer, since Federal Travel Regulations define "dependent" as child under age 21 or incapable of support. Since the travel advance received by employee does not come within the definition of pay or allowances at 4 C.F.R. § 91.2, there can be no waiver of the overpayment of travel funds. B-170774, December 7, 1970.

Per diem

Employee was erroneously paid per diem after he had accomplished transfer to his new duty station. Overpayment of per diem may not be waived under 5 U.S.C. § 5584 because per diem relates to travel expenses, as distinguished from post differentials which are referred to in 5 U.S.C. § 5925 as additional pay. B-168655, May 27, 1970.

Household goods shipments

There is no authority under which liability to the United States for excess cost of shipping household goods may be waived. Waiver of certain claims of the United States Government against a person arising out of erroneous payment of pay or allowances to civilian employees authorized when collection action would be against equity and good conscience and not in best interest of the United States, but such authority does not extend to indebtedness resulting from payment of travel and transportation expenses and allowances and relocation expenses payable under 5 U.S.C. § 5724a. B-181631, October 9, 1974.

Equipment maintenance

Although rural postal route of post office employee was reduced in length, payments to employee for maintenance of his vehicle were not correspondingly reduced. This overpayment for equipment maintenance may not be waived because it is not considered pay within the meaning of 5 U.S.C. § 5584. B-171935, May 13, 1971.

Refund of civil service retirement deductions

While he was employed by Government, deductions from employee's pay for retirement had been overcertified, so that less was in fact deducted than was credited to his account in the retirement fund. Upon separation, employee was paid amount reflected on his account. Overpayment may not be waived because erroneous payment from CSC represented refund of retirement deductions, not erroneous payment of pay. B-165979, February 10, 1969.

Military retired pay

Retired Marine Corps officer was overpaid retired pay in the amount of $4,080.29, resulting from improper advancement on retired list. Although the officer is presently employed by the Government in a civilian capacity, waiver of the overpayment may not be made under 5 U.S.C. § 5584 because the overpayment did not arise from his civilian service but resulted from retired pay received as a retired member of the uniformed services. B-165983, March 11, 1969.

D. EFFECT OF EMPLOYEE'S FAULT

Generally

In order for erroneous overpayments to be the proper subject of a waiver under 5 U.S.C. § 5584, there must be no fraud, misrepresentation, lack of good faith, or fault on the part of the employee or any other interested party. Therefore, if it is determined that a reasonable man, under the circumstances involved, would have made inquiry as to the correctness of payment but the employee did not, then the employee may not be said to be free from fault, and the claim against him should not be waived. B-165663, June 11, 1969.

In determining whether waiver is proper in a given case, all the facts surrounding the overpayment should be considered. B-165557, January 14, 1969.

If an employee was aware or should have been aware of errors in pay resulting in overpayments, he cannot reasonably expect to retain such payments, but should expect the Government to seek recovery. Thus, where an employee received erroneous differential payments, duplicate salary payments, and erroneously issued U.S. Savings Bonds, he should have been aware of error; waiver therefore is not appropriate. B-165908, March 14, 1969.

Further, the conditions set forth in 4 C.F.R § 91.5 require more than freedom from fault--they impose on the employee an affirmative obligation to bring to the attention of the proper officials any unexplained increase in pay. B-171891, March 23, 1971. This obligation is not discharged by mere inquiry. See discussion, infra, "Effect of employee inquiry."

Imputed knowledge--employment history

Generally

An employee is not without fault when, by reason of his position, his responsibilities, his service longevity, his experience, or his prior participation in an activity, he is or should have been aware of an overpayment and should have taken corrective action.

Position

Employee prematurely received a within-grade step increase. Waiver of overpayment is not proper in view of employee's position as Postmaster. Because he had administrative responsibility for a large post office, he was charged with knowledge of laws and regulations governing pay administration. Since he should have recognized the error, employee was not without fault. B-168823, February 17, 1970.

However, in the case of a Post Office employee, who was prematurely granted a quality step increase, resulting in gross overpayment of $642.63, his gross pay was erratic during the period involved due to night differential, a general pay raise, and Sunday permium pay (corroborated by evidence of record and letter from Postmaster). Collection of erroneous payment of pay in gross amount of $642.63 was properly waived because detection of the relatively small error ($14.89 of gross pay and $7.66 of net pay) was made difficult by the wide fluctuations in his pay. The employee was not otherwise on notice of the error by reason of his position. B-172975, October 27, 1971.

Lengthy service history

Employee was overpaid by reason of premature granting of within-grade increase. Waiver of overpayment was properly denied in view of employee's lengthy service history (20 years), position of responsibility (GS-12), and receipt of payroll change slip indicating the nature of the action. B-174301, October 22, 1971.

Experience

Denial of overseas employee's request for waiver of indebtedness arising from erroneous continuation of post differential after return from Vietnam for home leave, temporary duty and reassignment, is sustained. Notwithstanding irregularities in checks and with infrequent earnings and leave statements while on home leave for some 2 months, it would seem employee would have received checks, papers, deposit receipts, and/or bank statements showing slight reductions in paychecks. Since the employee's wide experience at overseas positions imputes to him knowledge concerning post differentials, employee should have known that substantial reduction in paychecks, representing discontinuation of post differential, should have occurred. B-175584, June 1, 1972.

Participation in activity or plan

Health insurance premiums were erroneously not deducted from employee's salary for 18 months following his transfer. Although the employee received two Government-wide pay raises and a step increase during the period, he was not without fault, since he had been enrolled in the same health insurance plan for 7 years and reasonably could be expected to know the approximate amount of the deduction therefor. His failure to inquire as to the correctness of the deduction precludes waiver of the overpayment. B-176231, September 5, 1972 and B-176231, February 23, 1973.

Employee-initiated action

Postal employee demoted at his own request from level 6 ($7,862) to level 5 ($7,334), step 10 and erroneously paid salary of higher grade until corrective action was taken is denied request for waiver. Employee with 22 years of service should have realized demotion resulting in decrease of annual pay rate would have necessitated substantial reduction of gross biweekly pay with appropriate deductions, including additional Federal withholding tax surcharge and union dues. B-168506, January 21, 1970 and B-168506, March 20, 1970.

Constructive notice--receipt of documents

General rule

Where an employee has necessary records which, if reviewed, would indicate overpayment, and employee fails to review

such documents for accuracy or otherwise fails to take corrective action, he is not without fault and waiver will be denied. B-184480, May 20, 1976.

Employee on notice of error

Employee requested waiver of debt arising because of agency failure to terminate saved pay after end of 2-year salary retention period. Record showed that employee had notice of end of 2-year period, that he regularly received statements of leave and earnings, and that it was his custom to file such forms without reviewing for accuracy. Waiver was denied because employee was at fault for his failure to review for accuracy necessary records which, if reviewed, would have indicated error. B-184480, May 20, 1976.

Where a new employee was advised by receipt of Standard Form 50 that his initial salary will be $9,053 per annum, but he is paid and receives biweekly earnings statements indicating that his salary is $10,865, his failure to report the discrepancy constitutes fault which precludes waiver. B-180559, March 11, 1974. In another case, however, a newly hired employee was appointed to a position at GS-12, step 7, instead of GS-12, step 1, to which he was entitled. Since the employee did not receive documents indicating the error and since the employee had previously been appointed to a temporary position at GS-13, step 1, the employee had no notice of the erroneous appointment. Waiver of the overpayment was therefore proper. B-184182, July 22, 1976.

Waiver of debt resulting from erroneous failure of employing agency to deduct health plan premiums was properly denied where employee was aware of biweekly cost of insurance and leave and earnings statement furnished to him indicated failure to make deductions. B-165663, January 30, 1969.

Employee not on notice of error

As a result of administrative error in implementing Federal employees' pay raise of 1972, an employee was paid at a rate of GS-14, step 7, rather than GS-14, step 6, with an overpayment totaling $994.40. Overpayment was waived since erroneous increase was not so significant as to put employee on notice of error and there is no evidence that leave and earnings statements showed grade and step. Therefore, it cannot be said that receipt of those documents

constituted constructive notice of error. B-182188, January 22, 1975.

Employee was overpaid his basic pay, post differential, and living allowance. Because the employee's per annum salary rate did not appear on the pay and leave statements he received and because a general salary increase occurred at the time the error was made, the employee was not to be regarded as being on constructive notice of the overpayment and was entitled to waiver. B-177046, December 15, 1972.

A secretary employed by the American Embassy in Paris, France, requested waiver of $176 in overpayments resulting from an erroneous award of a periodic step increase in August 1965, before prescribed waiting period was completed. Since the employee was serving in a somewhat unusual, limited-indefinite-resident appointment, she was uncertain as to her entitlements. Also, her attempts to ascertain the extent of her entitlements from Department officials were unsuccessful. Moreover, overtime compensation at time of periodic step increase award tended to conceal the relatively small ($8.65) gross biweekly increase in compensation. It was concluded that employee was free from fault, and Government's claim for $716 in overpayments was waived. B-180454, October 18, 1974.

Documents other than those furnished by the Government

Upon raise in salary, employee was erroneously paid on the basis of 144 hours per pay period rather than 80 hours, plus permium pay. Even though paycheck was mailed directly to the employee's bank, since the employee received statements from his agency and his bank, he should have had notice of overpayment in excess of $100 per pay period credited to his bank account. Failure to notice error constituted fault, precluding waiver. B-173565, October 27, 1971.

Where, however, an employee's paychecks were deposited directly to his bank account in the United States at a time when he was on overseas assignments, in the absence of other fault waiver was proper since the employee was unable to make inquiry for the period of his absence. B-171033, November 25, 1970.

An employee continued to receive paychecks from former employing agency due to agency's failure to terminate pay after employee's transfer. Paychecks were mailed to employee's bank in Texas. Waiver was granted since employee was not at fault in failing to notify former employing agency until arrival at new duty station in Dominican Republic as mail was sent directly to Dominican Republic while employee attended training in Washington and he had no knowledge of overpayment at that time. B-184078, February 19, 1976.

Effect of employee's inquiry

Mere inquiry

Generally, when an employee is cognizant of an error which results in an overpayment to him, even though he may inform his employing agency of the error, in the absence of official notice that the payments were not in error, he cannot reasonably expect to retain excess payments without being obligated to make a refund thereof when the error is corrected. See B-171944, March 23, 1971; and B-172117, May 12, 1971.

A transferred employee informed his agency that his earnings statements indicated no payroll deductions had been made for insurance premiums. Waiver was properly denied because when corrections were not made after a reasonable time, the employee should have been aware that the error was more than a routine disruption of paperwork attending an interagency transfer and he should have actively pursued the matter further. B-172117, May 12, 1971.

An employee who received a temporary appointment that entailed a reduction in salary from his previous position informed his supervisor that he was continuing to be paid at the previous rate, but also accepted overpayments. Waiver was properly denied, since employee may not be said to be without fault when he knowingly accepted and continued to accept erroneous payments. B-171944, March 23, 1971. See also B-171487, January 26, 1971.

Reliance on agency assurance that payment is correct

Where, upon inquiry the employee is assured by the proper official that the payment received was not erroneous, and the employee reasonably relies on such assurance, waiver, in a proper case, may be granted. See B-182311, November 7, 1974 and B-186262, June 28, 1976.

An employee was erroneously advanced 1 year prior to eligibility, resulting in an overpayment. With reason to doubt propriety of payments made, employee had reportedly brought question of eligibility to attention of supervisor in charge of personnel matters, who stated that under such circumstances she would have verified correctness of payment. Since supervisor would have verified correctness of payment, reliance by employee on supervisor's assurance was reasonable and waiver was proper. B-171256, December 22, 1970. See also B-182311, November 7, 1974.

Subsequent official notice of incorrectness of payment

Although an employee's indebtedness may be waived based upon his reasonable reliance on information provided to him, amounts received after he was advised that payment was improper may not be retained, since employee may no longer rely on assurance of correctness. Thus, a wage grade employee receiving $7.45 per hour, including overseas differential while stationed on Guam, transferred to Norfolk, Virginia. His pay was incorrectly established at that rate on basis of information in travel orders, since his official personnel jacket had not arrived. When employee questioned rate of pay he was advised of "saved pay" provision, and relied on information provided him. Amount of $536.82 is waived since employee, who had no special knowledge of personnel law, reasonably relied on information provided him. However, $188.68 may not be waived since it represents amounts paid him after he was advised that he had been overpaid. B-186262, June 28, 1976.

E. EVIDENCE REQUIRED

An employee's request for waiver must be accompanied by clear and convincing proof that collection of his debt due the Government would be against equity and good conscience and not in the best interests of the United States. Thus, where an employee could not corroborate his unsupported statement that he received misinformation concerning an overpayment, and the record indicated that the employee had notice of the error, waiver of his indebtedness was properly denied. B-168738, February 24, 1970.

Denial of waiver was proper when an employee's statements that he was unaware of the error and that he did not understand his leave and earnings statements were refuted by evidence that

he had a working knowledge of the entries on his leave and earnings records. B-176889, December 21, 1972.

F. STATUTES OF LIMITATION

Generally

Requests for waiver must be filed within the 3-year period established by 5 U.S.C. § 5584(b) and 4 C.F.R. § 91.5. The date of discovery, as distinguished from the date of payment, is the controlling date in determining whether a request for waiver is timely filed. B-152040, B-158422, December 26, 1968.

Effect of agency inquiry

A "Pay and Allowance Inquiry" form (on which the date was altered), prepared by the Army Finance Center and sent to the member's disbursing officer which inquired as to the erroneous payment but upon which no action was taken by the Army for over 3 years to notify the member or collect the debt, may not be considered evidence that, as of the original date of such form, it was definitely determined by an appropriate official that an erroneous payment had been made, so as to preclude the member's request for waiver from consideration as not being timely filed within the 3-year period. 54 Comp. Gen. 133 (1974).

Application for refund

Employee has 2 years from date of waiver to file a claim for refund of amounts paid to the Government. 5 U.S.C. § 5584(c); 4 C.F.R. § 92.5 (1970); and B-165764, January 17, 1969.

G. DETERMINATION BY AGENCY OR BY GAO

Cases with aggregate overpayments not exceeding $500 are for determination by the employing agency; cases in amounts exceeding $500 are to be referred to GAO for disposition. 5 U.S.C. § 5584(a); 4 C.F.R. § 92.3; and B-156031, January 9, 1969.

H. APPEAL FROM ADMINISTRATIVE DETERMINATION

GAO will consider appeals from employees of an agency's action on their requests for waiver under 5 U.S.C. § 5584. Our Office has adopted the policy, however, of not reversing an agency's determination under such law except to the extent that the agency action is contrary to the statute or the implementing Standards for Waiver, 4 C.F.R. §§ 91 et seq. as interpreted

by our Office, or unless the agency's action is found to be arbitrary or capricious. B-167497, October 7, 1969.

I. VALIDATION EFFECT OF WAIVER

On erroneous payments

Amount of overpayment waived is deemed to be valid payment for all purposes. 5 U.S.C. § 5584(e).

An employee who was separated, received an overpayment of separation pay which was waived, and then was found to have suffered an unjustified personnel action which qualified individual for backpay equal to that which would have been received had unjustified action not occurred. Amount of separation pay which was waived must be considered as separation pay and deducted in determining amount of backpay due. B-185192, March 2, 1976.

Adjustment of accounts

Employee, overpaid salary during 1964-65 through administrative error without fault on his part, repaid net amount by payroll deductions, with retirement and life insurance deductions adjusted on payroll and restored to appropriations. Administrative office recommends that requested waiver be granted in gross amount and that refund be authorized to employee in net. In event waiver is granted in gross and refund authorized to employee in net, retirement and insurance deductions again should be transmitted to CSC since 5 U.S.C. § 5584(e) provides that "erroneous payment, collection of which is waived under this section, is deemed valid payment for all purposes." B-165808, May 8, 1969.

On erroneous personnel action

Waiver of overpayment only validates the payments waived; it does not validate erroneous personnel actions which gave rise to the payments. 49 Comp. Gen. 18 (1969) and B-179324, October 11, 1973.

Although upon waiver of the collection of an erroneous payment resulting from a promotion in violation of the Whitten Amendment, the payment is deemed validated, the erroneous personnel action that gave rise to the overpayment is not validated. Therefore, an employee whose erroneous promotion on June 2, 1968 from a GS-7 to a GS-9 position is corrected January 26, 1969, and who is properly promoted to GS-9 on March 23, 1969,

may only count the period of service from June 2, 1968, to January 26, 1969, for within-grade increase purposes in the same manner and to the same extent as if the premature promotion had never been processed, and the service for the period of the erroneous promotion may be counted as GS-7 service and not GS-9 service for step increase purposes. 49 Comp. Gen. 18 (1969).

J. EFFECT ON ACCOUNTS OF ACCOUNTABLE OFFICERS

In accordance with 5 U.S.C. § 5584, an accountable officer is entitled to full credit in his accounts for erroneous payments that are waived under the authority of the act, as the payments are deemed valid for all purposes. Therefore, a refund to an employee of the overpayment which he had repaid prior to waiver of the erroneous payment by an authorized official is regarded as a valid payment that may not be questioned in the accounts of a responsible certifying officer regardless of the fact that he may not regard the erroneous payment as having been appropriately waived. 49 Comp. Gen. 571 (1970).

K. SETOFF OF UNDERPAYMENTS

Debts due the employee from the United States may be setoff against the employee's indebtedness to the Government prior to consideration for waiver under 5 U.S.C. § 5584. The above rule was applied in the case of employees working the shift commencing 11 p.m. on 1 day and ending at 7 a.m. on the succeeding day. It had been the practice of the administration to credit the full 8 hours of service to the day on which the shift began rather than crediting 1 hour on the day the shift began and the other 7 hours to the day the shift ends. Thus the employee actually worked 47 hours in 1 week but only 33 hours in a preceding week and received straight time pay for 40 hours in each such week. Therefore, in an administrative workweek in which the employee actually worked more than 40 hours he became entitled to payment at overtime rates rather than straight time rates for the work in excess of 40 hours. For those weeks in which he worked 33 hours but received pay for 40 hours he was indebted to the United States for 7 hours pay at the straight time rate. We held that where the overtime payable exceeded the overpayment which would be collected by setoff no waiver should be granted. In a situation where straight time rates would exceed overtime rates there would appear to be adequate basis for waiving the indebtedness of the employee. B-168323, December 22, 1969.

L. OVERPAYMENT OF BACKPAY

An employee was prematurely retired from Government service and was awarded backpay pursuant to 5 U.S.C. § 5596 for the erroneous separation upon restoration to duty. The administrative office failed to deduct from the payment the amount attributable to the employee's outside employment. Employee is not entitled to waiver of the overpayment, since collection of the overpayment would not be against equity and good conscience as the employee was aware that he was responsible to repay the amount of his outside earnings during the period of erroneous separation, and collection would not be against the best interests of the United States. 52 Comp. Gen. 587 (1972).

M. WAIVER ENTITLEMENT AS BASIS FOR PAYMENT

Where an employee would be entitled to waiver of an overpayment of salary if such salary actually had been paid, that employee may be paid, even after separation, the reasonable value of the services he had rendered in good faith. This constitutes an extention of the de facto employment rule. See COMPENSATION, Chapter 2, for a discussion of the de facto rule.

Thus, a Navy enlisted member erroneously employed for temporary intermittent period of civilian service by the Council on Environmental Quality may nevertheless be paid, in view of the fact that if the civilian compensation had been paid, the member could retain the payment under the de facto rule or the erroneous payment could be waived under 5 U.S.C. § 5584. Since no payment occurred, it is appropriate to consider for purposes of the waiver statute that the administrative error and "overpayment" arose at time the member entered on duty with the understanding of a Government obligation to pay for his services. 52 Comp. Gen. 700 (1973).

Similarly, an Army officer, assigned as executive assistant to Ambassador at Large, retired from the Army in anticipation of a civilian appointment to that position. After retirement he continued to serve as executive assistant for 7 months before the Department of State determined he could not be appointed. Claimant was a de facto officer who served in good faith and without fraud. He may be paid the reasonable value of his services despite the lack of appointment, in view of the fact that if compensation had been paid, claimant could retain it under de facto rule or recovery could be waived under 5 U.S.C. § 5584. Although he was not paid, administrative error arose when claimant, in good faith, entered on duty with understanding

of Government obligation to pay for services. 55 Comp. Gen. 109 (1975).

Likewise, an employee of Bureau of Mines retired, effective December 31, 1974, after being advised by local personnel office that he had been appointed as a reemployed annuitant, effective January 1, 1975. Appointment was not effective until approved by Bureau of Mines headquarters on January 23, 1975. Claimant worked during January 1 through January 22, 1975, but was not paid. He may be paid the reasonable value of services despite lack of appointment, in view of the fact that had compensation been paid, collection thereof could have been waived under 5 U.S.C. § 5584. B-183850, March 18, 1976.

CHAPTER 6

RESTRICTIONS ON PAYMENT OF COMPENSATION BY UNITED STATES AND ON ACCEPTANCE OF COMPENSATION FROM SOURCES OTHER THAN FEDERAL FUNDS

SUBCHAPTER I--PAYMENT OF COMPENSATION BY THE UNITED STATES

A. MISCELLANEOUS STATUTORY PROVISIONS

Holding two positions

Where the holding of two offices is forbidden by a constitutional or statutory provision, the acceptance of the second office is regarded as a resignation or relinquishment of the first office. However, this rule is not applicable where a constitutional or statutory provision declares that persons holding one office shall be ineligible for another, the rule in this situation being that the prohibition incapacitates or disqualifies the incumbent of the first office from holding the second and that an attempted appointment to the second is without legal effect. 20 Comp. Gen. 288 (1940).

Office must be authorized

No payment for services shall be made from the Treasury to any person acting or assuming to act as an officer in the civil service or uniformed services in an office which is not authorized by existing law, unless such office is subsequently sanctioned by law. 5 U.S.C. 5502(a).

Extra Compensation

Authorization requirement

An employee or a member of a uniformed service whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty, unless specifically authorized by law and the appropriation therefor specifically states that it is for the additional pay or allowance. 5 U.S.C. § 5536.

Prohibition

The acceptance by Navy medical officers under a fee-splitting arrangement with civilian physicians of a

portion of the fees paid from "Medicare" funds under the Dependents' Medical Care Act of 1956, 10 U.S.C. §§ 1071 et seq., for medical services furnished dependents of Navy and Marine Corps members in civilian hospitals is the acceptance of additional compensation for the same work and duties which the medical officers were required to perform and for which they received pay as naval officers. Therefore, the acceptance of the additional compensation violates 5 U.S.C. § 5536, and the fact that the medicare funds are placed in the checking accounts of the civilian doctors before payment to the Navy medical officers does not change their character as Government funds nor cure the illegality of the fee-splitting arrangement. 41 Comp. Gen. 741 (1962).

The practice of the Canal Zone Government in furnishing living quarters rent free to the district judge, district attorney, and the marshal, whose salaries have been fixed without regard to the free quarters, is contrary to 5 U.S.C. § 5536, which prohibits the receipt of compensation or perquisites beyond the salaries allowed by statute. 34 Comp. Gen. 445 (1955).

Exceptions to prohibition

The prohibition of 5 U.S.C. § 5536 does not apply to the payment of compensation on a fee basis when the fees are payable under separate and distinct employments. It does not prohibit a person from holding and receiving the compensation of two distinct compatible offices, positions, or employments not otherwise forbidden, the pay of each of which is fixed by law or regulation. 4 Comp. Gen. 84 (1924) and 19 id. 751 (1940). For example, section 5536 does not prohibit the engagement of a full-time employee paid on a salary basis fixed by statute by another Government agency to render lecturing services which are separate and distinct from his full-time duties and do not interfere with the performance thereof, or the payment to him for the lecture services of fees fixed by regulation. 28 Comp. Gen. 459 (1949). The Dual Compensation Act, 5 U.S.C. §§ 5531 et seq., does not apply since a person serving on a fee basis does not hold an office to which compensation is attached and a fee does not constitute salary. 31 Comp. Gen. 566 (1952). Nor would the prohibition apply to the allowance for the expense of obtaining a notary commission. 36 Comp. Gen. 465 (1956).

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Concurrent military and civilian service

Incompatibility

A person who holds two incompatible offices is entitled to receive the salary of only one. It has been held that military service is incompatible with Federal civilian service. 18 Comp. Gen. 213 (1938) and 33 id. 368 (1954). There is no right to receive the compensation of a civilian position rather than military pay where a person is employed in a civilian office or position and also in active military service of the United States during the same period of time, as the obligation under the military service is paramount. 37 Comp. Gen. 255 (1957).

Members of the Reserves and National Guard

See 5 U.S.C. §§ 502, 2105(d), and 5534 which permit membership in a reserve component of the armed forces or in the National Guard concurrent with the holding of a civilian office.

Extra pay for details prohibited

Under 5 U.S.C. § 5534(a), an officer performing the duties of another office during a vacancy, as authorized by 5 U.S.C. §§ 3345, 3346, or 3347, is not by reason thereof entitled to any other compensation than that attached to his proper office. When through an administrative error a qualified employee is not paid the lawful salary attached to his position, retroactive correction of salary may be made. 30 Comp. Gen. 94 (1950).

Employment of aliens

Citizenship requirements

A Peruvian national who resigned from a position with the Social Security Administration in San Francisco, California, on March 31, 1959, after she learned that she was not a United States citizen, may be paid her final salary and lump-sum leave payment and need not refund any prior salary payments, if a determination is made that Peru is country allied with the United States in current defense effort. An employee as a Peruvian national is exempt from prohibition in

section 202, General Government Matters Appropriation Act, 1959, Public Law 85-468, June 25, 1968, against the payment of compensation to noncitizens employed within the continental United States. However, the responsibility for the determination rests with the department or agency whose appropriation is involved. B-139667, June 22, 1959.

The decision as to whether a Swedish national is a citizen of a country allied with the United States in a current defense effort, so as to authorize his appointment by the Smithsonian Institution without regard to prohibition in section 502 of Public Law 87-880, October 24, 1962, 76 Stat. 1227, 1228, against the use of appropriated funds for payment of compensation to a noncitizen of the United States, is matter of political nature for determination by the agency involved, with the possible assistance of the Department of State. GAO is not in a position to state whether employment is prohibited; however, an administrative determination predicated upon reasonable grounds will not be questioned in GAO audit. B-151064, March 25, 1963.

Voidable appointment

The employment of a noncitizen by the Department of the Army contrary to 5 C.F.R. § 338.101, which precludes permanent employment in the competitive service unless a person is a citizen or owes allegiance to the United States, does not make the appointment void ab initio, but voidable only, so that an employee who is separated pursuant to such regulation, when it is learned that no record could be found of the naturalization of her father as a United States citizen, is entitled to compensation and lump-sum leave earned prior to her separation. 37 Comp. Gen. 483 (1958).

Supreme Court review of prohibition

In Hampton v. Mow Sun Wang, 426 U.S. 88 (1976), the Supreme Court struck down the prohibition against hiring aliens found in 5 U.S.C. § 338.101. However, Executive Order 11935, September 2, 1976, 41 F.R. 37301, Civil Service Rule VIII (5 C.F.R. Part 7), was amended by adding section 7.4, which imposes a new citizenship requirement for appointment to competitive service positions.

Employment of attorneys for litigation

Under 5 U.S.C. § 3106 and 28 U.S.C. §§ 516, et seq., and in the absence of specific authority by the Congress for departments and establishments of the Government to conduct their own litigation in connection with the performance of the duties and responsibilities with which they are charged, it is the duty of the Attorney General, as chief law officer of the Government, to institute, prosecute, and defend actions on behalf of the United States in matters involving court proceedings and to defray the necessary expenses incident thereto from Department of Justice appropriations expressly provided therefor. 32 Comp. Gen. 118 (1952).

B. LIMITATION ON DUAL COMPENSATION FROM MORE THAN ONE CIVILIAN OFFICE

Generally

5 U.S.C. § 5533 prohibits an employee from receiving basic pay from more than one position for more than an aggregate of 40 hours in 1 week. For exceptions to the application of the above provision, see 5 U.S.C. § 5533(d).

Computation of 40-hour period

An employee who holds two intermittent positions with compensation at different hourly rates and works an aggregate of more than 40 hours plus overtime in one position during a week is not limited by 5 U.S.C. § 5533, which restricts to 40 the number of hours of basic compensation an employee may be paid in 1 week when he has more than one position to the compensation for the first 40 hours of work. The employee should be paid the maximum basic compensation benefits, regardless of the sequence in which the different rates are earned and regardless of overtime compensation. Since the restriction in section 5533 is on receipt of basic compensation and not upon overtime compensation, the employee does not have to receive compensation for all of the basic 40 hours in the one position to qualify for overtime in that position when in fact he worked more than 40 hours in such position. 44 Comp. Gen. 690 (1965).

Severance pay

An employee who was receiving severance pay was awarded two consulting contracts. He would not be considered to be receiving dual pay within the meaning of 5 U.S.C. § 5533(a). In order to receive serevance pay, an individual must be

separated, and an individual who has been separated does not hold a position with the United States during the period covered by his severance pay. B-178446, May 4, 1973.

Waiver of dual compensation payments

The 6-year time limitation for the waiver of dual compensation payments in 31 U.S.C. § 237a is to be counted from the last day the person draws the dual compensation payment, and, if the last date of any unbroken period of dual compensation payments is less than 6 years prior to the date the debt was reported to GAO for collection, no part of the claim for that unbroken period is waived, even though the period extends beyond 6 years, but if the last date of the dual compensation violation is more than 6 years prior to the date of reporting to GAO, the claim is waived. 43 Comp. Gen. 165 (1963).

C. WHITTEN AMENDMENT

Generally

The Whitten Amendment, 5 U.S.C. § 3103, note, provides that no person in any executive department or agency whose position is subject to the Classification Act of 1949, as amended, shall be promoted or transferred to a higher grade subject to such act without having served at least 1 year in the next lower grade. There are certain specific exemptions set out in the above-cited note. Also, CSC is given authority to grant exceptions to the 1-year limitation.

Failure to complete service-in-grade requirement

Withdrawal of appointment

Persons with prior service in positions subject to the Whitten Amendment who have not completed the required 1-year period in grade when reached for appointment to a higher grade position of attorney on a noncivil service register established by the Federal Trade Commission may not be appointed to the higher grade. 31 Comp. Gen. 205 (1951).

The appointment of veterans to higher grades under the Classification Act of 1949, from a noncivil service register established for attorneys by the Federal Trade Commission, prior to the completion of at least 1 year's service in the next lower grade is not authorized under

the provisions of the Whitten Amendment. Thus, offers of such appointments to veterans may be withdrawn without violating the provisions of the Veterans Preference Act of 1944. 31 Comp. Gen. 205 (1951).

Position reallocation upward

An employee whose position is reallocated upward pursuant to the Classification Act of 1949, although qualified to perform duties and carry out the responsibilities of the position, is not eligible to be immediately promoted to the higher grade because of the service-in-grade requirements of the Whitten Amendment. He may be regarded as remaining in status quo, as if on detail, until he is eligible for a higher grade, but he is not entitled to receive salary of the higher grade during such period. 34 Comp. Gen. 179 (1954).

When a competitive civil service position is regraded one grade higher--the lower grade position being abolished concurrently--and there is no other position in the normal line of promotion in the grade immediately below that of the position to be filled, the incumbent employee of the regraded position comes within the Whitten Amendment exception applicable to normal line promotions. Therefore, the employee does not have to serve a year in the lower graded position before being eligible to receive the salary of the regraded position. 40 Comp. Gen. 119 (1960).

Reappointment

An employee who resigned from a grade GS-11 position in August 1953, and who in October 1953 was appointed to a grade GS-14 position in a different agency, is indebted for the salary in excess of the GS-12 rate. The Whitten Amendment and CSC regulations prohibit promotion or transfer to higher grade without the employee having served at least 1 year in the next lower grade or until passage of 1 year from the date of separation. B-127494, August 3, 1956 and B-127494, February 10, 1961.

De facto rule not applicable

An employee who was promoted in violation of the minimum service requirements of the Whitten Amendment may not be regarded as in a de facto status in order to retain the additional compensation, and, notwithstanding the

absence of fault on the part of the employee, he is required to refund the excess salary received. The de facto rule may not be applied to nullify the effect of a statutory requirement. 36 Comp. Gen. 230 (1956).

Exceptions to service-in-grade requirement

Reemployment subsequent to reduction in force

An employee received a reduction-in-force notice and, prior to the expiration of the notice period, resigned. Upon reemployment by another agency, or transfer to a position in another agency in a lower grade, he may be restored to a position in the grade he held prior to receipt of said notice, before the expiration of the required 1-year period, without violating the promotion restrictions of of the Whitten Amendment. 31 Comp. Gen. 386 (1952).

Hardship cases

Action by CSC purporting to authorize or approve retroactive promotions contrary to the time-in-grade promotion restrictions of Whitten Amendment, under the authority of its hardship proviso, which authorizes CSC to grant exceptions to time-in-grade provisions in meritorious cases, may not be accepted by GAO as authorizing payment of increased compensation for any period prior to date of action by CSC. 33 Comp. Gen. 140 (1953) and 55 id. Gen. 539 (1975).

D. REEMPLOYMENT OF ANNUITANTS

Generally

5 U.S.C. § 3323(b) provides that retired annuitants under the Civil Service Retirement Act may be reemployed to serve at the will of the appointing officer. Pursuant to 5 U.S.C. § 8344, no deductions from their pay are required for further annuity credits, but the annuity allocable to the period of actual employment should be deducted, except from any payment for lump-sum leave. Annuitants who have served on a full-time basis for at least 1 year, in employment not excluded from coverage by 5 U.S.C. § 8331, shall have their annuity increased and computed in accordance with 5 U.S.C. § 8339. See also FPM Supp. 831-1, subchapter S-15.

Withholding annuity from compensation earned

Period of actual employment

The provision in 5 U.S.C. § 8344, requiring that the salary of a civil service annuitant who is reemployed be reduced in a sum equal to the retirement annuity allocable to the "period of actual employment," has reference to the actual period during which an annuitant holds the position in which he is reemployed, including all periods of leave without pay as well as all regular nonworkdays forming a part thereof. 28 Comp. Gen. 693 (1949).

Deduction of sum equal to retirement annuity

Mandatory requirement--5 U.S.C. § 8344 requires the deduction from the salary paid an annuitant for a position in which he is reemployed of "a sum equal to the retirement annuity allocable to the period of actual employment." The total annuity payable to a reemployed annuitant must be deducted from the annual salary for the position, and the remainder thereof represents the total salary authorized to be paid for a full year of employment, or the maximum rate of compensation payable for any period of less than 1 year. 28 Comp. Gen. 693 (1949) and B-165430, October 3, 1975.

A retired annuitant who is a member of the Technology Assessment Advisory Council is not exempt from the requirements of 5 U.S.C. § 8344(a) that an amount equal to the annuity allocable to a period of employment be deducted from the pay of an annuitant. That provision covers all positions not specifically exempted, and Congress has not exempted Council members. 53 Comp. Gen. 654 (1974).

Computation of annuity deduction

Reemployed upon per diem or hourly basis

The holding to the effect that the annuity payable to a reemployed annuitant must, in consonance with 5 U.S.C. § 8344, be deducted from the annual salary of the position to determine the total salary payable is applicable in cases where annuitants are reemployed upon a per diem or hourly basis. To determine the per diem or hourly rate properly payable, the rates of such pay should be converted to their

per annum equivalent, which equivalent rate should be reduced by the total annuity received, and the remainder thereof to a per diem or per hour rate. 28 Comp. Gen. 693 (1949). See also 32 Comp. Gen. 146 (1952).

WAE consultants and experts

The standard employment year for civil service annuitants who are reemployed as consultants or experts on a when-actually-employed basis is now established at 260 days for the purpose of computing the annual compensation from which the annuity is deducted and for converting the remainder to a per diem rate. 36 Comp. Gen. 186 (1956).

Additional compensation

Overtime

In view of the requirement in 5 U.S.C. § 8344 that a reemployed annuitant must have his per annum salary rate reduced by the annuity received to determine the total salary payable, overtime compensation may be paid upon the same basis and at the same rate authorized by law to be paid other employees who occupy similar positions. 28 Comp. Gen. 693 (1949). See also 32 Comp. Gen. 146 (1952). In computing the aggregate rate of pay for determining maximum limitation on premium pay under 5 U.S.C. § 5547, the regular salary rate of the position, without deduction of the annuity, is to be used. 54 Comp. Gen. 247 (1974).

Cost-of-living allowance

In computing the aggregate amount of compensation payable to an annuitant who is reemployed for duty outside the continental United States, for which additional compensation in the form of a cost-of-living allowance is payable, the reduction required to be made from the salary of said annuitant under 5 U.S.C. § 8344 is not to be regarded solely as a reduction in the basic rate of compensation for the position, but, rather, is to be regarded as a deduction from the amount of "compensation otherwise payable" to the annuitant, which includes basic compensation as well as addtional compensation. 29 Comp. Gen. 119 (1949).

Exceptions to deduction requirement

Lump-sum leave payment

In view of the provisions of 5 U.S.C. § 8344(a) and (b), the lump-sum leave payment due on the final separation of an employee who is immediately reemployed after mandatory retirement for age is not to be reduced by the amount of the retirement annuity. 36 Comp. Gen. 209 (1956).

Reemployment without regard to civil service laws

A retired civil service annuitant who is reemployed under an act which authorizes employment, "without regard to the civil service laws or regulations, the Classification Act of 1949 * * * or any other law or regulation relating to either employment or compensation," may have the reemployment conditions prescribed in 5 U.S.C. §§ 3323(b) and 8344, relating to annuity deductions, regarded as within the meaning of the above-quoted phrase and, therefore, the annuity deduction is not required to be made from the salary of the employee. 38 Comp. Gen. 850 (1959). The authority of the Lincoln Sesquicentennial Commission to procure "supplies, services and property" without regard to the laws and procedures applicable to Federal agencies does not have reference to personal services. Additionally, in the absence of any indication of any intent to invoke the above authority to exempt a civil service retired annuitant who was employed under contract by the Commission from the annuity deduction provisions in 5 U.S.C. §§ 3323(b) and 8344, together with the fact that such deductions were made, the employee's compensation must be regarded as subject to annuity deduction. 39 Comp. Gen. 681 (1960).

Independent contractor versus employer-employee relationship

5 U.S.C. § 8344(a) only applies when an employer-employee relationship exists. See COMPENSATION, Chapter 11, for a detailed discussion of this subject matter.

Retired judges

A retired territorial judge who receives an annuity under 28 U.S.C. § 373 is not precluded by 5 U.S.C. §§ 5532 and 5533

from accepting employment or an office with the United States, since the office of judge was relinquished upon his retirement and the annuity is not considered salary under the dual salary prohibition of 5 U.S.C. § 5533. However, annuity payments may not be made under 28 U.S.C. § 373 while the judge serves in a fixed salary position in the Federal service, because concurrent payments would be inconsistent with policies regarding dual payments of annuity and salary. Also, an appointment which provides for payment of travel and living expenses is not prohibited, since authorized travel expenses, which ordinarily would include living expenses, do not constitute salary or compensation. B-144579, February 1, 1961.

E. EMPLOYMENT OF RETIRED MEMBERS OF THE UNIFORMED SERVICES

For a detailed discussion of questions concerning concurrent military retired and civilian service pay and the need to reduce the military retirement pay, consult the General Accounting Office Military Pay Manual to be published in the near future.

SUBCHAPTER II--RESTRICTIONS ON ACCEPTANCE OF COMPENSATION FROM SOURCES OTHER THAN FEDERAL FUNDS

A. PROHIBITION AGAINST ACCEPTANCE

Generally

18 U.S.C. § 209(a) provides:

> "(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or
>
> "Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection--
>
> "Shall be fined not more than $5,000 or imprisoned not more than one year. or both."

Exception to prohibition

18 U.S.C. § 209 is not applicable to employees detailed to international organizations pursuant to 5 U.S.C. § 3343(d).

Contributions from private sources

Rockefeller Public Service Award

A Defense Department employee who receives a Rockefeller Public Service Award is prohibited by 18 U.S.C. § 209 from receiving any expenses (tuition, fees, professional materials, travel and living expenses) under the grant. However, the authority in the Defense Department appropriation acts for training civilian employees permits the payment of compensation and expenses, including

tuition, during the employee's period of study abroad. 36 Comp. Gen. 155 (1956). See also 35 Comp. Gen. 639 (1956).

Acceptance of travel expenses

Although the prohibition in 18 U.S.C. § 209 against supplementing the salary of Government employees for official services precludes direct payments of cash by private sources to employees of the National Bureau of Standards for travel expenses, the furnishing of services in kind (hotel accommodations, meals, and travel accommodations) by private sources may be accepted and utilized, providing the per diem payable by the Government to the employee is reduced on the basis of the services furnished. 36 Comp. Gen. 268 (1956) and 55 id. 1332 (1976).

Payment by air carrier for failure to provide reserved space

Where an air carrier becomes liable for liquidated damages for failure to provide a Government employee on official travel with confirmed reserved space, the Government is regarded as damaged by the carrier's default and, since the employee is precluded from accepting payments from private sources as a result of the performance of official duties, the payment should be made to the Government and deposited into miscellaneous receipts. 41 Comp. Gen. 806 (1962).

B. EMOLUMENTS FROM FOREIGN GOVERNMENTS

Annuity payments as damages for injuries

The acceptance of annuity payments made by the German Government to a United States employee as damages for injuries inflicted by the Nazi regime while he was a citizen and public official of Germany does not violate article 1, section 9, clause 8 of the United States Constitution which prohibits the acceptance by Government employees of any present, emolument, etc., from a foreign state. 34 Comp. Gen. 331 (1955).

World War II pension

An individual who is in receipt of a World War II pension from the British Government and who is appointed as a court crier in a United States District Court with regularly prescribed

duties and compensation fixed by law and payable from appropriated funds is regarded as receiving an emolument from a foreign Government and is a person holding an office of profit or trust within the meaning of article 1, section 9, clause 8 of the United States Constitution, so as to preclude the payment of compensation concurrently with the receipt of pension payments from the British Government without the consent of Congress. 37 Comp. Gen. 138 (1957).

CHAPTER 7

EMPLOYEE MAKE-WHOLE REMEDIES

A. INTRODUCTION

Generally

There are a number of remedies provided under law and regulations that are designed to make an employee whole who has been deprived of compensation or benefits as a result of improper action by an agency official. The single most comprehensive statutory make-whole remedy for Federal employees who have been wrongfully deprived of pay, allowances, differentials or benefits is the Back Pay Act of 1966, 5 U.S.C. § 5596. CSC administers this law and has promulgated implementing regulations in 5 C.F.R. Part 550, subpart H, and in the Federal Personnel Manual chapter 550, subchapter 8. Other make-whole remedies include the reinstatement of health insurance under 5 U.S.C. § 8908 to improperly separated employees who are subsequently reinstated. Similarly, life insurance may also be restored to such employees as a make-whole remedy in accordance with 5 U.S.C. § 8706(f). Discrimination in Government employment on grounds of race, color, religion, sex, or national origin may be corrected under 42 U.S.C. § 2000e-16(b). Also, the Assistant Secretary of Labor for Labor Management Relations (A/SLMR), under sections 6(a)(4) and 6(b) of Executive Order No. 11491, as amended, is authorized to hear unfair labor practice complaints and to require that agencies and labor organizations take such affirmative action as he considers appropriate when unfair labor practices are found to have occurred.

Waiver

Another make-whole remedy is the waiver of claims against employees for overpayments of pay and allowances, including, in appropriate cases, excess leave credited through administrative error. Waiver of such claims is authorized under 5 U.S.C. § 5584, as implemented by regulations promulgated by GAO at 4 C.F.R. § 91, where collection would be against equity and good conscience. See also COMPENSATION, Chapter 5, Subchapter III.

Restoration of leave

Under provisions of 5 U.S.C. § 6304(d), excess leave that is forfeited may be restored to an employee, where certain agency actions were in part responsible for the forfeiture. See also LEAVE, Chapter 5.

Foreign service

The Secretary of State has authority, under provisions of 22 U.S.C. § 993, to correct certain erroneous personnel actions that affect Foreign Service employees by implementing recommendations of grievance boards, panels, or equal opportunity appeals examiners and by awarding retroactive promotions and additional increases in salary.

B. BACK PAY ACT

Essential elements

In order to come within the purview of the Back Pay Act, an employee must show that an appropriate authority has determined that he has undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or part of his pay, allowances, or differentials. Hence, he is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials that he would have earned if the the personnel action had not occurred, less any amounts earned by or through his other employment during that period.

Administrative error concept

General rule on retroactive pay adjustments

An administrative change in salary of a Federal employee may not be made retroactively effective in the absence of a statute so providing. 26 Comp. Gen. 706 (1947), 39 id. 583 (1960); and 40 id. 207 (1960). Thus, where an employee of one regional office of an agency complained that similarly situated employees in other regions were promoted and that he would have been promoted also, had officials of his region properly construed guidance from the agency headquarters, there is no authority to award the employee a retroactive promotion, in the absence of a statute or nondiscretionary agency policy to that effect. 53 Comp. Gen. 926 (1974).

Exceptions

As an exception to the general rule, we have allowed retroactive salary adjustments where administrative errors or unjustified or unwarranted personnel actions have deprived

an employee of a right granted by statute or regulation or have resulted in a failure to carry out nondiscretionary administrative regulations or policies. 21 Comp. Gen. 369, 376 (1941) and 34 id. 380 (1955). Thus, where CSC waived the experience and training requirement of the incumbent of a position that was reclassified from grade GS-9 to grade GS-11, the agency's administrative requirement that the employee serve 1 year in the reclassified position to obtain required experience before being promoted to grade GS-11 was an administrative error, where CSC regulations required that the employee be either promoted or placed in another position within a fixed period of time. Therefore, the employee was entitled to a retroactive promotion and backpay. 48 Comp. Gen. 258 (1968).

Administrative error as unjustified or unwarranted personnel action

For the most part, our decisions covering administrative errors predated the enactment of the Back Pay Act of 1966, 5 U.S.C. § 5596, and, although we have continued to follow the earlier decisions, we have recognized that the Act provided additional authority to make retroactive salary adjustments and have recognized that the erroneous actions involved in the earlier decisions would also constitute unjustified or unwarranted personnel actions under 5 U.S.C. § 5596 and consequently be remediable by the payment of backpay. 54 Comp. Gen. 312 (1974); id. 435; and id. 888 (1975). Since 5 U.S.C. § 5596 provides broad statutory authority to rectify erroneous personnel actions by providing backpay to employees injured by such actions, it effectively covers those cases which previously could only be handled under our administrative error exceptions to the prohibition against retroactive salary payments. Hence, administrative errors will in the future be treated as a form of unjustified or unwarranted personnel action.

Where an employee was advised, prior to being detailed to another station, that if she elected, she could be promoted temporarily but would not receive per diem while at the temporary duty station, she elected to receive per diem in lieu of a temporary promotion. Although a temporary promotion was discretionary, the agency had no right to require the employee to make such a choice. Under our decisions predating the Back Pay Act of 1966, this improper agency action would have been considered as an administrative error. However, now it is considered to be an unjustified or unwarranted personnel action. Since the agency stated

that the employee would have been promoted but for the improper action, an unjustified or unwarranted personnel action occurred and the employee could be granted a retroactive promotion with backpay under the Back Pay Act of 1966 for the period of the detail. 55 Comp. Gen. 836 (1976).

Determinations regarding unjustified or unwarranted personnel actions

Erroneous removal

Procedurally defective--The Back Pay Act of 1966 authorizes recovery of pay, allowances, and differentials lost by an employee during a period of separation due to an erroneous personnel action by an agency. Such removals include those that are determined to be procedurally defective. Hence, where an employee resigned and subsequently claimed that his resignation was coerced, if the employee can establish that his resignation was involuntary, his removal would have been procedurally defective and he, therefore, would be entitled to reinstatement and backpay. Gratehouse v. United States, 206 Ct. Cl. 288, 512 F.2d 1104 (1975).

Dismissal arbitrary and capricious or unsupported by substantial evidence--Where employee can establish that a removal action is arbitrary and capricious or unsupported by substantial evidence, he will be entitled to reinstatement and backpay for the period of improper separation under the Back Pay Act of 1966. Harrington v. United States, 174 Ct. Cl. 1110 (1966).

Constructive discharge or removal--Where an applicant for employment in a position was formally notified by the agency of his selection and the agency subsequently attempted to withdraw its selection and refused to allow the employee to serve, it was held that such action by the agency constituted a constructive removal of the employee from the position to which he was appointed. The employee was, therefore, entitled to have his appointment duly documented on a retroactive basis with backpay for the period involved. B-175373, April 21, 1972 and B-181614, February 5, 1975.

Improper suspension

An employee was placed on involuntary sick leave pending action on an agency-filed application for disability

retirement and was continued on involuntary leave while the agency appealed the initial CSC denial of the application. The employee was entitled to backpay and restoration of leave from the date of initial CSC denial to the date employee was restored to active duty, because the agency was obligated either to restore employee to active duty on initial CSC determination or to take action to separate employee pending agency's appeal. B-184522, March 16, 1976.

Improper reductions in force

Employees who undergo improper personnel actions incident to a reduction in force may be entitled to remedial action under the Back Pay Act of 1966. Where an agency reduced an employee from GS-15, step 5, to GS-12, step 10, in a reduction-in-force action that was subsequently determined to have been improper, the agency utilized its discretion under the highest previous rate rule to bargain with the employee to have him drop pending arbitration and litigation cases in order to be repromoted to the GS-15, step 5 level. When the employee refused to bargain, agency repromoted employee to GS-15, step 1. The Comptroller General determined that the agency's abuse of discretion was an unjustified and unwarranted personnel action and allowed retroactive correction of the step level to step 5. 54 Comp. Gen. 310 (1974).

Retroactive promotions

Generally--Normally, employees have no vested right to be promoted at any specific time. However, an agency may, through the promulgation of regulations or the negotiation of a collective bargaining agreement, vest in specified employees the right to be promoted on an ascertainable date as provided by the regulations or agreement. B-181173, November 13, 1974; 54 Comp. Gen. 69 (1974); id. 403; and id. 538. For example, an agency included a provision in a collective bargaining agreement providing that employees detailed to higher level positions for 60 days or more are to be given temporary promotions. When two employees were detailed for several months without being given temporary promotions, they filed a grievance which was arbitrated. The arbitrator found that the agency had violated the agreement, and GAO did not object to awarding the two employees retroactive promotions. B-181173, ibid.

Nondiscretionary agency policy--An agency head may exercise his normal promotion or appointment discretion on a prospective contingent basis by providing in agency regulations or agreements that employees who satisfy stated criteria are entitled to be promoted on a fixed or ascertainable date. For example, an agency included a provision in its collective bargaining agreement that employees in career ladder positions would be promoted on the first pay period after 1 year in grade when certain performance criteria were met. The employees' supervisors neglected to process the promotion request timely, which violated the agreement. We held that the agency was authorized under the Back Pay Act of 1966 to correct this error by granting retroactive appointments with backpay. 55 Comp. Gen. 42 (1975).

Promotions involving reclassification of positions--The effective date of a classification action, either by the agency or CSC, that upgrades a position may not be made retroactively effective. An incumbent in such an upgraded position has no vested right to an immediate promotion. However, should the agency leave him in the position he becomes entitled to a promotion to the higher grade no later than the fourth pay period after the position is upgraded. Therefore, such an employee can be retroactively promoted and given backpay where the agency fails either to promote him or to reassign him out of the position. Thus where a GS-12 employee's position in an overseas area was reclassified to the GS-13 level on July 3, 1970, and the employee continued to occupy the position until August 28, 1972, without a promotion until he rotated back to the United States, it was held that the employee was entitled to a retroactive promotion and backpay for the period in question. 53 Comp. Gen. 216 (1973).

Delayed administrative processing of promotions--Because promotion appointment authority is discretionary with the agency official granted such authority, an employee is not entitled to a promotion until such appointment authority has been exercised. For example, in a regional office of a large Federal department, approximately 350 promotion actions were delayed from 1 pay period to several months as a result of alleged ineffective management coupled with an unusually heavy workload which caused a breakdown in the processing of personnel actions within the agency. The agency corrected its procedure and sought authority to award retroactive promotions for the period of delay.

We held that inasmuch as the official delegated authority to approve such promotions had not done so, there was no statutory authority under which retroactive promotions and backpay could be awarded. B-183969, B-183985, July 12, 1975.

Retroactive change in initial appointments

As a general rule, initial appointments, like promotion appointments, may not be administratively changed on a retroactive basis in the absence of specific statutory authority. As an exception to this rule, we have permitted retroactive adjustments when agencies have failed to carry out nondiscretionary administrative regulations, agreements, and policies. Hence, where an agency had a nondiscretionary policy to initially appoint law clerks and attorneys in grade GS-9 unless they possessed specified superior qualifications that entitled them to grade GS-11, the agency head was authorized to retroactively appoint two GS-9 law clerks in grade GS-11 and grant backpay when the agency discovered that the two had satisfied the superior qualifications requirement when they were initially appointed. B-181223, July 29, 1974.

Retroactive periodic step increases

Under 5 U.S.C. § 5335, employees of the General Schedule are entitled to within-grade increases when certain specified criteria are satisfied. Retroactive within-grade increases may be awarded upon a determination by appropriate authority that such increases were delayed as a result of administrative error or unjustified or unwarranted personnel action. Hence where an agency withheld within-grade increases during a Presidential wage-price freeze, and subsequently determined that the freeze did not cover within-grade increases, the agency was authorized to retroactively correct this error and provide backpay. B-173976.10, July 11, 1972. See also 37 Comp. Gen. 300 (1957) and id. 774 (1958).

Retroactive adjustment of rate of pay

When an appropriate authority determines that an employee's rate of pay has been improperly set and that such agency action was an unjustified or unwarranted personnel action, a retroactive pay adjustment may be made to correct the error. For example, backpay has been allowed in a case where the step rate of a prevailing-rate employee who has

converted to the General Schedule was determined by appropriate authority to have been set at a lower rate than required by applicable regulations. 51 Comp. Gen. 656 (1972). Also, an employee who was denied the benefit of the highest previous rate rule, which the agency admits he would have received if he had been willing to drop certain grievance actions initiated by him, was awarded the rate retroactively since the agency's terms were improper and it committed an abuse of discretion in carrying out its threat to award him the lower rate if he did not drop his grievance actions. The agency's action was an unjustified or unwarranted personnel action. B-180997, October 30, 1974.

Premium pay

Overtime--Where the union and agency stipulated that a violation of their collective bargaining agreement had occurred when an employee was denied an overtime assignment, and they requested a ruling from this Office concerning whether backpay could be granted the employee, we held that the employee was entitled to backpay. We indicated that if the agency had not improperly assigned the work, the employee would have worked overtime and received overtime compensation. 54 Comp. Gen. 1071 (1975). See 55 Comp. Gen. 171 (1975) and id. 405, for similar cases involving arbitration awards. In another case, however, we refused to allow implementation of an arbitration award that awarded backpay for overtime not worked to a group of shipyard workers whose hours of work had been rescheduled in violation of consultative provisions in the collective bargaining agreement. The arbitration award failed to satisfy the "but for" test because there was no showing that the agency could not have rescheduled the employees' hours of work as it did, had it properly followed the consultative provisions of the agreement. Thus there was no basis for backpay. 55 Comp. Gen. 629 (1976).

Environmental and hazardous duty differentials--Where a food service employee worked in a cold storage area and was exposed to temperatures below freezing for substantial periods of time, we held that he was entitled to an environmental differential on a retroactive basis for the periods of exposure despite the fact that the agency provided him with protective clothing. 53 Comp. Gen. 789 (1974) and B-163901, May 2, 1973.

Post differential and living quarters allowance--A predecessor of the Back Pay Act of 1966 was applied to retroactively compensate an employee who was removed while stationed overseas and entitled to a post differential. The employee was transported back to the United States, where he proceeded with legal action that ultimately succeeded in his reinstatement. Although the employee remained in the United States throughout the period his legal action was pending, his entitlement to a post differential was included in the award, since he would have received it but for his unjustified removal. Vitarelli v. United States, 150 Ct. Cl. 59 (1960). The Back Pay Act of 1966 has been applied to compensate an employee stationed overseas who, at the time of an unjustified removal, was receiving a living quarters allowance pursuant to 5 U.S.C. § 5923 and section 031, Department of State Standardized Regulations (Government Civilians, Foreign Areas). The living quarters allowance was included in a backpay award despite the fact that the employee had been returned to the United States at the time of removal. Urbina v. United States, 192 Ct. Cl. 875 (1970).

Backpay incident to unfair labor practices--Where the A/SLMR determines that an agency official has discriminated against an employee as a result of his union involvement and caused the employee to be deprived of pay or other employee benefits, the A/SLMR may order an agency head to take remedial measures available under the Back Pay Act of 1966 and other make-whole statutes. However, before any monetary payment may be made under provisions of the Back Pay Act of 1966, there must be a determination, not only that an employee has undergone an unjustified or unwarranted personnel action, but that such action directly resulted in a withdrawal of pay or other benefits to which the employee was entitled. 54 Comp. Gen. 760 (1975).

C. REMEDIES NOT ALLOWED UNDER THE BACK PAY ACT

Interest on backpay

The general rule of law is that in the absence of a contract or a statute expressing a contrary intention, interest does not accrue upon claims against the Government. Seaboard Air Line Railway v. United States, 261 U.S. 299, 304 (1923); Smyth v. United States, 302 U.S. 329, 353 (1937); 45 Comp. Gen. 169 (1965); and B-180021, March 20, 1975. Inasmuch as the backpay statute does not specifically provide for the payment

of interest, no interest may be paid on any backpay allowances and differentials recovered by an employee. B-184200, April 13, 1976.

Attorney fees and other litigation expenses

Not allowed under the Back Pay Act

An employee who successfully appealed an adverse action against him by his agency and then submitted a claim to this Office for attorney fees and litigation expenses incurred in his appeal, was disallowed such expenses by GAO on the basis that such expenses are not authorized by the Back Pay Act of 1966. B-184200, April 13, 1976.

Recent court cases

Recent court cases have awarded attorney fees and litigation expenses in connection with employee make-whole claims, however, such awards have not been made under the Back Pay Act of 1966. See for example National Treasury Employees Union v. Nixon, 521 F.2d 317 (1975) and Fitzgerald v. U.S. Civil Service Commission, et al., 407 F. Supp. 380 (1975). In the absence of a statute so providing, the Comptroller General has no authority to award attorney fees and litigation expenses.

Consequential damages

An employee was erroneously separated and required to vacate Government quarters. Expenses of moving household goods out of, and back into, Government quarters upon reinstatement, were disallowed because these costs are considered as consequential expenses and, therefore, not covered by the Back Pay Act. B-182282, May 28, 1975.

Recompense for discrimination in hiring on non-EEO grounds

It is a general principle of law that the salary and other entitlements of a Government job are incident to and attached to the job. Consequently, the salary and other entitlements are payable only to the person appointed to the job, and a Government employee is entitled only to the salary and other benefits of the position to which he has been appointed. See Borak v. United States, 78 F. Supp. 123 (Ct. Cl. 1948), cert. denied, 335 U.S. 821 (1948); Price v. United States, 80 F. Supp. 542 (Ct. Cl. 1948); and Ganse v. United States, 376 F.2d 900 (Ct. Cl. 1967). If an applicant for employment is not selected

on the basis of discrimination because of his race, color, religion, sex, or national origin, an exception is made and the agency may be ordered to hire him under the provisions of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16. However, if he is not selected on some equally unjustifed or unwarranted non-EEO ground, and therefore never appointed, he has not suffered a dimunition of pay or other entitlements so as to come within the purview of any make-whole legislation, such as the Back Pay Act of 1966. B-180021, March 20, 1975.

Prearbitration settlement agreements

The Back Pay Act of 1966 and implementing regulations require that an appropriate authority, such as an agency head or someone designated by him, must determine that an agency personnel action has been improper or erroneous as to specific employees and has directly resulted in the reduction of their pay, allowances, or differentials. 54 Comp. Gen. 761 (1975). Such an improper action would include the violation of a nondiscretionary agency regulation or provision of a negotiated agreement. 54 Comp. Gen. 312 (1974). A Commander of an Air Force base temporarily changed the workweek of about 30 employees so that they worked on Saturday and Sunday instead of 2 other days, in order that the base could participate in a readiness exercise without scheduling overtime. The employees, through their union, claimed that the temporary schedule violated the collective bargaining agreement. To avoid lengthy arbitration, the Commander agreed to pay the employees backpay for lost overtime if such were approved by this Office, but steadfastly maintained that he had not violated the collective bargaining agreement. We held that backpay could not be awarded without a finding of an improper agency action by an appropriate authority. B-180010.05, January 2, 1976.

Punitive damages

An agency hired a consultant and the union grieved that the work he was performing violated the collective bargaining agreement. The matter was submitted to binding arbitration. The arbitrator found that the agreement had been violated but that no employee had been injured as a consequence of the agency's action. Nevertheless, the arbitrator ordered the agency to pay the union a sum equal to 5 days' pay of the consultant. The matter was submitted to this Office, and we ruled that the payment was in the nature of punitive damages and not authorized by statute or regulation. 55 Comp. Gen. 564 (1975).

D. COMPUTATION OF BACKPAY UNDER 5 U.S.C. § 5596

Generally

In recomputing the pay, allowances, etc. of an employee who has undergone an unjustified or unwarranted personnel action, the agency is responsible for determining the exact amount of pay the employee would have earned had the improper personnel action not occurred. Such pay would include all premium pay the employee would have earned, B-163164, February 28, 1968, and the computations should account for changes in pay and allowances such as a periodic step increase or shift change. 55 Comp. Gen. 1311 (1976). However, in the case of an employee improperly removed or suspended, recomputations may not include periods when the employee was not ready or able to perform his job due, for example, to sickness, B-179422, September 27, 1973, or when the employee was not available due to incarceration. B-178712, July 16, 1973.

Setoff of outside earnings

Earnings from employment during the period of the improper action may not be setoff against Federal backpay on a pay period basis. Total private sector earnings for the period must be setoff against total Federal backpay. 55 Comp. Gen. 48 (1975); B-178143, July 9, 1973; and 48 Comp. Gen. 572 (1969). Also, where income was generated from part-time teaching, lecturing, and writing activities prior to the unjustified separation action, only the added increment from such activities during the period need be deducted from backpay. The determination as to the amount of the added increment may be based upon a comparison of the amount of such work prior to and after separation. Income from the publication of a book during period need not be setoff against backpay if substantial work on the book was accomplished prior to separation. 53 Comp. Gen. 824 (974).

E. OTHER MAKE-WHOLE REMEDIES

Make-whole remedies under the Veterans Preference Act

The Veterans Preference Act provides authority for make-whole remedies for preference eligible employees in certain situations. Under the "corrective action" provision of the Veterans Preference Act, 5 U.S.C. § 7701, CSC may award backpay and other substantial monetary corrective action to preference-eligible employees who have successfully appealed adverse actions. This authority is separate from the Back Pay Act of 1966.

Health insurance for restored employees

Employees improperly removed or suspended, upon reinstatement, may at their option, enroll as if they were new employees or have their coverage restored, with appropriate adjustments made for contributions and claims. This make-whole remedy is governed by 5 U.S.C. § 8908 and CSC regulations contained in paragraph S8-5, Federal Personnel Manual Supplement 890-2, Instruction 34, dated September 24, 1973. B-180021, March 20, 1975.

Government life insurance for restored employees

Employees improperly removed or suspended upon reinstatement are deemed to have been insured during the period. However, deductions otherwise required by law shall not be withheld from any backpay awarded for the period unless death or accidential dismemberment of the employee occurs during such period. This make-whole remedy is governed by 5 U.S.C. § 8706(f) and CSC regulations contained in paragraph S4-23, Federal Personnel Manual Supplement 870-1, Instruction 14, dated September 12, 1973. B-180021, March 20, 1975.

Employment discrimination

The Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000-16, provides make-whole remedies for individuals where Federal agencies have taken discriminatory action against them with respect to employment opportunities, compensation, terms, conditions, or privileges of employment, hiring or discharge because of their race, color, religion, sex, or national origin. There are some significant differences between the remedies provided in the Back Pay Act of 1966 and the Equal Employment Opportunity Act of 1972 which have a bearing on the extent to which employees are made whole. In some respects remedies under the Equal Employment Opportunity Act are broader, in that remedies are provided for applicants for employment as well as employees and expungement of records is also allowed. However, backpay under the Equal Employment Opportunity Act of 1972 is to be computed in the same manner as prescribed for the Back Pay Act of 1966 in 5 C.F.R. § 550.804. The Equal Employment Opportunity Act of 1972, in contrast to the Back Pay Act of 1966 limits the period of retroactivity for which backpay is permitted to 2 years from the date the action is brought. B-180021, March 20, 1975.

Waiver of claims against employees

Another remedy in law sometimes useful to correct errors resulting from certain erroneous overpayments to an employee is the claims waiver statute contained in 5 U.S.C. § 5584. See also COMPENSATION, Chapter 5, Subchapter III.

Restoration of annual leave lost under certain circumstances

A make-whole remedy contained in 5 U.S.C. § 6304(d) (Supp. III, 1973), permits the restoration of leave to an employee which is lost, through no fault of his, because of administrative error, exigencies of the public business or sickness of the employee when the annual leave was scheduled in advance. It should be noted that this make-whole remedy does not cover leave lost as a result of unjustified and unwarranted personnel actions which are covered under the Back Pay Act in 5 U.S.C. § 5596(B)(2). See also LEAVE, Chapter 5.

Make-whole remedies for Foreign Service employees

The Secretary of State has authority under 22 U.S.C. § 993, to take certain remedial measures to correct erroneous personnel actions affecting Foreign Service employees. The Secretary has authority to remedy improper personnel actions affecting Foreign Service employees through the implementation of recommendations of certain factfinding authorities and by granting retroactive promotions and additional increases of salary in special circumstances. This authority is in addition to other make-whole remedies such as the Back Pay Act, 5 U.S.C. § 5596. B-180021, March 20, 1976.

CHAPTER 8

OTHER PROVISIONS PERTAINING TO EMPLOYEES

A. GOVERNMENT EMPLOYEES TRAINING ACT

Generally

The payment by an agency of all or part of the necessary expenses incurred in the training of employees by, in, and through Government and non-Government factilities is authorized by the Government Employees Training Act, 5 U.S.C. §§ 4101 et seq. The head of each agency is authorized and directed to establish needed training programs in accordance with regulations issued by CSC, found at 5 C.F.R. Part 410.

Permissible training

The training for which the head of an agency is permitted to pay is defined by 5 U.S.C. § 4101(4).

Personal versus Government benefit--Examinations leading to certification of a Federal employee as an accredited rural appraiser are not an integral part of the course of instruction and, therefore, are not within the definition of "training" in 5 U.S.C. § 4101(4). Professional accreditation as a rural appraiser is personal to its holder and remains with him whether or not he remains in the employ of the Government. Thus, the costs of such examinations were not reimbursable. 55 Comp. Gen. 759 (1976).

Employees eligible for training

Employee defined

5 U.S.C. § 4101(2) defines employee for the purposes of the Government Employees Training Act.

Specific exceptions

5 U.S.C. § 4102 lists organizations and employees to which the Government Employees Training Act does not apply.

Presidential appointees--A Presidential appointee is not eligible for training under the Government

Employees Training Act, unless he is specifically designated by the President for training under the Act. B-166117, March 17, 1969.

Requirement of 1 year of civilian service

An employee sought to qualify for reimbursement of tuition expense at the American University for a course under 5 U.S.C. § 4106, which provides for the training of employees with 1 year or more of continuous civilian service as a Federal Government employee, could not count the time spent working for Gallaudet College towards the 1 year requirement since, though the Department of Health, Education, and Welfare is charged with supervision of public business relating to it, under District of Columbia Code, Gallaudet is a private corporation and, except for certain insurance, health and retirement benefits, its employees are not Federal employees. B-155751, September 17, 1971.

Military members

The specific exclusion of members of the uniformed services from the Government Employees Training Act precludes use of appropriated funds for expenses of attendance at meetings of any member of the uniformed services during periods he is receiving active duty military pay and allowances under title II of the Career Compensation Act of 1949, even though during such period the member is assigned to active duty with a civilian Government agency which reimburses the military service for the members pay and allowances. 38 Comp. Gen. 312 (1958).

Authorization requirement

Must be in advance and in writing

The requirement in 5 U.S.C. § 4108 that employees selected for training in non-Government facilities shall, prior to such assignment for training, enter into written agreements implies an advance authorization for such training by an appropriate administrative official prior to the training. In the absence of authority for retroactive approval of such training, payment for training expenses of an employee who was undergoing training prior to both the request for and the administrative

approval of the request for training must be denied. 40 Comp. Gen. 12 (1960).

Delegation of authority

The authority to approve for payment on an individual basis expenditures that were incurred in the administration of a training program established by the Selective Service System pursuant to 5 U.S.C. §§ 4101 et seq., and to establish criteria for payment, was delegated by the Director of the Selective Service, and a directive to this effect was issued. This was permissible notwithstanding that neither the language of the Government Employees Training Act nor the implementing regulations did not expressly provide for such delegation. 5 U.S.C. §§ 4103, 4109(a), and 4105(c), in assigning to agency heads the responsibility for the establishment of training programs and for oversight of such programs, sanction the delegation of authority by agency heads in connection with the development and conduct of agency training programs. 51 Comp. Gen. 777 (1972).

Agreements to continue in Government service

Generally

5 U.S.C. § 4108 requires that an employee selected for training by, in, or through a non-Government facility enter into a written agreement before assignment to training to continue in the service of his agency for a minimum specified period, and to repay the Government for the additional expenses incurred by the Government if he is voluntarily separated from the service prior to the end of the required period of service.

Failure to fulfill obligated service

A former employee was indebted to the Government on account of his resignation in violation of a training agreement which required 18 months of service with the Department of the Navy after completion of training. He contended that he should not have been returned to a GS-7 position when he qualified for a higher grade. However, since the debt resulted from his failure to serve the obligated period, and since he remained at work an insufficient period of time to be assigned duties warranting a higher classification, and since prior

to earning a Ph.D. he did not possess the required 1 year engineering experience at the GS-7 level or education which would have qualified him for a higher grade, there is no basis for canceling the indebtedness. B-160977, June 2, 1967.

Waiver of repayment of training costs--With the amendment of the FPM by FPM Letter No. 410-8, the head of an agency or his delegated representative is authorized to waive recovery of training costs extended under 5 U.S.C. § 4108 when an employee transfers to another agency or organization in any branch of Government prior to completion of the agreed period of service and gives notice of at least 10 workdays of his intent to transfer, and the losing agency determines that collection of the training costs would be against equity and good conscience or against public interest. 51 Comp. Gen. 419 (1972).

Training costs paid under 5 U.S.C. § 4108 which were collected from employees who transferred to other Government agencies or organizations without discharging their service commitment (prior to issuance of FPM Letter No. 410-8) may not be reimbursed to such employees, notiwthstanding completion of the period of time by the employee with the gaining agency at least equal to the service commitment to the losing agency. The waiver authority under FPM Letter No. 410-8 extends only to waiver of the right to recover, and since the debt for training costs had been extinguished, no right of recovery remained. 51 Comp. Gen. 419 (1972).

Transfer to another Government agency

Assumption of training costs by losing agency--Irrespective of whether a determination was made that recovery was required of training costs provided an employee under 5 U.S.C. § 4108 at the time of his transfer to another Government agency or organization, or whether an employee's obligations under a service agreement are satisfied by service with another agency or organization, there is no authority for the assessment of training costs against the agency to which the employee transferred, notwithstanding that the benefit of the employee's training paid for by the losing agency inured to the gaining agency. 51 Comp. Gen. 419 (1972).

Effect of reemployment--The amount collected and deposited into the U.S. Treasury upon the failure of an employee to remain in Government service for the time required after training under an agreement pursuant to 5 U.S.C. § 4109 was not refundable to the employee upon his reemployment. Recovery of the indebtedness was proper since the amount was collected prior to the determination to waive the indebtedness, and was not erroneously received and covered into the Treasury so as to be available for refund. B-146111, July 6, 1961. See also 40 Comp. Gen. 162 (1960).

Effect on compensation

Overtime, holiday pay, and night differential

Prohibition against payment--The prohibition in 5 U.S.C. § 4109 against the payment of overtime, holiday pay, and night differential during training courses precludes the payment of such premium compensation to employees during periods of training, even though the employees would otherwise be entitled to such pay, unless an exception is established by CSC. 48 Comp. Gen. 620 (1969); 38 id. 262 (1958); id. 363; id. 404; and 39 id. 453 (1959). See also B-168528, January 2, 1970.

Although employees who are in training on holidays are precluded under 5 U.S.C. § 4109 from receiving overtime or holiday pay, they are entitled to receive regular pay during periods of training. 38 Comp. Gen. 262 (1958).

Air traffic trainees who during an 8-week, 40-hour week training course volunteered to participate on Saturdays in a series of medical tests to determine stresses and strains upon air traffic controllers, which tests were entirely unrelated to the training assignment and constituted official work, were allowed to have the 40-hour training period regarded as "hours of work" so as to be entitled to overtime compensation under 5 U.S.C. § 5542(a) for the work performed on Saturdays.

The restriction in 5 U.S.C. § 4109 against payment of overtime for training does not preclude payment of overtime compensation for work in addition to the 40

hours of training performed in any workweek. 41 Comp. Gen. 477 (1962).

Exception to prohibition--The authority vested in the President to exempt agencies or employees from the restrictive provisions of the Government Employees Training Act may, in view of additional information concerning congressional intent, be viewed as authority for the exemption of certain employees from the premium pay prohibition in 5 U.S.C. § 4109(a)(1), in those cases where denial of premium pay would defeat the broad purposes of the Act. 38 Comp. Gen. 363 (1958). See also, 5 C.F.R. § 410.602.

Overtime compensation for traveling to and from training--With respect to the payment of overtime compensation to employees when they are traveling to and from training courses, 5 U.S.C. § 4109(a)(1), which prohibits the payment of premium compensation to employees during periods of training (except when specifically authorized by CSC) does not prevent payment of overtime compensation to employees traveling to and from places of training, provided that the conditions of 5 U.S.C. § 5542(b)(2) are met. B-165311, November 12, 1968.

Administratively uncontrollable overtime--Additional annual compensation in lieu of premium pay which is authorized under 5 U.S.C. § 5545(c) and received by employees who are to participate in training programs under the Government Employees Training Act is considered a type of pay in lieu of overtime, holiday, and night differential within the prohibition in 5 U.S.C. § 4109. Unless the President has made an exception under authority in 5 U.S.C. § 4102, such additional compensation may not be paid during training programs. 38 Comp. Gen. 404 (1958). CSC has established certain exceptions to the prohibition which are enumerated in 5 C.F.R. § 410.602(b).

Compensatory time--In view of the restriction in 5 U.S.C § 4109 against payment of overtime, unless CSC establishes an exception, employees who are assigned to training courses for more than 40 hours in any week may not be granted compenatory time for the hours in excess of 40. The condition precedent to the granting of comensatory time in lieu of overtime under 5 U.S.C. § 5543, is qualification for overtime under 5 U.S.C. § 5542(a).

Furthermore, an employee may not be granted compensation at straight time rates for overtime training. 39 Comp. Gen. 453 (1959).

Allowances and differentials payable

Foreign area allowance--Although the allowances payable to employees in foreign areas may not in the strict sense be considered "salary" or "pay" as those words are used in 5 U.S.C § 4109, which authorizes the head of each department to pay "all or any part of the salary, pay, or comensation" to employees in training programs, they may be considered to be within the broader term "compensation." Therefore, when employees are receiving training at a foreign post, the head of the department may authorize payment of all or any part of the allowances applicable to employees permanently stationed overseas, or he may authorize a per diem as for temporary duty, but not both such benefits. However, foreign area allowances may be paid in addition to transportation of dependents and effects. 39 Comp. Gen. 140 (1959).

Post differential--Under 5 U.S.C. § 4109, an employee who is authorized to receive training at an overseas location where a post differential is payable may, in the discretion of the head of the department, be paid all or part of the post differential which is additional compensation payable under 5 U.S.C. § 5941, and also receive a per diem allowance during the period of detail, provided that such employee would be eligible for the post differential if the detail or assignment were in connection with the official duties of his position, as distinguished from training. 39 Comp. Gen. 140 (1959).

Subversive activities prohibition

Generally

The prohibition in 5 U.S.C. § 4107(a)(1) against the payment of funds whenever the non-Government training facility teaches or advocates overthrow of the Government of the United States by force or violence applies to individuals contracting with the Government to provide training as well as to institutions. It, however, does not apply to individual teachers or instructors employed by institutions or to employees of Government contractors where there is no contractual

relationship between the Government or the employee receiving the training and the teacher or employee of the contractor. 38 Comp. Gen. 857 (1959).

Enforcement

A loyalty affidavit, certificate, or an express contractual warranty that the institution or individual furnishing training under the Government Employees Training Act does not teach or advocate the overthrow of the Government of the United States by force or violence would be a proper means of enforcement of the subversive activities prohibition in 5 U.S.C. § 4107(a). 38 Comp. Gen. 857 (1959).

The prohibition in 5 U.S.C. § 4107(a)(2) against the payment of funds whenever the non-Government training facility is an individual concerning whom a determination has been made by a proper Government authority that a reasonable doubt as to the loyalty of the individual exists would be complied with when it is ascertained that the loyalty files of CSC show no record of any past determination of the reasonable doubt concerning the individual's loyalty. 38 Comp. Gen. 857 (1959).

Foreign organizations and individuals

In making a determination whether the prohibition in 5 U.S.C. § 4107(a) against the training of employees by, in, or through a non-Government facility which teaches or advocates the overthrow of the Government of the United States by force or violence, or by or through an individual whose loyalty is in doubt applies to foreign organizations and individuals in foreign areas, the Department of Defense may delegate the authority granted agency heads by Executive Order No. 11348, dated April 20, 1967, to determine the eligibility of a foreign government or an international organization to provide training to a major theater or local commander, subject to consultation with the Department of State and other appropriate Federal agencies in the area, and may also provide that the eligibility of noncitizens may be determined from security files in the local or theater level since applying the procedures in 5 C.F.R. § 410.504 to determine security eligibility in the United States would ineffective. 51 Comp. Gen. 199 (1971).

Related expenses

Rental fee charged for use of equipment owned by employee

A claim for $30 representing 2 months rental of a typewriter purchased and used by an employee of Internal Revenue Service in a training program sponsored by CSC was denied, notwithstanding the fact that the costs for typing during the course were specifically authorized by written agency guidelines under 5 U.S.C. § 4118(a)(8), since there are no regulations authorizing a trainee to purchase a typewriter for his private use and charge the Government a rental fee for its use during a 2-month training program. It is doubtful whether the purchase could be considered a necessary expense of training within the meaning of 5 U.S.C. § 4109. B-176928, November 17, 1972.

B. DETAILS OF GOVERNMENT EMPLOYEES

Agency detail

Generally

The head of an executive department or military department may detail employees among the bureaus and offices of his department, except employees who are required by law to be exclusively engaged on some specific work. Such details may be made only by written order of the head of the department and may be for not more than 120 days. These details may be renewed by written order of the head of the department, in each particular case, for periods not exceeding 120 days. 5 U.S.C. § 3341.

Assignment to duties of a higher grade position

Details for less than 120 days--A Bureau of Reclamantion employee was detailed to the Virgin Islands under an appointment as a garage serviceman. His work was subsequently found to involve the duties of an automotive mechanic but, through administrative error, he was not paid the higher salary assigned to this position. He may not receive the additional compensation representing the difference in the salaries of the two positions despite the fact that the employee was apparently qualified for and performed the duties of an automotive mechanic. A Federal employee is entitled only to the salary of the position

to which he is properly appointed, regardless of the duties he actually performs. B-172825, May 28, 1971.

Details for more than 120 days

Temporary promotions after 120 days

Two Bureau of Mines employees, Turner and Caldwell, were detailed to higher grade positions in excess of 120 days and no prior approval of extension beyond 120 days was sought from CSC. Employees were entitled to retroactive temporary promotions for period beyond 120 days until the details were terminated because the Board of Appeals and Review, CSC, interpreted regulations to require temporary promotions in such circumstances. 55 Comp. Gen. 539 (1975). The above decision will be given retroactive effect. 55 Comp. Gen. 785 (1976).

Whitten Amendment effect

Employees who are otherwise determined to be entitled to retroactive temporary promotions on the basis of a mandatory requirement of the regulations must also satisfy eligibility criteria for promotions, including 1 year service in grade required by the "Whitten Amendment," 5 U.S.C. § 3103 note. 55 Comp. Gen. 539 (1975).

Effect of collective bargaining agreement

A collective bargaining agreement entered into by the Federal Aviation Administration (FAA) provided that employees who were detailed to higher level positions for 60 days or more were to be given temporary promotions. The arbitrator found that two employees had been detailed, rather than assigned to higher grades for training, and awarded temporary promotions and retroactive compensation to such employees. The award may be implemented by the agency under the Back Pay Act of 1966, 5 U.S.C. § 5596, since by including the provision in the collective bargaining agreement, the agency made the provision a mandatory agency policy. B-181173, November 13, 1974.

Details between executive agencies

Performance of the same duties

The detail of a civilian employee to the Public Health Service for a brief period, either on a reimbursable or nonreimbursable basis, for such duties as the Public Health Service might specify, was not legally objectionable so long as the employee performed the duties on the same basis that duties would ordinarily have been performed by any civilian employee detailed from one department or agency to another under 31 U.S.C. § 686. However, if the employee were to be "detailed" to the Public Health Service, to perform he would be regarded as a reserve office in an active duty status and could not have been considered to be on detail from his civilian position. 41 Comp. Gen. 478 (1962).

Requirement of written agreement

In the absence of a written agreement in advance between two Federal agencies operating under separate appropriations, the loan of employees between such agencies is regarded as an accommodation only for which no reimbursement or transfer of appropriations will be made for salaries. Such nonreimbursable details of personnel do not fall under the constraints of 31 U.S.C. § 628 (which requires that funds appropriated to the various governmental agencies and instrumentalities be applied solely to the objects for which they are made and for no others), provided the employees so detailed are not required by law to be engaged exclusively upon the work for which their salaries are appropriated and provided the employees' services can be spared for the purpose of the details. 15 Comp. Gen. 32 (1935); 13 id. 234 (1934); and B-182398(1), March 29, 1976.

Detail of military personnel to civilian agency

Compensation

Prohibition against double compensation--Officers and enlisted personnel serving on extended active duty in the armed forces may not be employed during their off-hours in civilian positions which are paid for by appropriated funds. The enactment of the Dual Compensation Act did not change the longstanding rule that active

military service is incompatible with concurrent Federal civilian service. 46 Comp. Gen. 400 (1966). See also 38 Comp. Gen. 222 (1958).

Fee-basis medical services rendered to an eligible veteran for disabilities identified on an Outpatient Medical Treatment Identification Card by a military physician on active duty with the armed forces, who is engaged in a limited medical practice after hours with the permission of his commanding officer, could not be paid by the Veterans Administration in the absence of statutory authority under the rule that concurrent Federal civilian employment and active duty military service are incompatible. 47 Comp. Gen. 505 (1968).

Detail to civilian supergrade position

Salary entitlement--The entitlement of a Navy officer, detailed to a supergrade position in the Maritime Administration under 46 U.S.C. § 1111(f) to the compensation differential between his Navy pay and allowances and the compensation of a supergrade position does not depend on the availability of an appropriate supergrade position in the Administration. Section 1111(f) provides that the basis for determining the aggregate compensation payable to an officer on detail to the Administration is a position of comparable importance, difficulty, and responsibility in the officer's military service, or a civilian position in a corresponding executive department, rather than the position to which detailed.

Details under foreign assistance programs

Compensation--Members of the armed forces assigned to perform functions outside the United States under the Foreign Assistance Act of 1961, 22 U.S.C. § 2385(d), which authorizes compensation, allowances, and benefits to assigned personnel at the rates provided for the Foreign Service Reserve and Staff by the Foreign Service Act of 1946, as amended, 22 U.S.C. §§ 801 et seq., may only be paid in accordance with section 625(d)(1) of the 1961 Act in the absence of statutory exemption to the extra allowance restrictions of 5 U.S.C. § 5536. Therefore, the right of commissioned personnel of the United States Coast Guard assigned to programs under the Foreign Assistance Act to their pay and allowances is suspended during the period of the assignment and they may only receive the compensation, allowances, and benefits

prescribed for the Foreign Service Reserve and Staff. 42 Comp. Gen. 296 (1962).

Details of Public Health Service employees

Employee benefits

Although Public Health Service employees detailed to state, municipal, and other nonprofit institutions under 42 U.S.C. § 215 may continue to be paid from Federal appropriated funds and to retain all Federal employee benefits, when detailed and placed in leave-without-pay status, employees are entitled only to Federal employee benefits prescribed in 42 U.S.C. § 215(d)--basic pay, promotion, retirement, injury or death compensation, and benefits provided in 42 U.S.C. § 213--but they are not entitled to annual and sick leave (5 U.S.C. §§ 6301 et seq.), a 40-hour workweek (5 U.S.C. § 6101), and overtime and holiday pay (5 U.S.C. §§ 5542 and 5546). The entitlement to return to the Federal service without loss of or detriment to the detailed employees' status as Federal employees did not create entitlement to retain all rights and benefits of Federal employees during leave-without-pay period. 43 Comp. Gen. 511 (1964).

Payment of state license fees

State license fees imposed on medical doctors employed by the Public Health Service who were detailed to states or local health agencies may not be reimbursed to employees detailed to carry out state functions, absent statutory authority for use of Federal funds to defray the cost of license fees. 42 U.S.C. § 215, although authorizing the detail of personnel and providing for the use of appropriated funds and credit for state service as though performed for the Public Health Service, does not include authority for payment of license fees, and 42 U.S.C. § 246(f), enacted to facilitate interchange of medical personnel with state agencies, does not include a reference to license fees in the enumeration of reimbursable items of cost. Such omission is inferred as intentional under the rule of statutory construction of a provision that designates persons and things. 46 Comp. Gen. 695 (1967).

Local holidays

Employees of the Public Health Service detailed to state, municipal, and other nonprofit institutions, pursuant to 42 U.S.C. § 215, who are paid by the Federal Government may be excused from duty on state or local holidays on which normal duties may not properly be performed. However, if they are required to work on such holidays, even though other Federal employees similarly situated may have been excused, there is no authority for the payment of extra compensation to them, and, although employees excused from work on a state or local holiday need not be charged leave, if the employees are not excused they are only entitled to their regular compensation. 43 Comp. Gen. 511 (1964). See also 17 Comp. Gen. 298 (1937).

Intergovernmental Personnel Act

Assignment of Federal employees

An employee of an executive agency assigned to a state or local government is deemed, during the assignment to be either (1) on detail to a regular work assignment in his agency or (2) on leave without pay from his position in the agency. In either case he remains an employee of his agency. The assignment may be made with or without reimbursement by the state or local government for the travel and transportation expenses to or from the place of assignment and for the pay of the employee during assignment. Any reimbursements are credited to the appropriation of the agency used for paying the travel and transportation expenses or pay.

In the event the rate of pay of an employee so assigned and on leave without pay is less than what he would have received on his regular assignment with the agency, he is entitled to receive supplemental pay from the agency for the difference between the state and local government rate and the agency rate. He is also entitled to annual and sick leave, continuation of his insurance, crediting of the period of his assignment toward periodic step increases, retention, and leave accrual purposes, and, upon payment into the civil service retirement and disability fund of the appropriate percentage of his pay, to treat his service during that period as service of the type performed in the agency immediately before his assignment. Further, he is entitled to credit such outside service as Federal service and to consider his

state and local government pay as Federal wages. However, the employee may not receive continuation of his insurance; credit of the period of assignment toward period step-increases, retention, and leave accrual, and treatment of his service during his assignment as service of the type performed in the agency immediately before his assignment, on the basis of service during the assignment for which he elects to receive benefits under any state or local government retirement or insurance law or program which CSC determines to be similar. An employee who elects to receive benefits from a state or local government may not receive a retirement annuity from the Federal Government and benefits from the state or local government for an injury or disability to himself covering the same period of time. 5 U.S.C. §§ 3371 et seq.

Assignment of state employees

Generally--An employee of a state or local government who is assigned to an executive agency of the Federal Government may either (1) be appointed without regard to the statutory provisions governing appointment of the competitive service for the agreed period of the assignment or (2) may be deemed to be on detail to the Federal agency. An employee given an appointment is entitled to the pay accorded a Federal employee and is deemed to be an employee of the agency for all purposes except retirement annuity, life insurance, and health insurance. A state or local government employee on detail to a Federal agency is not entitled to pay from the agency, is deemed to be an employee of the agency for certain specified purposes, and is subject to regulations as prescribed by the President. Such detail may be made with or without reimbursement by the agency for the pay, or part thereof, of the employee during the period of assignment. 5 U.S.C. § 3374.

In the event a state or local government fails to continue the employees contribution to state or local government retirement, life insurance, and health benefits plans for a state or local government employee who is given an appointment in an executive agency, the employer's contribution may be made from the appropriations of the executive agency concerned. 5 U.S.C. § 3374(e).

Payment of per diem to achieve pay comparability--A state employee who was detailed under 5 U.S.C. §§ 3374 et seq. to an executive agency was paid per diem authorized by assignment agreement while not traveling, purportedly to bring his salary to a level comparable with Federal employees. 5 U.S.C. § 3374(c)(1) states that a state or local government employee who is detailed to an executive agency "is not entitled to pay from the agency." Thus, that portion of assignment agreement purporting to grant per diem for the purpose of supplemental salary was without legal effect. B-185496, August 26, 1976.

"Pay" reimbursement to state and local governments--When a state or local government employee is detailed to an executive agency of the Federal Government, 5 U.S.C. § 3374(c) authorizes the executive agency to reimburse the state or local government for all or part of the "pay" of the employee. Such reimbursement may include fringe benefits, such as retirement and life and health insurance, but may not include the cost of negotiating an assignment agreement required under 5 C.F.R. § 334.105, nor the cost of preparing payroll records or assignment reports prescribed under 5 C.F.R. § 334.106. 54 Comp. Gen. 210 (1974).

The Federal employee pay limitation imposed by 5 U.S.C. § 5308 is not applicable to reimbursements to state and local governments for "pay" of employees detailed to Federal executive agencies under 5 U.S.C. § 3374. Reimbursement for such details is made under 5 U.S.C.§ 3374(c) and not under the statutory pay system to which the limitation applies. Such reimbursement is not pay to a Federal employee, but is repayment to a state or local agency for the cost of participation in the program. B-157936, March 18, 1976.

C. RIGHTS RESERVED UPON TRANSFER TO INTERNATIONAL ORGANIZATIONS

Generally

The head of any Federal agency is authorized to detail, for a period not exceeding 5 years, an employee of his agency to an international organization which requests services, except that under special circumstances, where the President determines it to be in the national interest, he may extend the 5-year period for up to an additional 3 years. A detail is defined to mean the assignment or loan of an employee to

an international organization without change of position from the agency by which he is employed to an international organization. 5 U.S.C. § 3343.

Entitlement to pay and other allowances

Under 5 U.S.C. § 3582 an employee who is detailed for service with an international organization continues to receive compensation, allowances, and benefits from funds available to that agency and retains coverage by the retirement, life insurance, health benefits (if proper payments are made), employees' compensation, leave acts and definitive reemployment rights with his agency. B-135075, May 10, 1968.

Travel and transportation expenses specifically excluded

The travel and subsistence expenses, transportation of household effects and leave are not considered to be monetary benefits; therefore, reimbursement is not authorized to an employee who transfers to an international organization. 5 C.F.R. § 352.310(a)(3) (1973) and B-181853, August 23, 1976.

Entitlement to relocation allowances upon return to regular agency

The Agriculture Research Service, which planned to reemploy a former employee in Georgia, who was separated in Texas to accept a position with an international agency overseas, when his contract expired, was allowed to issue an order transferring the employee from Texas to Georgia. Payment of travel expenses was allowable, temporary quarters and subsistence expenses were allowable, and transportation expenses for household effects were reimbursable, as these determinations accorded with the provisions of then-applicable Bureau of Budget Circular No. A-56 and with 5 U.S.C. §§ 3581 et seq., for reemployment rights in such cases. However, expenses involved in the sale of a former Texas residence were not allowable since the employee's actual family residence had been established in Austria. B-166678, May 23, 1969.

Detail versus transfer of employee

A distinction is made between those employees detailed to international organizations and those who are transferred. Detailed employees remain on the Government rolls and receive pay as being in the service of the United States.

Those transferred are guaranteed that their pay will not be less than if they had remained on the Government rolls, but such guarantee is effective only upon condition of reemployment. Should an employee while serving with an international organization earn as much or more than he would have earned as a Federal employee, no payment under the guarantee would be required. If he earns less without being reemployed, no payment would be authorized. 50 Comp. Gen. 173 (1970).

Reemployment rights

A Federal employee who transfers to an international organization under 5 U.S.C. § 3582, is an employee of the international organization, not of the Federal Government, but has reemployment rights with the Federal Government if application is made within 5 years, or any authorized extension, after entering employment with the international organization. If an individual should fail to exercise his reemployment right within the stated time period, then all entitlements between him and the United States Government are severed. B-181853, August 23, 1976.

Grade promotions

An employee on detail to an international organization is considered to be an employee of the agency for general administrative purposes, thus an agency may grant promotion to an employee while he is on such detail. B-135075, May 10, 1968.

D. RESTORATION AFTER MILITARY SERVICE

Right to restoration under 5 U.S.C. § 3551--5 U.S.C. § 3551 provides that an employee as defined by 5 U.S.C. § 2105, who is ordered to active duty or to duty as a reserve of the armed forces or member of the National Guard is entitled, on release from duty within the time limits specified in 38 U.S.C. §§ 2021 et seq., to be restored to the position that he held at the time he was ordered to duty. The right to restoration given by 5 U.S.C. § 3551 is a right separate from and in addition to the restoration rights given former employees by 38 U.S.C. §§ 2021 et seq. and the right given by 5 U.S.C. § 3551 is not defeated by the length of time the former employee has been in military service. Further, the responsibility of reinstating eligible individuals is that of the head of the department or agency involved. 43 Comp. Gen. 439 (1963).

See also B-148404, August 18, 1966; B-158925, April 27, 1966; and B-158925, July 21, 1966.

No vacancy at place from which furloughed

Payment of travel and transportation expenses--Upon the return of a civilian employee from military duty, where no appropriate vacancy exists in the particular agency at the place from which he was furloughed to enter the armed forces, the employee may be regarded as restored at that place for the purpose of paying travel and transportation expenses in connection with his transfer from the place of restoration to the place where a suitable vacancy was available in the same agency. 25 Comp. Gen. 786 (1946); 25 id. 293 (1945); B-176982, December 14, 1972; and B-170987, December 14, 1970.

Appointment to a different position

A postal employee was given a temporary indefinite appointment pending establishment of a substitute clerk-carrier register. He resigned upon his induction into the Army. Upon his retirement from the Air Force he received a probationary appointment and reinstatement in a different position in the Postal Service. His claim for a higher salary rate was properly disallowed. The question of whether a veteran has been restored to a position within the meaning of 38 U.S.C. §§ 2021 et seq. is for determination by the administrative agency, jointly with CSC. As the Postal Service determined that the veteran was not entitled to reemployment rights upon reemployment to a different position, that determination was binding upon this Office. B-159926, September 27, 1966.

Effect of relinquishment of reserve status

An employee who, while on active duty as a reserve officer in the naval service, voluntarily accepted a commission in the regular Navy was held to have relinquished his reserve status and was, therefore, no longer entitled to benefits under 5 U.S.C. § 3551 which provides for reemployment of Government employee members of the Reserves or National Guard upon release from active duty. 41 Comp. Gen. 680 (1962).

Restoration under 38 U.S.C. §§ 2021 et seq.

Erroneous refusal by agency to restore

After completing military service, an employee was denied restoration to the position he had formerly held in violation of his statutory right. Upon restoration, he may avail himself of the remedy provided by the Back Pay Act of 1966, 5 U.S.C. § 5596, for the period that restoration was withheld upon a determination that the agency's failure to restore him was erroneous. B-158925, July 16, 1968.

Failure to apply for restoration within statutory period

An employee of the General Services Administration who had been serving under a temporary appointment, was ordered to active duty on June 24, 1951, and was separated retroactive to June 23, 1951, on June 9, 1961, was not entitled to reemployment rights and benefits under 38 U.S.C. §§ 2021 et seq., since he was retired from active duty on June 4, 1960, by reason of physical disability and the record did not indicate that an attempt was made to obtain a release within the statutory time limitation. Therefore, the employee was paid in a lump sum for annual leave previously earned at the rate at which it was earned, sick leave was noncreditable since there was no reemployment within 3 years after release from active duty, and the employee's military service was not creditable as civilian service since he was not regarded as having been in a furlough status during that period. B-162148, October 5, 1967.

Salary entitlement upon restoration

Promotion rights while im military service--An Internal Revenue Service examiner on military leave who, through administrative error, was not considered for waiver of the time-in-grade restriction under the Whitten Admendment, 5 U.S.C. § 3101 note, incident to offered conversion from examiner to attorney position, was entitled to have his promotion date changed to September 22, 1968, with adjustments in step-increase dates, despite the general prohibition against retroactive adjustment of a personnel action which would result in additional comensation. Under 38 U.S.C. §§ 2021 et seq., 5 U.S.C. § 5335(b), and CSC regulations, it is mandatory for an employee who is absent in military service to be considered for promotion, and

if eligible, to be promoted on the same date as he would have been had he remained in his civilian position. B-172077, April 7, 1971.

E. SETTLEMENT OF ACCOUNTS OF DECEASED OFFICERS AND EMPLOYEES

Generally

Payments of unpaid compensation due deceased civilian employees of the Federal Government to beneficiaries or to proper claimants in accordance with the order of precedence contained in 5 U.S.C. § 5582, may be made by the employing agency without reference to GAO. However, a claim for any such payment must be submitted to the Claims Division, GAO, for adjudication when doubt exists as to (1) the amount or validity of the claim, or (2) the person or persons properly entitled to payment. B-143966, June 29, 1961. 4 GAO Manual for the Guidance of Federal Agencies, §§ 19 et seq. (1967 ed.)

Beneficiary designation

Designation of other than statutory beneficiary--The executor of the will of a deceased Federal employee who did not file a designation of beneficiary to receive his unpaid compensation upon his death was not entitled to payment in preference to the decedent's adopted son notwithstanding the executor's status as principal beneficiary under the will. 5 U.S.C. § 5582, which governs the distribution of unpaid compensation due Government employees, requires that designations of beneficiaries be filed with the employing agency. B-150308, December 12, 1962. See also B-172540, May 28, 1971.

Unnecessary for relationship to employee to exist--Under 5 U.S.C. § 5582, an employee may designate any person or persons as beneficiary. The term "person or persons" includes a legal entity or the estate of the deceased employee. 4 GAO Manual for the Guidance of Federal Agencies § 19.2 (1967 Ed.)

Error in names--The claimant, the cousin of a deceased Army employee, who contended that the beneficiary "Mary E. Sanchez, cousin," designated by the employee to receive the unpaid compensation due at the time of his death was actually the claimant, Mary E. Santos, who resided at the address shown for the beneficiary on the designation form. Her claim may not be paid in the absence of a determination by a court of compentent jurisdiction that

the name of the beneficiary shown was in error and that the intent was to designated the claimant, in view of the fact that the employee's former wife at one time was known as Mary Sanchez and was referred to as a cousin by the employee after their divorce. B-147549, November 22, 1961.

A deceased Government employee incorrectly listed the name of the person that he desired to receive part of any compensation due him at death. However, other evidence clarified the employee's intent as to the intended beneficiary and the intended beneficiary is entitled to payment. B-182519, July 2, 1975.

Necessity for designation to comply with statute--Even if a court should declare the written statement left on the evening of death to be the last will and testament of a deceased Federal employee, such decision would not satisfy the statutory requirements of designation of beneficiary under 5 U.S.C. § 5582, since the statute requires the designation by an employee to be in writing and filed with the agency prior to the employee's death. B-154278, June 11, 1964.

Distinction from designation of beneficiary under FEGLI--A deceased Federal employee did not designate a beneficiary to receive her unpaid compensation due at death, in accord dance with 5 U.S.C. § 5582(b). The employee's aunt may not be paid this compensation, even though she is designated beneficiary under the Federal Employees' Group Life Insurance program, since the latter designation is distinct from the designation of a beneficiary to receive unpaid compensation. Under the terms of 5 U.S.C. § 5582(b), the employee's widower, from whom she was separated, was entitled to this compensation. B-178403, June 5, 1973.

Surviving spouse as designated beneficiary

Rights of common-law widow

Claim of the sister of a deceased civilian employee for unpaid compensation due the decedent who had not designated a beneficiary but who was survived by a common-law widow, may not be allowed. Under 5 U.S.C. § 5582, when no beneficiary has been designated, payment is to be made to the widow. Furthermore, unpaid compensation of a deceased Federal employee does not become part of the estate of the decedent unless there is no designated

beneficiary, spouse, children or their issue, or parents. B-130743, November 30, 1962. See also B-175195, April 26, 1972.

Illegality of marriage

Under California law, the legal relationship between husband and wife is not terminated by an interlocutory divorce decree. It is terminated only by the expiration of the statutory waiting period and entry of final judgment. Therefore, as the ceremonial marriage of the claimant and the decedent occurred prior to entry of final judgment (no later evidence of validation of the marriage having been presented), the claimant was not the decedent's lawful widow and there was no basis for allowance of the claim for unpaid compensation due the deceased employee, settlement having been made in favor of his children under the order of precedence contained in 5 U.S.C. § 5582. B-173414, July 30, 1971.

Effect of separation agreement

A separation agreement does not divest a wife of her right to unpaid compensation in the absence of the designation of another beneficiary. B-169560, June 3, 1970.

Failure of beneficiary-husband to claim unpaid compensation

The mother of the deceased employee was advised that under 5 U.S.C. § 5582, GAO was prohibited from authorizing payment to her unless it could be established by competent evidence that her daughter's husband was either divorced from or had predeceased her daughter. Where reasonable and diligent efforts had been made without success to establish the existence or death of the husband, settlement for the amount of unpaid compensation due upon the death of the decedent was issued in favor of the mother. The mere possibility of the husband's existence should not foreclose entirely the entitlement of those whom Congress has designated as next in the order of precedence. B-173574, November 2, 1971. See also B-168930, June 16, 1970.

Beneficiary charged with decedent's death

Felonious intent rule

A husband who entered a plea of guilty to first degree manslaughter in connection with the death of his wife--a former Federal employee in the State of Ohio--was not entitled to the unpaid compensation due the decedent. The statute and case law of the State which permit payment to husband would prevail only in the absence of a Federal statute or policy. However, the policy governing payment pursuant to 5 U.S.C. § 5582, prescribing the order of precedence for the payment of money due a deceased employee, is that payment will not be made to a person otherwise entitled if such a person participated in the death of the employee, in the absence of evidence establishing that there was no felonious intent on his part. 51 Comp. Gen. 483 (1972).

Compensation payable

Day of death

Compensation is payable for the day of death where the employee was in a pay status immediately prior to his death. 25 Comp. Gen. 366 (1945). In the case of a substitute postal employee who worked only when called and who was on sick leave on May 31, 1962, the day preceding his date of death, his salary was allowed for a full day for June 1, 1962, in view of the administrative report that the employee would have been carried in a sick leave status on that day had not death intervened. It is reasonable to assume that an employee in a pay status immediately before his death would have continued in such status had not death intervened; therefore, his beneficiary is entitled to compensation for the day on which the employee's death occurred. B-149836, September 20, 1962.

Unused compensatory time

Where, for reasons beyond his control, an employee's compensatory time in lieu of overtime remains unused at the time of his death, payment at the overtime rates may be made therefor to his beneficiary pursuant to 5 U.S.C. § 5582. 31 Comp. Gen. 245 (1952).

Change of beneficiary received by agency after death of employee

Where the designation of the widow as sole beneficiary was not received by the employing agency until after the employee's death, the widow was not entitled to unpaid compensation due the employee at time of death, notwithstanding allegations that previously designated persons were not legal heirs and the employee's will named her as beneficiary. 5 U.S.C. § 5582 provides that the employing agency must receive the designation prior to the employee's death and that payment to the designated persons bars recovery by any other person. B-157353, August 12, 1965.

Death of beneficiary prior to death of employee

Where the wife, who was the designated beneficiary, died before the employee, the designation was ineffective by operation of law upon her death. No rights to compensation which would later become due upon death of the employee vested in the wife or her heirs or estate. Therefore, even though the employee did not cancel or change the beneficiary designation after his subsequent marriage, his surviving wife, rather than the children of his deceased wife, became entitled to the unpaid compensation upon his death. 41 Comp. Gen. 431 (1962).

Death of beneficiary subsequent to death of employee

A claim by the administratrices of the deceased beneficiary of a deceased employee for money due the employee at his death was allowed as the beneficiary died after her husband. Under 5 U.S.C. § 5582(b), if the person entitled to payment of money due the deceased employee survives the deceased employee, the right to payment vests in that person. If she should thereafter die before payment is accomplished, that right passes to her estate or to her heirs-at-law as the case may be. B-162287, August 25, 1967.

Prohibition against beneficiary to waive statutory right

A claimant who stated that the deceased employee was his legal wife and who relinquished his claim in favor of his stepdaughter was allowed compensation due the decedent as widower. 5 U.S.C. § 5582, which established the order of precedence to unpaid compensation, does not permit a survivor of a higher order of preference, such as the widower, to waive his statutory right in favor of a child of the decedent. B-156732, May 24, 1965.

Minor children

Illegitimate children

The illegitimate children of a deceased Federal employee claimed the unpaid compensation due under 5 U.S.C. § 5582. Even though the illegitimate children had not been formally acknowledged in accordance with New York inheritance laws, their claim was allowed. The record established the fact of paternity and other New York laws conferring analagous benefits did not require a formal judicial order of paternity. If the relevant state's statute of intestate succession incorporates rigid procedural requirements (such as the New York filiation proceeding) for establishing paternity before "illegitimate children" can inherit, GAO will not be precluded from considering other statutes in the same state which deal with receipt of governmental benefits--e.g., state wrongful death or workmen's compensation statutes--in determining what evidence of paternity may be accepted.

In light of decisions of the United States Supreme Court and lower Federal court decisions, any distinction between "legitimate and illegitimate" children for purposes of receipt of Federal benefits, including unpaid compensation, has been abrogated. All prior Comptroller General decisions which held contra will no longer be followed. 54 Comp. Gen. 858 (1975).

F. PAYMENTS TO MISSING EMPLOYEES

Generally

Under 5 U.S.C. §§ 5561 et seq., the Missing Persons Act, an employee in a missing status is entitled to receive or have credited to his account, during the period he is in a missing status, the same pay and allowances to which he was entitled at the beginning of such period or may become entitled thereafter. An employee in a missing status on or after January 1, 1965, may elect either to receive payment for annual leave which accrued to his account on or after January 1, 1965, but which was forfeited because he was unable to use such leave by virtue of his missing status, or to have such annual leave restored to him and credited to a separate leave account. 5 U.S.C. § 5562(a).

Termination of entitlement

Entitlement to pay and allowances ends on the date of (1) receipt by the head of the agency concerned of evidence that the employee is dead or (2) a determination of death made after review by the agency and the lapse of 12 months in a missing status. 5 U.S.C. § 5562(b) and B-163944, May 23, 1968.

Finality of administrative determination

A determination of an employee's entitlement under the Missing Persons Act by the head of an agency is conclusive in accordance with 5 U.S.C. § 5566. Where an agency head determined that an employee was intermittent or native labor casually hired and, therefore, ineligible for benefits under the Act, GAO had no authority to reconsider the matter. B-157343, August 17, 1965. However, the conclusiveness of such a determination does not extend to decisions as to whether a particular type of pay or allowance is properly includable under the Act. 27 Comp. Gen. 205 (1947).

Entitlement to overtime compensation

Method of computation

A civilian employee is entitled to overtime compensation based on the amount of overtime compensation received prior to entering a missing status, if such compensation was part of his regularly scheduled pay and allowances and such overtime compensation would have continued throughout his missing status period. This is so even though the office to which the employee was assigned had been disestablished. However, where overtime was not a part of the employee's regularly scheduled workweek, the employee is not entitled to overtime compensation unless he became entitled to it thereafter. Such entitlement would be based on the overtime performed by his replacement or the average overtime performed by employees in his unit. 55 Comp. Gen. 147 (1975).

G. CONFLICT OF INTEREST STATUTES

Generally

18 U.S.C. §§ 201 et seq., in general, prohibits Federal employees from receiving compensation for any services rendered or to be rendered by the employee or another in relation to

any proceeding, application, request for a ruling or other determination, charge, accusation, arrest, or other matter in which the United States is a party; prohibits such employees from appearing as agent or attorney on behalf of anyone in a proceeding in which the United States is a party; disqualifies former officers and employees from participating in matters connected with their former duties or official responsibilities; prohibits a Government employee from having any present or prospective financial interest in Government decisions in which he participates; and prohibits Federal employees from receiving compensation for their work from any private source.

Aiding or assisting in claims

Although an agency is not required to notify employees of underpayments, separated Veterans Administration employees who were not compensated for holidays occuring within periods of lump-sum leave payments or not granted statutory increases under schedule II, Public Law 87-793, and who were not aware of their entitlement and who apparently would not claim the amounts due, could be informed of underpayments or paid when current addresses became available without awaiting the filing of claims since, GAO did not object to the additional payments, legally due. The criminal provisions of former 18 U.S.C. § 283, prescribing penalties for employees who aided or assisted in prosecution of claims against the United States have been repealed and replaced by 18 U.S.C. § 205. Whether that provision is applicable is a matter for determination by the Department of Justice or the courts. B-115800, December 8, 1964.

Criminal penalties--jurisdiction

The principal statutory provisions relating to conflicts of interest are contained in 18 U.S.C. §§ 201 et seq. The basic regulatory provisions setting forth standards of conduct for Government employees are found in Executive Order No. 11222, May 8, 1965, as amended, and in CSC and agency regulations promulgated thereunder.

Under the Executive Order and CSC regulations, the determination of whether a conflict of interest or the appearance of a conflict of interest exists is left to the head of the agency concerned or CSC. In the event it is determined that there is a conflict of interest and that a violation of the criminal code may have occurred, the matter would be referred to the Department of Justice. GAO does not have authority, either by statute or regulations, to determine whether conduct

on the part of an employee of another Federal agency has violated any statutes or regulations pertaining to conflicts of interst. See 48 Comp. Gen. 24 (1968).

H. EQUAL EMPLOYMENT OPPORTUNITY MATTERS

Generally

Effective March 24, 1972, under Public Law 92-261, 86 Stat. 103, 111, 42 U.S.C. § 2000e-16, the Congress, in amending title VII of the Civil Rights Act of 1964, provided specific administrative and judicial remedies for discrimination in Federal employment.

Remedies for employment discrimination prior to 1972 amendments to the Civil Rights Act of 1964

Entitlement to retroactive promotion

A female employee who received an excepted schedule B appointment at grade GS-9 had been discriminated against because of race or sex in violation of 5 U.S.C. § 7154(b) and 5 C.F.R. § 713.202, as she qualified for a GS-11 position and was assigned and performed duties warranting a GS-11 classification. Correction of the personnel action and adjustment in pay was legally justified on the basis that the original classification and appointment as a GS-9 was illegal. The corrective action was not viewed as a retroactive promotion such as ordinarily is prohibited by law, but as a correction of an intentional illegal appointment or misclassification. 50 Comp. Gen. 581 (1971).

Back Pay Act of 1966 not applicable

The remedial action of retroactively promoting an employee who alleged racial discrimination after such employee had been promoted from grade GS-9 to grade GS-11 without regard to his complaint did not entitle the employee to a higher grade salary for the period prior to the effective date of his regular promotion. Neither 5 U.S.C. § 7151 nor the implementing CSC regulations provide for retoractive remedial action in event of a finding of discrimination. Furthermore, the employee could not be paid additional compensation under the Back Pay Act of 1966, 5 U.S.C. § 5596, nor on the basis of a retroactive correction of an administrative error. Failure to timely promote the employee is neither a positive adverse administrative action required for payment under the statute nor an administrative error. 48 Comp. Gen. 502 (1969).

Following enactment of 1972 amendments to the Civil Rights Act of 1964

Nonhiring of applicant for employment based on sex discrimination

The Internal Revenue Service determined that an applicant's nonselection for a position with the agency was based on sex discrimination. Although the applicant declined a subsequent offer of a position, she was entitled to backpay from the date of nonselection to the date of declination of the offer under 42 U.S.C. § 2000e-16. 54 Comp. Gen. 622 (1975).

Unwarranted and unjustified personnel actions

The Equal Employment Opportunity Commission (EEOC) separated a probationary employee for alleged inefficiency without formally making a determination on his grievance or his discrimination complaint. Subsequently, the EEOC changed the employee's separation date from May 16, 1972, to June 12, 1972, and stated on the Notification of Personnel Action, Standard Form 50, that the employee had resigned to accept another position and was entitled to backpay under 5 U.S.C. § 5596. Although the EEOC did not specifically state that the employee had undergone an unjustified personnel action, no exception was taken to the payment of backpay since the statement on the Standard Form 50 was tantamount to an agency determination of discrimination and met the documentation requirement contained in 5 C.F.R. § 550.803(a). B-180042, June 5, 1974.

I. EMERGENCY EVACUATIONS

Generally

Under the broad authority in 5 U.S.C . § 5523(b), the special allowances, prescribed by the Standardized Regulations, incident to the evacuation of the dependents at an overseas post of duty may be paid to an employee on behalf of his dependents who are not at his post at the time of an evacuation but who are directly affected by the evacuation orders. However, as payments of the additional allowances for unusual expenses must be attributable to a post evacuation order, when dependents are absent for personal reasons at the time an evacuation order issues, with no intention of returning to the post for the duration of the evacuation, the employee is not entitled to the

special allowance, having incurred no unusual expenses. But if an absent dependent is prevented from returning by reason of the evacuation order issued during his absence, the unusual expenses incurred are payable from the time the intended return is blocked. 50 Comp. Gen. 89 (1970).

CHAPTER 9

SERVICE AS JUROR OR WITNESS

INTRODUCTION

A. STATUTORY PROVISIONS

No fees in United States Courts

An employee of the United States or the District of Columbia may not receive fees for service as a juror in courts of the United States or the District of Columbia or for service as a witness on behalf of the United States or the District of Columbia. 5 U.S.C. § 5537.

Setoff of fees for jury or witness service in state courts

Jury or witness fees received by an employee of the United States or the District of Columbia for service as a juror or witness during a period for which the employee is entitled to court leave under 5 U.S.C. § 6322 shall be credited against pay payable to the employee by the United States or the District of Columbia for that period. 5 U.S.C. § 5515.

Court leave

An employee of the United States or of the government of the District of Columbia is entitled to leave, without loss of or reduction in pay or leave to which the employee is otherwise entitled, for a period of absence during which the employee is summoned in connection with a judicial proceeding to serve as a juror or as a witness on behalf of a state or local government. 5 U.S.C. § 6322(a), as amended by Public Law 94-310, June 15, 1976.

Testimony for U.S. or D.C. or in official capacity

An employee who is summoned or assigned by his agency to (1) testify or produce records on behalf of the United States or the District of Columbia, or (2) testify in his official capacity or produce official records on behalf of a party other than the United States or the District of Columbia, is performing official duty for the period of such service. 5 U.S.C. § 6322(b).

SUBCHAPTER I--SERVICE AS JUROR

A. JURY SERVICE BY POSTAL SERVICE AND GOVERNMENT OF GUAM EMPLOYEES

Employees of the Government of Guam

Employees of the Government of Guam who receive salaries from the territory in accordance with sections 26(a) and (b) of the Organic Act of August 1, 1950, do not receive compensation as employees of the United States within the purview of 5 U.S.C. §§ 5537 and 6322 which authorize court leave for Federal employees. Such employees therefore are entitled to retain the jury fee without diminution of salary for performance of jury duty in the District Court of Guam. 35 Comp. Gen. 369 (1955).

Postal Service employees

Although the Postal Reorganization Act, Public Law 91-375, effectively removed Postal Service employees from the purview of title 5 of the United States Code, the provisions of that title have been continued in effect for Postal Service employees through the postal regulations. The provisions of 5 U.S.C § 5537, therefore, still apply to Postal Service employees and they may not be paid jury service fees authorized by 28 U.S.C. § 1871, until the Postal Service regulations are modified or amended so as to make that section inapplicable to Postal Service employees. B-70371, January 22, 1976.

B. EFFECT ON NON-BASIC COMPENSATION

Night differential

An employee otherwise entitled to night pay differential may continue to receive such pay for periods excused from duty while serving as a juror in the United States District Court for the District of Columbia. 29 Comp. Gen. 427 (1950).

Premium pay

Because it would be a hardship on employees called for weekday jury service to also work on weekends, the Federal Aviation Administration could establish a policy to permit employees whose normal tours of duty included work on Saturday or Sunday, or both days, to be absent on weekends without charge to annual leave and with payment of the premium pay normally received

by them for work on Saturdays. 54 Comp. Gen. 147 (1974).

Overtime

Per diem and per hour employees who are regularly required to work 6 8-hour days per week, for which overtime rates of compensation are paid in accordance with 5 U.S.C. § 5544 for the sixth day of work, may be paid overtime compensation when required to serve on a jury for such day of the week. 23 Comp. Gen. 904 (1944).

C. PAYMENT FOR JURY SERVICE

Per diem allowance

Prohibition of 5 U.S.C. § 5537 against receiving compensation for jury service, does not preclude allowing employees serving as jurors mileage payments and meals and lodging in kind authorized by law for jurors, in addition to their regular compensation as employees of the United States, but does preclude payment of the per diem allowance for each day's attendance in courts and for travel time prescribed by 28 U.S.C. § 1871. 20 Comp. Gen. 145 (1940).

Part-time employees

A part-time permanent Federal employee who is called for jury service in a United States court may receive the compensation of his position, and for any hours of jury service which do not conflict with his regular tour of duty and for which he is not entitled to court leave, the employee may receive the jury fee. 36 Comp. Gen. 378 (1956).

Jury service on nonworkdays

Full-time and part-time employees who perform jury service on nonworkdays are entitled to retain the fees received for such service. 37 Comp. Gen. 695 (1958).

Jury service outside of normal workhours

An employee who is authorized by a state court to be paid jury fees for 2 days during which the trial was recessed and who returned to and performed the duties of her regular position during the period of the recess may retain the jury fees received for those days without setoff against her regular compensation. B-170497, September 9, 1970.

An employee who performs duty for a full workday and then sits on grand jury duty in the evening may be granted court leave for the following day to the extent necessary to alleviate hardship. Employee is entitled to retention of prorata portion of grand jury fee to the extent that hours of actual service exceed hours of court leave granted. B-70371, August 5, 1975.

An employee who performs jury duty in a court of the United States or the District of Columbia after his hours of duty so that no court leave is involved is entitled to payment of jury fees. 36 Comp. Gen. 378 (1956).

Jury service overlapping normal workhours

For each hour of jury service performed in a court of the United States or the District of Columbia, outside of the hours of duty an employee otherwise worked or, but for jury service, would have been required to work on a given day, the employee is entitled to a proportionate part of the jury fee for that day. Prior decisions to the contrary are overruled. 53 Comp. Gen. 407 (1973).

Principle of 53 Comp. Gen. 407 (1973) permitting prorata payment of jury fees to employees for jury service in Federal courts extending beyond scheduled workday is equally applicable to jury duty performed in state courts. Employees may be permitted to retain a prorata portion of fee for jury service in state or municipal courts extending beyond their scheduled workday. Prior decisions overruled. 55 Comp. Gen. 1266 (1976).

Computation of jury fee entitlement

Federal courts

Jury service fee payable to Federal employees whose period of jury service in Federal court overlaps in part their normal workday shall be based on the statutory jury service fee of $20, prorated over standard 8-hour workday; that is, $2.50 for each hour of jury service outside hours employee worked or would have worked but for jury service. 55 Comp. Gen. 1264 (1976).

State courts

Amount of jury service fee retainable by employee whose period of jury service extends beyond end of normal workday should be computed by dividing the total jury service

fee by eight to arrive at an hourly rate. This rate times the number of hours of jury service beyond the end of the employee's workday equals the amount retainable. 55 Comp. Gen. 1266 (1976).

Hours of jury service

In computing excess hours of jury service over number of employee's working hours in day, fractional hours shall be rounded off, one-half hour or more being considered 1 hour. 55 Comp. Gen. 1264 (1976) and id. 1266 (1976).

When the end of an employee's working day coincides with beginning of jury service, there is no necessity to prorate fee. Any travel time between duty station and court is to be considered court leave. 55 Comp. Gen. 1264 (1976).

State courts--travel expenses in lieu of fees

A Federal employee who has performed jury service in a state court is not required under 5 U.S.C. § 5515 to remit to the Federal Government that part of the compensation he receives from the state to cover traveling expenses where it is clear that a specific amount is received for travel expenses rather than for juror fees. 52 Comp. Gen. 325 (1972).

Absent evidence that a specific amount is intended as reimbursement for transportation expenses, amount received as jury fee must be credited against compensation payable. B-176863, October 4, 1972.

Jury fees that exceed compensation payable

5 U.S.C. § 5515 does not require that collection or deduction on account of jury fees received by an employee exceed the compensation otherwise payable to the employee for the period of absence on jury service. 20 Comp. Gen. 209 (1940).

Rate of payment of jury fees

Retroactive increases--Federal courts

The presiding judge may at his own discretion authorize a retroactive increase in jury fees for jurors in cases extending beyond 30 days' duration under the provisions of 28 U.S.C. § 1871 which authorizes a jury fee of $25 per day for each day of service on one case beyond 30 days. 54 Comp. Gen. 472 (1974).

Variable "expense rate"--state courts

Where Georgia statute provides for reimbursement of expenses at a rate from $5 to $25 per day as determined by county grand juries for next year's jurors, GAO will not look beyond prima facie intent of statute since varying amount seems reasonable in statute that covers entire state. Employees may therefore retain monies paid to them as an expense allowance. B-183711, October 21, 1975.

Refund of fees

Since section 59-120 of Georgia Code Annotated, as amended effective July 1, 1974, provides that jurors in state courts are to receive expenses instead of compensation in connection with their service, employees who performed jury service in Georgia State courts on or after July 1, 1974, and who have turned in the monies received to their agencies, are entitled to refunds from the appropriations into which such monies were deposited. B-183711, October 6, 1976.

SUBCHAPTER II--COURT LEAVE

A. ENTITLEMENT

Employee on other types of leave

When an employee is on annual leave status when summoned for jury service in a state or United States court, court leave should be substituted for annual leave for the period of such duty, but if the employee is in a leave without pay status, court leave is not available to him--such leave being available only to employees who otherwise would be in a duty status or on authorized leave with pay status. 27 Comp. Gen. 84 (1947).

Jury duty outside normal workday

An employee who performs duty for a full workday and then sits on grand jury duty in the evening may be granted court leave on the following day to the extent necessary to alleviate hardship. Employee may retain prorata portion of grand jury fee to the extent that hours of actual service exceed hours of court leave granted. B-70371, August 5, 1975.

B. TEMPORARY EMPLOYEES

An employee who had served on jury duty under both his current 4-year term appointment and under a prior 1-year temporary limited appointment may be granted court leave for the jury duty performed under both appointments. Temporary employees may be granted leave of absence with pay for the purpose of serving on jury duty. 48 Comp. Gen. 630 (1969).

C. PART-TIME EMPLOYEES--"WHEN-ACTUALLY-EMPLOYED"

Substitute employees of the Postal Service, whether career or temporary, who are compensated at an hourly rate and have no established work schedules, hold appointments that are similar to appointments on an intermittent "when-actually-employed" basis, even though substitutes may work an average of 40 hours per week and, therefore, they may not be granted court leave under 5 U.S.C. § 6322. 49 Comp. Gen. 287 (1969).

Employee serving under a career-conditional (intermittent) appointment, whose work technically is on a "when-actually-employed" basis, but whose employment actually covered a protracted period under a continuing established work schedule, may be viewed for purposes of court leave to occupy a position

similar to that of a temporary employee and court leave may be granted for jury duty performed on prescheduled workdays. B-166056, August 12, 1970.

SUBCHAPTER III--SERVICE AS A WITNESS

A. COURT MARTIAL PROCEEDINGS

Expert versus ordinary witness

Claim of psychiatrist for payment of expert witness fees incident to the taking of a deposition in connection with court martial proceedings may not be paid where the record fails to disclose that employment of claimant as an expert witness was authorized in advance of the deposition as required by paragraph 116 of the Manual for Court Martials (1969). However, a claim may be submitted for ordinary witness fees and mileage incident to the taking of the deposition. B-168623, February 17, 1970.

Travel expenses

A change to the Joint Travel Regulations to permit the issuance of invitational travel orders and the payment of travel allowances to civilian persons other than Federal employees who are requested to testify at pretrial investigations made pursuant to Article 32 of the Uniform Code of Military Justice may not be authorized in view of paragraph 34d of the Manual for Court Martials (1969), which, in its present form, provides no authority for any payment to Article 32 witnesses. Article 34d must be changed prior to the contemplated revision of the Joint Travel Regulations. 50 Comp. Gen. 810 (1971) and B-171739, April 21, 1972.

B. ADMINISTRATIVE HEARINGS

Invited witness

Payment of travel expenses, including lodging and subsistence, to non-Government employee witnesses who are invited rather than subpoenaed to appear at an administrative hearing may be made on a commuted basis as well as on an actual expense basis. The term "persons serving without compensation" is broad enough to include such persons, and constitutes authority for reimbursement of travel expenses on a commuted basis. 48 Comp. Gen. 110 (1968).

Corporation, etc. summoned

The word "person" in 26 U.S.C. § 7602 which authorizes issuance of summonses incident to tax inquiries, includes corporations,

trusts, etc. Therefore, when a summons is issued to a corporation to compel attendance as a witness before an Internal Revenue officer, the witness fees and allowances authorized to compensate persons appearing as witnesses are payable directly to the business organization and not to the individual appearing on its behalf. 49 Comp. Gen. 666 (1970).

Mileage fees--persons summoned

Persons summoned for testimony to enable the Internal Revenue Service to establish tax liability, whether the witness is the taxpayer or is a person whose testimony is relevant and material to the inquiry involving the taxpayer, may be paid the fees and mileage provided for attendance at administrative hearings. 48 Comp. Gen. 97 (1968).

Individuals not members of the uniformed services or Federal employees may be called as witnesses in adverse administrative proceedings, whether on behalf of the Government or on behalf of a member or employee, and paid transportation and per diem allowances as "individuals serving without pay" if the presiding hearing officer determines that it has been reasonably shown that testimony of the witness is substantial, material and necessary, and that an affidavit would be inadequate. 48 Comp. Gen. 644 (1968).

C. JUDICIAL HEARINGS

Testimony in official capacity

Where value of employee's testimony in private litigation arises from his official capacity and he is subpoenaed solely because of and to testify in that capacity, or to produce official records, he may be regarded as having been in official duty and pay status during the period of necessary absence. 15 Comp. Gen. 196 (1935).

The attendance of an employee as a witness in a criminal hearing concerning an automobile accident which occurred while the employee-witness and another employee were on official business, for the purpose of strengthening the other employee's case in order to obtain a favorable verdict which would limit the possibility of a tort claim against the Government must be regarded as an appearance in the best interest of the Government. Travel of the employee-witness may, therefore, be considered official business for the reimbursement of travel expenses. 44 Comp. Gen. 188 (1964).

Private litigation

Veterans Administration employees, who testify or produce records on behalf of victimized private parties (VA claimants) to aid in criminal prosecution of individuals under Philippine statute limiting fees which may be charged for assisting VA claimants, may be reimbursed for travel expenses since employees are in an official duty status. See 44 Comp. Gen. 188 (1964) and B-166938, July 17, 1969.

Employees who were summoned to appear as individuals and not in their official capacities in a suit in the Court of Claims by fellow employees for overtime compensation are not entitled to court leave authorized by 5 U.S.C. § 6322, for the period of absence in which they appeared as witnesses on behalf of a private party and without official assignment. 52 Comp. Gen. 10 (1972). But see Public Law 94-310, June 15, 1976, 90 Stat. 687 amending 5 U.S.C. § 6322 to permit payment under such circumstances.

Suspended employees as witnesses

Suspended employees who were requested by U.S. Attorney to give testimony before Federal grand jury and in trial of criminal cases were not reinstated to duty status for periods they spent testifying, even though their testimony was in regard to their official duties. They were, however, entitled to be paid and to retain any witness fees that would be payable to non-Government employees appearing as witnesses in such proceedings. 53 Comp. Gen. 515 (1974).

CHAPTER 10

SERVICES OBTAINED THROUGH OTHER THAN REGULAR EMPLOYMENT

SUBCHAPTER I--EXPERTS AND CONSULTANTS

A. AUTHORITY TO EMPLOY EXPERTS AND CONSULTANTS

Statutory authority

Agencies may secure the services of experts and consultants in accordance with the following authority contained in 5 U.S.C. § 3109:

"(b) When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts and consultants or an organization thereof, including stenographic reporting services. Services procured under this section are without regard to--

"(1) the provisions of this title governing appointment in the competitive service;

"(2) chapter 51 and subchapter III of chapter 53 of this title; and

"(3) section 5 of title 41, except in the case of stenographic reporting services by an organization.

However, an agency subject to chapter 51 and subchapter III of chapter 53 of this title may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section 5332 of this title only when specifically authorized by the appropriation or other statute authorizing the procurement of the services."

Regulatory authority

CSC's instructions implementing 5 U.S.C. § 3109 are found in FPM chapter 304. That chapter contains definitions of the terms "expert," "consultant," "intermittent employment," and "temporary employment" and provides guidance as to the proper use of expert and consultant services. Procedural instructions regarding employment of experts and consultants are contained at FPM, chapter 304, appendix A.

B. FEE LIMITATION

General limitation on compensation

Under 5 U.S.C. § 3109, the amount an agency may compensate an expert or consultant is limited to the daily equivalent of the highest rate payable under 5 U.S.C. § 5332, unless a higher rate is specifically authorized by the appropriation or other statute authorizing procurement of the services.

Limitation applies to "employees"

The compensation payable to an expert or consultant whose services are secured on an employer-employee basis is the maximum rate of compensation payable under the General Schedule. A discussion of when services are obtained on an employer-employee basis rather than on an independent contract basis is included in Subchapter II of this Chapter. See also FPM chapter 304, subchapter 1-4.

Generally--The amount payable to an expert or consultant hired by an agency subject to 5 U.S.C. § 5332 (General Schedule) on an employer-employee basis is the top step of grade GS-15. This is true inasmuch as departments and agencies generally do not have authority in their own right to place positions in grades GS-16 through GS-18. 27 Comp. Gen. 46 (1947); 29 id. 267 (1949); and B-134645, January 7, 1958.

Scientific and engineering positions--The rate of compensation payable to experts or consultants appointed to research and development, scientific and engineering positions is grade GS-18, inasmuch as such positions may be filled without numerical limitation and approval by CSC. 43 Comp. Gen. 509 (1964).

Exceptions

By virtue of specific statutory authority granted it, an agency may be authorized to pay experts or consultants a different or higher rate of compensation than prescribed in 5 U.S.C. § 3109. Also, appropriation acts frequently authorize a GS-18 rate.

Higher rate authorized--The Department of Labor was found to have specific statutory authority under the Occupational Safety and Health Act of 1970 to compensate experts or consultants at the rate of pay for GS-18. 51 Comp. Gen. 225 (1971).

Lower rate authorized--The Agency for International Development, by virtue of a specific limitation contained in the Foreign Assistance Act of 1961, was held to be limited in the amount it could compensate experts or consultants to $100 per day, notwithstanding the higher limitation otherwise prescribed in 5 U.S.C. § 3109. 55 Comp. Gen. 567 (1975).

Independent contracts

The limitation on compensation contained at 5 U.S.C. § 3109 is not applicable, however, to a contract for expert or consultant services entered into under that authority on a truly independent contract basis. 26 Comp. Gen. 188 (1946). The fact that services are secured by contract is not conclusive of the question of the applicability of the fee limitation. If the relationship created under the contract as between the purported contractor and the Government is in fact tantamount to that of employer and employee, the expert or consultant will be regarded as an employee and the amount of compensation which he may be paid will be regarded as subject to the maximum limitation set forth at 5 U.S.C. § 3109. 26 Comp. Gen. 188 (1946); id. 442; and 42 id. 395 (1963).

Employment versus independent contract--The criteria to be used to determine whether the relationship created between an expert or consultant and the Government is in fact an employment relationship rather than an independent contractual relationship are set forth at FPM chapter 304, subchapter 1-4 and are more fully discussed at Subchapter II of this Chapter.

C. INTERMITTENT VERSUS TEMPORARY

Statutory requirement

Under 5 U.S.C. § 3109, experts and consultants may be employed only on an intermittent or temporary basis.

Temporary employment

Temporary employment is defined as employment for 1 year or less and covers continuous employment. It includes periods of temporary employment less than 130 days. 35 Comp. Gen. 90 (1955); B-180698, August 19, 1974; and FPM chapter 304, subchapter 1-2.

Intermittent employment

Intermittent employment is occasional or irregular employment on programs, projects and problems requiring intermittent services as distinguished from continuous employment. 35 Comp. Gen. 90 (1955) and FPM chapter 304, subchapter 1-2.

Conversion from intermittent to temporary--When an intermittently employed expert or consultant has worked more than one half of full time employment, or in excess of 130 days in a service year, his employment automatically ceases to be intermittent and becomes temporary. 36 Comp. Gen. 351 (1956) and B-179640, August 16, 1971.

Relevance of distinction

Renewal of appointment

Intermittent appointments or contracts may be renewed from year to year, whereas temporary appointments cannot. FPM chapter 304, subchapter 1-3.

Generally--The services of experts or consultants may not be secured under a succession of short-term contracts for full or part time services where the resulting continuous employment would be in excess of 1 year. When the need for temporary services extends beyond 1 year, there is no authority to enter into an employment agreement under 5 U.S.C. § 3109 for periods extending beyond 1 year, regardless of any period of break between the employment agreements. 28 Comp. Gen. 670 (1949).

Exceptions

Intermittent appointment following temporary

An expert or consultant who served under a temporary appointment in 1 service year may be reappointed the next year to the same position on a purely intermittent basis. FPM chapter 304, subchapter 1-3.

Successive but distinct temporary appointments

An expert or consultant who served under a temporary appointment in 1 service year may be appointed on a temporary basis in the subsequent year to an entirely different position. FPM chapter 304, subchapter 1-3.

Travel expenses

Intermittent appointment--The travel expense entitlement of persons employed intermittently as experts or consultants is governed by 5 U.S.C. § 5703 which authorizes payment of travel expenses, including a per diem allowance, to such individuals while away from their homes or regular places of business. Under that authority, intermittently employed experts or consultants may be paid a per diem allowance while at the place of their employment as an expert or consultant. 35 Comp. Gen. 90 (1955).

Temporary--A temporarily employed expert or consultant, like a regular Federal employee, is entitled to the ordinary travel allowances payable in connection with the performance of official duty away from the individual's permanent duty station. 35 Comp. Gen. 90 (1955); and B-180698, August 19, 1975.

D. PROCEDURAL ASPECTS

Contracts and appointments

Employer-employee relationship

Where the relationship between the expert or consultant and the Government is to be essentially that of employer and employee, the services should be obtained in accordance with the procedural requirements set forth at FPM chapter 304, appendix A. A discussion of when services are obtained on an employer-employee basis rather than on an independent contract basis is included at Subchapter II of this Chapter. See also FPM chapter 304, subchapter 1-4.

Contract or appointment--Under the FPM requirements, services of experts or consultants obtained on an employer-employee basis may be obtained by either contract or appointment. B-174226, January 12, 1972. Although the form and content of the contract of employment is primarily for administrative consideration, the use of a purchase order in lieu of the procedures prescribed in FPM chapter 304, appendix A, is not sufficient to constitute the appointment required to be made in order to secure the services of an expert or consultant. 27 Comp. Gen. 695 (1948) and B-174226, January 12, 1972.

Independent contract services

CSC procedures set forth at FPM chapter 304, appendix A, are not applicable to the procurement of expert or consultant services on an independent contract basis. Such services should be obtained under a proper contract executed in accordance with appropriate procurement procedures. 51 Comp. Gen. 561 (1972) and B-174226, January 12, 1972. A discussion of when services are obtained on an independent contract basis rather than on the basis of an employer-employee relationship is contained at Subchapter II of this Chapter. See also FPM, chapter 304, subchapter 1-4.

Pay administration

Payroll forms

The performance of expert or consultant services on an employer-employee basis by contract or appointment, as distinguished from independent contract services, results in an employer-employee relationship between the United States and the person performing the services and, consequently, payment therefor should be made on the regular payroll forms with income tax deductions made in the usual manner. 26 Comp. Gen. 695 (1948).

Setoff of annuity

Under 5 U.S.C. § 8344(a) an individual who receives an annuity from the civil service retirement fund and becomes employed in an appointive or elective position is required to have the amount of his compensation in such position reduced by the amount of his retirement annuity. This setoff provision applies to experts or consultants who are civil service annuitants and whose services are obtained on an employer-employee basis. 39 Comp. Gen. 681 (1960). Regardless of the manner in which the services are secured the nature of the expert or consultant services will be scrutinized under the criteria set forth at FPM chapter 304, subchapter 1-4, and the standards discussed at Subchapter II of this Chapter to determine whether the expert or consultant is required to function in a manner tantamount to that of a Government employee. If so, his compensation as an expert or consultant is to be reduced by the amount of his civil service retirement annuity. 53 Comp. Gen. 542 (1974) and B-165378, October 25, 1968.

Setoff of military retired pay--A retired military officer or member whose services as an expert or consultant are obtained on an employer-employee basis is subject to the annuity setoff provisions of 5 U.S.C. § 5332. 42 Comp. Gen. 297 (1962) and 51 id. 189 (1971).

Specifically exempted positions--Although the setoff provisions of 5 U.S.C. § 8344(a) are applicable to reemployed annuitants whose services are secured in an employer-employee relationship, experts or consultants appointed under section 213 of the Economic Stabilization Act, set forth as a note to 12 U.S.C. § 1904, are specifically exempted by statute from the setoff provisions. B-175501, April 12, 1972.

Independent contracts--If the expert or consultant services are obtained in a truly independent contract, the fee payable under the contract is not required to be reduced by the amount of the retirement annuity being received by the independent contractor inasmuch as the setoff provisions of 5 U.S.C. § 8344(a) are applicable only to annuitants who become "employed" by the Government. 53 Comp. Gen. 702 (1974) and B-154204, September 4, 1964.

Amount to be setoff--In the case of an individual who is a civil service annuitant and whose temporary or intermittent services as an expert or consultant are obtained on an employer-employee basis subject to the setoff provisions of 5 U.S.C. § 8344(a), his daily rate of compensation is required to be reduced by 1/260th of his annuity. 36 Comp. Gen. 186 (1956); B-159780, October 6, 1966 ; and B-167670, September 24, 1969.

E. RIGHT TO COMPENSATION

Salary increases

The pay of an expert or consultant hired pursuant to 5 U.S.C. § 3109 is fixed by administrative action. Without a provision in the documents effecting the expert's or consultant's appointment making increases in the General Schedule rate of pay under 5 U.S.C. § 5305 automatically applicable to those individuals, and in the absence of administrative action authorizing a consequent increase under 5 U.S.C. § 5703, an expert or consultant is not entitled to a pay increase on the basis of an increase in the General Schedule rate of pay. B-131259, July 6, 1976.

Overtime

Although, under 5 U.S.C. § 5542, intermittent employees who work in excess of 8 hours per day are entitled to payment of overtime compensation, that entitlement does not extend to experts or consultants employed on an intermittent basis under 5 U.S.C. § 3109. 28 Comp. Gen. 328 (1948) and 46 id. 667 (1967).

Holiday pay

Unless the appointment papers expressly provide to the contrary, an expert or consultant employed on a per diem basis is not entitled to compensation for holidays on which no work was performed. 36 Comp. Gen. 723 (1956); B-131457, September 19, 1962; and B-131259, January 23, 1976.

Traveltime

Generally the question of whether compensation may be paid during travel from and to home of the expert or consultant depends upon the terms of the contract. Where no particular place for the services is named in the contract, it has been held that compensation attaches the moment the consultant departs from his home or regular place of business. 28 Comp. Gen. 502 (1949); B-106176, January 8, 1952; and B-113778, March 19, 1953. Where the contract provides for payment of compensation "for each day worked" such contract may not be construed so as to permit compensation for elapsed travel time between the employee's home or regular place of business and his official headquarters. B-106176, January 8, 1952. See also 24 Comp. Gen. 498 (1945); 25 id. 704 (1946); 27 id. 659 (1948); 30 id. 283 (1950); and id. 495 (1951).

Pay setting upon regular appointment

To permit employment as an expert or consultant on an intermittent basis under 5 U.S.C. § 3109 to be considered a "first employment" when the consultant is subsequently appointed to a regular full time position for the purpose of fixing his compensation above the minimum rate for the grade of that position would not only be an evasion of the within-grade waiting requirements for advancement to higher steps in grades, but would be contrary to the spirit and intent of the Classification Act of 1949. Therefore, the fixing of the salary of a consultant employed under 5 U.S.C. § 3109 when he is appointed to a regular position at a rate of compensation based on his per diem rate which is above the minimum rate of pay for the

grade of the regular position is not proper. 42 Comp. Gen. 114 (1962) and B-154195, June 11, 1964.

F. SERVICES NOT CONTEMPLATED UNDER 5 U.S.C. § 3109

Full time operating positions

Since 5 U.S.C. § 3109 relates to the procurement of expert or consultant services on a temporary or intermittent basis, it does not contemplate full time employment in positions properly for allocation to a Classification Act grade. The civil service laws and regulations require that regular full time positions be set up under the Classification Act and allocated to the appropriate salary grade prescribed therein. It was not intended that 5 U.S.C. § 3109 be used as a subterfuge to pay such employees compensation and other benefits, such as per diem and travel expenses, in excess of those legally payable to regular employees of the Government. 30 Comp. Gen. 495 (1951).

Detective services

In view of the prohibition contained at 5 U.S.C. § 3108 against the Government's use of Pinkerton services, the services of detective agencies cannot be obtained under 5 U.S.C. § 3109. 41 Comp. Gen. 564 (1962); 44 id. 564 (1965); and 51 id. 494 (1972).

Legal services in connection with litigation

Under 5 U.S.C. § 3106 agencies are generally prohibited from employing attorneys either for the conduct of litigation in which the United States is a party or is interested, or for securing evidence for such litigation. However, legal services for other purposes may be obtained as in the case of a retired Federal Communications Commission attorney whose services were properly obtained on an independent contract basis to complete an investigation for and participate in a hearing before the Commission under its specific authority to pay special counsel fees. 53 Comp. Gen. 702 (1974) and B-180708, January 30, 1975.

SUBCHAPTER II--CONTRACT SUPPORT AND TECHNICAL SERVICES

A. DETERMINATION TO CONTRACT OUT

Pursuant to its general authority to contract, departments and agencies may contract for support and technical services. The determination of whether such services should be performed by the agency with its own employees or under an independent contract for services is to be made on the basis of the policy guidance set forth in Office of Management and Budget Circular No. A-76, including a consideration of the comparative costs of either method of securing the needed services and the requirement that Circular A-76 not be used to justify a departure from any law or regulation, including CSC regulations. B-183487, July 3, 1975.

Considerations of economy and necessity

Services normally performed by Government employees may be performed under an independent contract if contracting out for such services is substantially more economical or feasible, or is necessary under the circumstances. 43 Comp. Gen. 390 (1963); 44 id. 761 (1965); and B-160555, February 3, 1967.

Example

In the absence of a contrary showing, a proposal to contract with the D.C. Urban Corps for the purpose of recruiting students and dealing with institutions on the behalf of an agency would appear improper since the services to be rendered are the type of services for which personnel units of Federal agencies are ordinarily maintained and could presumably be performed on a substantially more economical and feasible basis by such personnel units. 50 Comp. Gen. 553 (1971).

B. PROPER CONTRACTING

Generally

Contract support and technical services may be obtained only under a proper contract pursuant to which the contractor and its employees perform on a truly independent contract basis rather than in a relationship that, as between the Government and the contractor, is tantamount to that of employer and employee. 44 Comp. Gen. 761 (1965) and 50 id. 553 (1971).

Independent contract versus employer-employee relationship

The standards to be applied in determining whether a contractor or contractor employees are functioning essentially as employees of the Government rather than on an independent contract basis are set forth in the Opinion of the General Counsel of CSC issued in October of 1967 and supplemented in July of 1968. See FPM Letter 300-12, August 20, 1968, and attachment. Under that opinion, as concurred in by B-133394, November 1, 1967, a contract is improper if it involves the performance of a Federal function and is performed by the contractor or its employees under the detailed supervision of the Federal officer or employee.

Supervision

In the absence of an actual showing of detailed supervision, the presence to a substantial degree of some or all of the following elements may evidence supervision of the type that will establish an employer-employee relationship:

--The contract is performed at a Government site.

--The contractor utilizes Government-furnished equipment.

--The services contracted for are applied directly to an integral effort of the agency.

--Comparable services, meeting comparable needs, are performed in the same or similar agencies by Civil Service personnel.

--The need for a type of services can reasonably be expected to last beyond 1 year.

The above elements of supervision are also listed at FPM chapter 304, subchapter 1-4.

Examples

A contract for the services of clerks, typists, telephone and teletype operators was held to be improper where the contract specifically provided for Government supervision and there was no evidence that the work could be properly performed without detailed and close supervision of contractor employees by Government personnel. 44 Comp. Gen. 761 (1965).

Under proposed contract for study of the special use Commercial Public Service Fee Structure, the study was to be performed for a lump sum price regardless of the time involved in its performance and was to be performed without Government supervision. Under these circumstances and where the study was only periodically required and comprised a definite limited service, the proposed contract was found to contemplate proper independent contractor performance even though the Government was to furnish office space, equipment, supplies, stenographic, and typing services required by the contractor while working in the Government office. B-155365, October 28, 1964.

Air Force contract for services for assistance in the conduct and analysis of experiments with the University of New Mexico was held not to be a proper independent contract but to involve an employer-employee relationship where the contractor was to be paid on the basis of the number of hours worked by its personnel, where the Air Force had control over the selection of contractor employees, where the type of work was such that it could not be performed without the direct supervision of Government personnel, and where such Government supervision was provided for by the contract terms. Under such circumstances the relationship created between the Government and the contractor's employees is tantamount to that of employer and employee, and personnel performing such work should be employed in accordance with the civil service laws and classification principles. B-157192, July 30, 1965.

CHAPTER 11

WAGE BOARD EMPLOYEES

SUBCHAPTER I--BACKGROUND INFORMATION

A. GENERALLY

The term "prevailing rate" or "wage board" employee is generally used to designate a civilian employee of the Government who occupies a position in a recognized trade or craft or any other position having trade, craft, or laboring experience and knowledge as the paramount requirement, and whose position is exempted by 5 U.S.C. § 5102(c)(7) from the position classification standards applicable to General Schedule employees. The term "prevailing rate employee" is more fully defined at 5 U.S.C. § 5342.

B. HISTORICAL DEVELOPMENT OF WAGE BOARD SYSTEM

Old wage system

Initially there was no uniform requirement that the rates of pay for wage board positions be set upon a prevailing rate basis. Certain agencies, including the Government Printing Office and Department of the Navy, were subject by statute to procedures requiring that the pay rates of their wage board employees be so established and, as to those agencies, the procedures were mandatory. With respect to other agencies with positions exempted by 5 U.S.C. § 5102(c)(7), the authority to utilize wage board procedures stemmed from the inherent authority vested in the heads of the departments or agencies to fix the compensation of employees not otherwise controlled by statute. 13 Comp. Gen. 367 (1934) and 15 id. 308 (1935).

Coordinated Federal Wage System (CFWS)

By Presidential directive of November 16, 1965, to the Chairman of CSC, the President recognized that uncoordinated treatment of the pay-setting procedures for wage board employees had resulted in diverse and often inequitable treatment of employees. In response to his direction to take action to develop common job standards and wage policies and practices, CSC issued procedures and instructions implementing the CFWS in furtherance of the statutory requirement that the pay of wage board employees be "fixed and adjusted from time to time as nearly as is consistent with the public interest in

accordance with prevailing rates." Under the CFWS, CSC sought to regulate the conduct of wage surveys, the determination of occupational groups, and to establish rules governing administration of pay for individual employees upon appointment and transfer.

Federal Wage System (FWS)

Public Law 92-392, August 19, 1972, 86 Stat. 564, provided statutory authority for a pay system under which the rates of pay of wage board employees were to be adjusted. The pertinent provisions of Public Law 92-392 are codified at 5 U.S.C. §§ 5341-5349. CSC's instructions implementing the FWS are contained at FPM Supplement 532-1.

SUBCHAPTER II--BASIC COMPENSATION

A. EFFECTIVE DATE OF INCREASES IN PAY RATES

Generally

Subject to the exceptions stated below, an increase in compensation authorized by a wage board or other wage-fixing authority for employees under the prevailing rate system may not be made effective prior to the date of final action by that wage-fixing authority. B-174278, December 23, 1971.

Forty-five days after wage survey ordered

By virtue of 5 U.S.C. § 5344, increases in rates of basic pay granted pursuant to wage surveys are effective not later than the first day of the first pay period which begins on or after the 45th day (excluding Saturdays and Sundays) following the date the wage survey is ordered to be made. However, retroactive pay pursuant to section 5344 is payable only when the individual is employed on the approval date of the order granting the increase, or when the individual retired or died during the period between the effective date of the increase and the approval date of the order granting the increase, and only for services performed during that period. Accordingly, wage board employees who are separated prior to the approval date may receive a retroactive adjustment only if they meet the statutory conditions. 54 Comp. Gen. 655 (1975). Section 5344 does not apply to special wage schedule employees. B-173783.169, August 5, 1976.

Monroney Amendment

Separated employees

The Monroney Amendment, Public Law 90-560, October 12, 1968, 82 Stat. 997, requires reconstruction of pay schedules based on "out-of-area" data where comparable positions do not exist in the survey area. The schedule adjustments required by the Monroney Amendment are to be regarded as corrective action and not as an order granting an increase in pay within the meaning of 5 U.S.C. § 5344. Hence, each separated employee who was on the rolls on the date of the original wage schedule order is entitled to a retroactive pay adjustment. 50 Comp. Gen. 266 (1970).

Corrective increases

In retroactive application of the corrected Monroney Amendment wage schedule, when a comparison of individual wage payments shows that previous wage schedule payments are less than the employee is entitled to under the Monroney Amendment wage schedule, the employee is to be paid the difference. If the previous payments are greater than the amount due under the Monroney Amendment wage schedule, the employee may retain the difference. Overpayments are to be setoff against underpayments and if they are equal, no payment is due the employee. 50 Comp. Gen. 495 (1971).

B. UNDER PRE-EXISTING COLLECTIVE BARGAINING AGREEMENTS

Generally

Collective bargaining agreements between an agency and a labor union which were in effect on the date of enactment, August 19, 1972, of Public Law 92-392, and which provided for negotiated wage fixing, are exempted from the wage survey provisions of 5 U.S.C. § 5343 by section 9(b) of Public Law 92-392. See 5 U.S.C. § 5343 note. 55 Comp. Gen. 162 (1975).

Retroactivity

Wage adjustments for wage board employees determined through collective bargaining under labor-management agreements, as differentiated from those determined by wage surveys, are not subject to 5 U.S.C. § 5344(a) and are, therefore, subject to the general rule that increases may not be made effective prior to the date of final approval. See 38 Comp. Gen. 538 (1959). However, a preliminary agreement between a competent wage-fixing authority and a union, which prospectively sets the effective date for wage increases yet to be negotiated, properly authorizes increases from that date even though the amount of the increase is not agreed upon or otherwise determined until a later date. 55 Comp. Gen. 162 (1975); B-170170, October 9, 1970; and B-185506, September 2, 1976. In the absence of a preliminary agreement fixing the date, the negotiated wage increase may not be made retroactive. 55 Comp. Gen. 162 (1975).

Limitation on retroactivity

The effective date of such a pay increase may not be established retroactive to a date earlier than the date of the preliminary agreement itself. B-183083, November 28, 1975.

Arbitrator's decision

Inasmuch as the effective date of a wage increase to be effected by collective bargaining can be set by preliminary agreement, the arbitrator may set a retroactive effective date for a wage increase in accordance with the collective bargaining agreement. 55 Comp. Gen. 1006 (1976).

C. WITHIN-GRADE INCREASES

Generally

Wage board employees are entitled to within-grade step increases after established waiting periods under the provisions of 5 U.S.C. § 5343(e)(2). In general, the waiting period for wage board (as well as General Schedule) employees begins at the beginning of a new appointment after a break in service or a nonpay status in excess of 52 weeks or begins upon receiving an "equivalent increase." 5 U.S.C. § 5335(d), which is applicable to General Schedule employees, provides that an increase in pay granted by statute is not an equivalent increase in the case of an employee converted from a wage board to a General Schedule position. A pay increase received by such an employee while in a General Schedule position as the result of a wage adjustment under the Federal Wage System is considered an increase in pay granted by statute and, as such, is not regarded as an "equivalent increase" for the purpose of 5 U.S.C. § 5335. 54 Comp. Gen. 305 (1974).

Effect of downgrading action

CSC's regulations implementing 5 U.S.C. § 5343(e)(2) and prescribing standards for within-grade increases for wage board employees are contained at FPM Supplement 532-1, subchapter S8-5. With respect to repromotion of an employee to a position from which he was previously downgraded in a reduction in force, they provide that he is not to be regarded as having received an equivalent increase as of the date of repromotion. A wage board employee who was separated from a WG-6, step 3, position in a reduction in force and who was given a temporary 120 day appointment to WG-3, step 3, but before expiration of that appointment was reinstated to his old position at WG-6, step 3, is not regarded as having received an equivalent increase upon temporary appointment. Therefore, he may have the time spent in step 3 of WG-6 prior to separation credited for purposes of determining eligibility for advancement to WG-6, step 4. B-182230, October 3, 1975.

Effect of statutory pay increases

See Subchapter IIA of this Chapter.

Effect of Public Law 92-392

An increase in pay received upon implementation of the five-step pay schedule for wage grade employees under Public Law 92-392 constitutes an equivalent increase for purposes of beginning a new waiting period. A wage board employee initially reduced in grade from WS-10, step 4, to WG-10, step 3, subsequently place in WG-10, step 4 upon implementation of Public Law 92-392, and ultimately repromoted to WS-10, step 4, begins a new waiting period on the date of increase to WG-10, step 4. B-185327, May 6, 1976.

D. CONVERSION AND TRANSFER BETWEEN PAY SYSTEMS

Conversions of positions

When an employee's position is initially brought under the General Schedule from a wage board position through conversion of his position, the rate of pay to which he is entitled is determined under 5 C.F.R. § 539.203.

Types of pay considered upon conversion

Night differential--The term "rate of basic pay" includes night differential pay being received by the employee on the date of conversion. 50 Comp. Gen. 332 (1970). Thus, an employee who occupies a position subject to rotating shifts may have night differential pay included in the rate of basic pay for determining his entitlement to pay upon conversion, only if he was actually working night shift and being paid night differential at the time his position was converted to a General Schedule position. B-177878, March 16, 1973.

Cost-of-living allowances--5 C.F.R. § 539.203 has been interpreted as not requiring a reduction in the General Schedule rate payable upon conversion by an amount equal to the cost-of-living allowance that the converted employee will receive as a General Schedule employee. Thus, in the case of an employee whose position is converted from a wage board to a General Schedule position in which he will receive a 15 percent cost-of-living allowance, the amount of the allowance is not for consideration in

comparing the General Schedule rate with the wage rate. 51 Comp. Gen. 656 (1972). This is so even though the wage rate is based on the prevailing rate in the area in which the cost-of-living allowance is payable to General Schedule employees and, in this respect, itself includes cost-of-living considerations. Unless the cost of living factor is separately identifiable in the wage board rate being paid, the total wage board rate is to be compared with the General Schedule rate, unreduced by the amount of the cost-of-living allowance ultimately to be received upon conversion. Thus, a pyramiding effect is unavoidable. 51 Comp. Gen. 656 (1972); 52 id. 695 (1973); and B-175124, June 2, 1976.

Inapplicability of simultaneous benefits rule

The simultaneous benefits rule of 5 C.F.R. § 531.203(f) is not applicable to a wage board employee whose position is converted to a General Schedule position on the date an increase in General Schedule rates becomes effective. When the conversion occurs on the same date as a General Schedule rate increase, those increased rates are the only rates in effect on that date and the rate of pay upon conversion is to be established on the basis of the increased rate schedule. 52 Comp. Gen. 671 (1973).

Erroneous conversion actions

The administrative action by the Department of the Navy in changing positions from a wage board system of pay to the General Schedule, without the concurrence of CSC and notwithstanding that CSC considered the positions excluded from the act, was without force and effect and did not vitiate the right of the employees to be paid under the wage board system. Therefore, the loss of pay suffered by such employees because of the erroneous change to the General Schedule may be corrected by retroactive adjustment to reflect the lawful rate of pay for the duties performed. 42 Comp. Gen. 164 (1962).

Transfers

Highest previous rate rule

When an employee is reemployed, transferred, reassigned, promoted or demoted from a wage board to a General Schedule position, the rate of pay to which he is entitled in the

General Schedule position is to be determined in accordance with 5 C.F.R. § 531.203(c). Under that regulation the agency may pay the former wage board employee at any rate of his grade in the General Schedule position that does not exceed his highest previous rate. However, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate. Thus, a $7,155.20 per annum wage rate that falls within the range of both grades GS-9 and GS-10 may be converted to $7,260, GS-9, step 6, rather than $7,160, GS-10, step 2, of the 1960 pay schedule because the selection of that step and grade for the purpose of determining the equivalent rate gives the employee the greatest benefit under the 1962 General Schedule pay rates. 43 Comp. Gen. 478 (1963).

Rule is discretionary

Rate not resulting in decrease--Instead of giving the employee the maximum benefit allowed under the highest previous rate rule, an agency may determine to adjust the employee's salary to the nearest rate in the General Schedule that does not result in a decrease. Thus, in the case of an employee whose wage board salary had been $7,526.60 and who had been promoted on August 2, 1964, to GS-9, step 4 at a salary of $7,720, the employee could, on the basis of a General Schedule salary increase retroactive to July 5, 1964, have his salary adjusted to GS-9, step 3, at $7,710 under the agency's policy requiring the employee's salary to be established at the nearest General Schedule rate not resulting in a decrease. 44 Comp. Gen. 518 (1965).

Rate not exceeding last earned rate--In B-181394, December 4, 1974, an agency policy fixing the employee's pay under the General Schedule at the minimum or any other step of the new grade not exceeding the employee's last earned rate was upheld. Similarly, in B-173815, April 3, 1973, an Air Force regulation providing for the employee's rate of pay to be established at the lowest step rate of his new General Schedule grade which equals or exceeds his existing rate was found to be proper.

Agency policy controls--A Navy regulation providing that the highest previous rate rule is not applicable to reassignments or transfers in a reduction-in-force, but that the rate of pay in the new General Schedule position is to be based on the employee's last earned rate was upheld in B-175430, June 1, 1972. See also B-175430, December 19, 1973.

Determining highest previous rate

Appointments for 90 days or less--Under 5 C.F.R. § 531.203(d)(1), the highest previous rate is based on the rate earned on a regular tour of duty under an appointment not limited to 90 days or less. Thus, an employee who was transferred from a wage board to a General Schedule position subsequent to holding a temporary promotion not to exceed 90 days may not ise the rate of pay received during that temporary promotion to determine his basic rate of pay. B-173815, April 3, 1975.

Night differential--For the purpose of determining the highest previous rate of an employee transferred from a wage board to a General Schedule position, the night differential pay earned in the wage board position should be included as part of the basic rate of pay. B-175430, June 1, 1972.

Overseas differential and cost-of-living allowances--Wage board employees in foreign areas do not receive cost of living allowances. However, their rates of pay are determined on the basis of prevailing area rates and, hence, reflect cost of living factors. In converting the employee's highest previous rate in the wage board position to a rate payable under the General Schedule position, the maximum rate at which his pay may be set under the General Schedule is that rate which, when increased by the applicable cost of living allowance payable for the General Schedule position, does not cause a loss of salary. 37 Comp. Gen. 285 (1957); 45 id. 88 (1965); and B-170675, October 3, 1975.

Effect of retroactive pay increases--Where an employee is transferred or reassigned from a wage board to a General Schedule position during the retroactive period of a General Schedule pay increase, the retroactively effective General Schedule pay schedule is the only pay schedule which may be used for converting the actual annual rate to an equivalent rate under the General Schedule. 44 Comp. Gen. 518 (1965) and id. 793. Where an increase enacted after

the employee's transfer from a wage board to a General Schedule position is retroactive to a time prior to the transfer, the agency may compare the wage board and General Schedule rates in effect prior to or after the retroactively effective date of the pay increases to determine the equivalent annual rate under § 531.203(d)(4)(i), inasmuch as that regulation permits a comparison of the actual rate earned at the time of services to be compared to the annual rates under the General Schedule as of the time of service to select an equivalent annual rate. 44 Comp. Gen. 518 (1965); id. 793; and B-157031, July 2, 1965.

E. PAY RETENTION

Generally

Prior to enactment of the Federal Wage System there were no statutory provisions for saved pay for wage board employees upon reductions in pay or grade or upon reassignments. The principal statutory authority governing pay rates provided for the fixing and adjusting of the rates of pay of wage board employees "as nearly as is consistent with the public interest in accordance with prevailing rates." On the basis of this authority we recognized that salary retention could, in certain circumstances, be found to be consistent with the "public interest" in view of statutory pay savings provisions for General Schedule employees downgraded under certain conditions. We, thus, held that it was within the discretionary authority of heads of departments and agencies to prescribe pay retention regulations for employees demoted or reassigned through no fault of their own. We stated, however, that such authority did not apply to wage rate reductions occuring as a result of decreases in prevailing industry rates. 44 Comp. Gen. 476 (1965).

Under the Federal Wage System, specific pay retention provisions limited to 2 years were enacted. 5 U.S.C. § 5345 provides that, subject to specified conditions, a prevailing rate employee who is reduced in grade or reassigned to a wage schedule position having a lower scheduled rate of pay may retain his existing scheduled rate of pay for 2 years, unless otherwise terminated under that provision. Under its general authority to prescribe regulations governing the pay of wage board employees CSC has adopted other pay retention provisions. Those appear generally as subchapters S5-14, S8, S9, and S10 of FPM Supplement 532-1, as well as at 5 C.F.R. § 532.506(e).

Limits on authority to provide for pay retention

Normal fluctuations in prevailing rates

A proposed CSC regulation to provide that a prevailing rate employee would retain his existing rate of pay for an indefinite period when an area wage survey produced a wage schedule containing lower rates than those of the present area wage schedule was held to be improper. Although there is authority under the Federal Wage System to make reasonable deviations from the prevailing rate criteria when the public interest requires, the primary consideration in adjusting the pay of wage board employees is the prevailing rate. CSC's proposal would have limited adjustments only to increases in the prevailing rate. 53 Comp. Gen. 665 (1974). A proposed CSC regulation to provide indefinite wage retention for prevailing rate employees where lower wage schedules resulted from changes in operating policies and procedures for determining wage rates was held to be improper. The changes in operating policies and procedures constitute nothing more than factors for consideration in local wage area surveys and are essential to the determination of an equitable prevailing rate. Any reduction in wage rates as a consequence of such changes would be the result of the normal and intended operation of the Federal Wage System. This may not be defeated by indefinite retention provisions, resulting in wage changes only when increases in prevailing rates are disclosed by the local wage survey. B-140583, December 10, 1975.

Unlimited retention improper

The congressional intent to permit policies and procedures in effect upon enactment of Public Law 92-392 to continue could be viewed as permitting preexisting indefinite wage retention regulations under FPM Supplement 532-1, S5-14(d)(3) and S8-8(a)(1) and 5 C.F.R. § 532.506(e) to remain in effect. However, other regulations providing for wage retention when special rates applicable to critical occupational groups are cancelled, when wage areas are consolidated, and when the local wage survey is based on out-of-area data are inconsistent with 5 U.S.C. § 5345 in providing unlimited retention rather than a 2-year retention period. CSC should take action to limit the pay retention provisions to a 2 year period. B-140583, December 10, 1975.

Conversion from CFWS to FWS

CSC regulations implementing the Federal Wage System and prescribing procedures for conversion from the Coordinated Federal Wage System to the Federal Wage System are contained in FPM Supplement 532-1, subchapter S10. Pay retention is provided for at subchapter S10-5, S6, S8, and S9 and is authorized thereunder on an indefinite basis. While CSC may not generally provide for indefinite pay retention upon downgrading of wage board employees, indefinite retention was appropriately prescribed for employees subjected to reductions in pay as a result of the initial application of the job grading standards of the Federal Wage System. This is so in view of the language of Public Law 92-392 indicating that its provisions shall not be construed to decrease the employee's rate of basic pay in effect immediately prior to the date on which his position was brought under the Federal Wage System and in view of the fact that wage board employees were granted indefinite wage retention upon the initial conversion of their positions from the old wage system to the Coordinated Federal Wage System. 52 Comp. Gen. 748 (1973).

Night differential

Under its authority to provide for salary retention of employees upon initial conversion of their positions to the Federal Wage System, CSC regulations preserved the rate of night differential applicable to the position on the date before the Federal Wage System took effect. Thus, a wage board employee who, prior thereto, received night differential pay at the rate of 10 percent is entitled to retain that 10 percent rate even though Public Law No. 92-392 provides for night work differential at a rate of 7-1/2 percent. 53 Comp. Gen. 744 (1974).

SUBCHAPTER III--ADDITIONAL COMPENSATION

A. OVERTIME PAY

Generally

5 U.S.C. § 5544(a) provides that wage board employees not in standby status are entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. The rate is one and one-half times the employee's basic rate of compensation. Wage board employees may also be entitled to overtime compensation under the Fair Labor Standards Act (FLSA). For a discussion of entitlement under the FLSA see COMPENSATION, Chapter 4, Subchapter I, para. B. (3).

Overtime pay for wage board employees is not subject to the aggregate limitation of 5 U.S.C. § 5547 applicable to General Schedule employees. 34 Comp. Gen. 512 (1955).

Method of computation

Work in excess of daily and weekly limitation

5 U.S.C. § 5544 must be construed as providing alternate methods of computation for determing overtime work in excess of 8 hours a day or in excess of 40 hours a week. The method allowing the greater number of overtime hours shall be used. Therefore, an employee whose workweek consists of 3 12-hour days and 1 10-hour day, or 46 hours per week, is entitled to overtime pay for the 14 hours per week in excess of 8 hours per day, but not for the 6 hours in excess of 40 hours per week. 42 Comp. Gen. 195 (1962), as modified by id. 329.

Day and week definitions

A calendar day should, whenever administratively feasible, be defined as from midnight to midnight, and a calendar week as Sunday through Saturday. However, to avoid problems involving employees with uncommon tours of duty, a 24-hour period may be treated as a day and any consecutive 7-day period may be treated as a week. 42 Comp. Gen. 195 (1962).

Administrative determination--Whether to adopt the consecutive 24-hour day concept is an administrative matter for determination by the agency. B-165765, March 17, 1969.

Back-to-back workweeks--Wage board employees are included in 5 U.S.C. § 6101, which permits an agency head to establish a workweek of other than the normal workweek of 5 days followed by 2 consecutive nonworkdays, provided that "his organization would be seriously handicapped in carrying out its functions or costs would be substantially increased * * *" by a normal workweek. Since the measure for determining overtime compensation is the administratively determined workday and workweek, the number of 8-hour days worked consecutively is immaterial unless more than 40 hours are worked within a single workweek. B-173779, November 22, 1971. Therefore, where an employee worked 10 days straight, but only 5 days in each of 2 administrative workweeks and never more than 8 hours a day or 40 hours a week, he was not entitled to overtime compensation. B-134864, July 27, 1976.

Intermittent and part-time employees

Under the provisions of 5 U.S.C. § 5544(a), part-time and intermittent wage board employees are entitled to overtime compensation for time worked in excess of 8 hours a day or 40 hours a week, regardless of whether a 40-hour workweek or an 8-hour day has been administratively established. 48 Comp. Gen. 439 (1968).

Training courses

Wage board employees are subject to the same statutory restrictions on overtime during training periods as are General Schedule employees. See COMPENSATION, Chapter 4, Subchapter I.

Actual work requirement

Leave effect

Since employees must actually work overtime hours in order to receive the overtime rate of pay, employees who are on leave during their regularly scheduled overtime hours are not entitled to time and one-half the basic rate of pay, 42 Comp. Gen. 195 (1962) and 46 id. 217 (1966). However, the 40-hour workweek may consist of hours in a leave-with-pay status, so that an employee with a 10-hour workday on leave during any part of the first 8 hours of the workday but working the last 2 hours thereof is entitled to overtime pay for the last 2 hours. He fullfills the actual work requirement. 42 Comp. 195 (1962).

Holidays

A wage board employee assigned to a workweek of 1 8-hour day, 2 10-hour days, and 1 12-hour day, who was prevented from working on a regulary scheduled 12-hour day because a holiday occurred, is only entitled to the basic rate of compensation for the holiday. 42 Comp. 195 (1962). See also 47 Comp. Gen. 358 (1968).

Exceptions

Callback--When a wage board employee is requested to perform irregular or occasional work on a day when work is not scheduled for him or for which he was required to return to his place of employment, he is considered to have worked a minimum of 2 hours of overtime whether or not the work is actually performed. FPM Supplement 532-1, subchapter S8-4d(2) and B-177313, November 8, 1972.

Military and court leave--Overtime compensation is payable to employees on military or court leave if the overtime duty was regularly scheduled and the employees would have been required to work overtime had they not been on military or court leave. 31 Comp. Gen. 173 (1951); 49 id. 233 (1969); and B-159835, March 11, 1976.

Back Pay Act, 5 U.S.C. § 5596--See COMPENSATION, Chapter 7.

Meals and rest periods

Meals

Time set aside for eating is noncompensable unless the employee is required to perform substantial official duties during that period. B-166304, April 7, 1969. See also Standby duty below.

Rest periods

When it is determined by proper administrative authority that brief rest periods during overtime hours of work are essential or beneficial to the service, such rest periods may be regarded as duty time for which overtime compensation is payable. B-166304, April 7, 1969.

Standby duty

Time during which a wage board employee is required to remain at or within the confines of his post of duty in excess of

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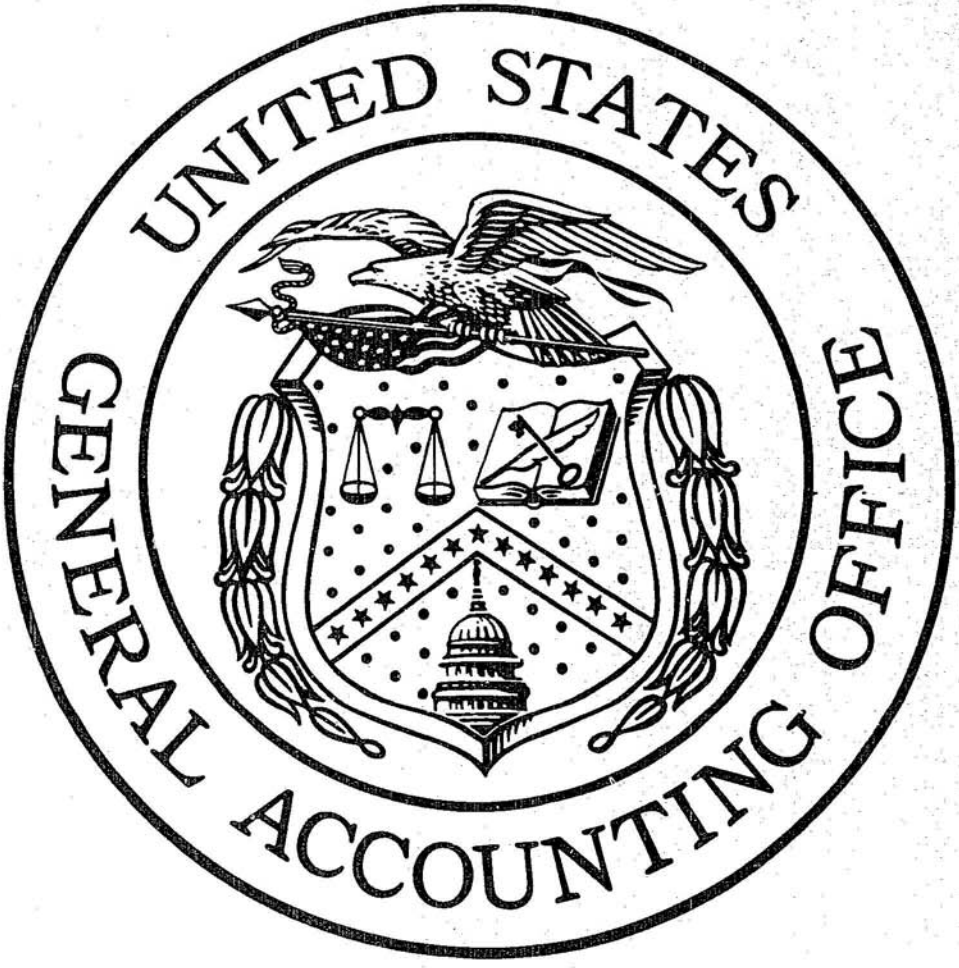

8 hours a day in a standby or on-call status, exclusive of eating and sleeping time, is compensable as overtime work only when it is in excess of 40 hours per week. 5 U.S.C. § 5544(a).

Definition of standby status

The phrases "on call" and "standby" used in the context of 5 U.S.C. § 5544(a), when used in conjunction with the phrase "required to remain at or within the confines of their post of duty," have generally the same meaning as the phrase "standby status" used in 5 U.S.C. § 5545 applicable to General Schedule employees. 42 Comp. Gen. 195 (1962). See also COMPENSATION, Chapter 4.

Sleeping and eating time

In the absence of any standard criteria for determining sleeping and eating time under 5 U.S.C. § 5544(a), attention is directed to Armstrong, et al. v. United States, 144 Ct. Cl. 659 (1959) and to Ahearn, et al. v. United States, 142 Ct. Cl. 309 (1958). In designating time for normally uninterrupted sleeping and eating, attention is called to Farley v. United States, 131 Ct. Cl. 776 (1955) and England v. United States, 133 Ct. Cl. 768 (1956), where compensation was allowed because it was determined substantial labor was performed during the time set apart for sleeping and eating. 42 Comp. Gen. 195 (1962).

Standby duty at home

Time spent in a standby status at other than the employee's duty station where his use of the time in question is severely limited and is in fact spent predominantly for the benefit of the Government may be compensable as overtime. Rapp v. United States, 167 Ct. Cl. 852 (1964); Moss v. United States, 173 Ct. Cl. 1169 (1965). Where a wage board employee's performance of duty as a security officer required him to remain at his residence located within the limits of his duty station and where the employee responded to emergencies 40 to 50 times per year, his whereabouts were narrowly limited and his activities substantially restricted so as to entitle him to overtime compensation. 55 Comp. Gen. 1314 (1976) and B-176924, September 20, 1976.

Traveltime

Travel inherent in work

Travel which is an inherent part of and inseparable from work itself constitutes work, and if such travel extends the employee's time in a work status beyond 8 hours a day or 40 hours a week, it is compensable as overtime work. Travel which represents an additional incidental duty directly connected with the performance of a given job and which is considered an assigned duty is regarded as travel inherent in work. B-173103, November 16, 1971. Where an employee reports to a shore pickup point to board a Government vessel in order to be transported to his duty station aboard a derrick boat, his early reporting and travel was for the purpose only of facilitating his own transportation and, hence, is separable from work. B-173103, November 16, 1971. Travel which has no purpose other than to transport an employee to and from the place where he is to perform actual work is not regarded as an incidental duty which is inseparable from work and is not regarded as work. B-178241, May 25, 1973.

Travel under 5 U.S.C. § 5544(a)

The traveltime of a wage board employee, which is other than an inherent part of his work, is compensable under 5 U.S.C. § 5544(a) as overtime, if the time spent traveling involves travel away from the official duty station and meets one of the following conditions: (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. The language of 5 U.S.C. § 5544(a) is identical to that of 5 U.S.C. § 5542(b)(2)(B), applicable to General Schedule employees and has, in general, been interpreted consistently with the latter provision. B-173103, November 16, 1971 and B-178241, May 25, 1973. For a more thorough analysis, see COMPENSATION, Chapter 4.

Officially ordered or approved--Where employees were given the option of reporting to a common pickup point before regular duty hours for the purpose of availing themselves of Government transportation to the work site, such early

reporting and travel was not officially ordered or approved and, hence, is not compensable as overtime work. B-177438, March 28, 1973.

Performance of work while traveling--A wage board employee who performed actual work reviewing documents during air travel is entitled to overtime compensation for such time. B-164353, October 21, 1969. A truck driver who reported before regular duty hours to drive himself and other employees from a central pickup point to a duty site may be regarded as having performed work while traveling. B-177438, March 28, 1973.

Administratively uncontrollable event

Event controllable--When the necessity for wage board employee's travel resulted from the gradual deterioration of gun mounts, the event necessitating the travel may not reasonably be considered to have resulted from a sudden emergency or catastrophe or an event which could not be scheduled or controlled administratively within the meaning of 5 U.S.C. § 5544(a)(iv). 49 Comp. Gen. 209 (1969).

Immediate official necessity--Travel of employee to inspect press sheets was subject to administrative scheduling and control and was not compensable under 5 U.S.C. § 5544(a), even though the event necessitating the travel was uncontrolled since there was no immediate official necessity for the travel. B-170683, November 16, 1970.

Transportation delays--Wage board employees who were delayed 2 hours beyond regular duty hours in returning to their duty station due to traffic congestion at the Baltimore Harbor Tunnel were not entitled to overtime compensation for such delayed traveltime since the traffic congestion was not the event necessitating the travel under 5 U.S.C. §5542(a)(iv). 54 Comp. Gen. 515 (1974).

Travel under the Fair Labor Standards Act

Wage board employees who are covered by the FLSA are entitled to overtime compensation for traveltime in accordance with CSC instructions in FPM Letter 551-10, April 30, 1976, and to the same extent as nonexempt General Schedule employees whose entitlement is more fully discussed in COMPENSATION, Chapter 4. A nonexempt wage board employee who either drives himself to his destination

or travels as a passenger during hours which correspond to his regular work hours would be entitled to overtime compensation under FLSA for those hours of travel which are in excess of 40 hours in a week. B-183493, July 27, 1976. Time spent by employees in boats traveling to and from the employees' principal worksite is within the purview of the Portal-to-Portal Pay Act of 1947 and not compensable as overtime work. B-178272, July 27, 1976.

B. HOLIDAY PAY

Regular pay

5 U.S.C. § 6104 provides that wage board employees who are relieved or prevented from working on a holiday are entitled to the same pay for that day as for a day on which an ordinary day's work is performed.

Premium pay

Despite lack of provision for holiday pay in Public Law 92-392, prevailing rate employees, pursuant to the provisions of FPM Supplement 532-1, are entitled to double time pay for work performed on a holiday. B-177313, November 8, 1972.

Temporary employees

In the absence of a regulation or agreement providing for holiday pay for temporary employees, only "regular employee(s)" are entitled to regular pay for holidays under 5 U.S.C. § 6104. Temporary summer aids who served under appointments limited to 90 days or less were entitled only to an ordinary day's pay for work performed on holidays, and not to premium pay, since applicable CSC regulations defined the term "regular employee" as an employee having appointments not limited to 90 days or less. B-153107, November 25, 1969. See also 34 Comp. Gen. 235 (1954) and 25 id. 584 (1946).

C. NIGHT DIFFERENTIAL

Generally

5 U.S.C. § 5343(f), provides as follows:

"(f) A prevailing rate employee is entitled to pay at his scheduled rate plus a night differential--

> "(1) amounting to 7-1/2 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 3 p.m. and midnight; and
>
> "(2) amounting to 10 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 11 p.m. and 8 a.m.
>
> A night differential under this subsection is a part of basic pay."

Wage board employees who negotiate their wages and working conditions are exempt from the effects of 5 U.S.C. § 5343(f) so that they are not automatically entitled to the statutory night differential. 5 U.S.C. § 5343 note. B-184858, August 19, 1976.

Computation

Applicable differential rate payable for entire shift

Where an employee works 4 hours between 3 p.m. and midnight and 4 hours between 11 p.m. and 8 a.m., he is not entitled to 7-1/2-percent for the first 4 hours and 10 percent for the last 4 hours, but is entitled to 7-1/2 percent for the entire shift. 53 Comp. Gen. 814 (1974).

Meal breaks included

An employee whose shift includes at least 5 hours between 3 p.m. and midnight, e.g., 3 p.m. to 8 p.m., would be entitled to the 7-1/2 percent night differential regardless of scheduled breaks of 1 hour or less. 53 Comp. Gen. 814 (1974).

Majority of hours requirement

The term "majority of hours" used in 5 U.S.C. § 5343(f) means that the number of whole hours worked in either of the night differential periods must be greater than one-half the total number of hours worked. Thus, an employee who works from 11 a.m. to 7:30 p.m. is not entitled to the night differential since the majority of the hours scheduled do not occur between 3 p.m. and

11 p.m. 53 Comp. Gen. 814 (1974). This rule is effective prospectively from the date it was issued, May 1, 1974, and is not effective retroactively. 54 Comp. Gen. 890 (1975).

Basic compensation determination

Night differential should be included in basic pay for annual and sick leave purposes and for the purpose of computing the amount of overtime pay. 26 Comp. Gen. 212 (1946) and 52 Comp. Gen. 716 (1973). But a day shift employee who occassionally works during the hours for which night differential is payable may not include the night differential in his basic compensation for purposes of computing his overtime compensation. 31 Comp. Gen. 48 (1951), amplified by id. 391 (1952).

Regularly scheduled

Definition

Regularly scheduled nightwork is work which is scheduled in advance by proper administrative authority and is scheduled to recur on successive days or after specified intervals. 40 Comp. Gen. 397 (1961). Nightwork which is determined in advance to be required only on the first 3 days of every other workweek may be regarded as regularly scheduled night work. 39 Comp. Gen. 73 (1959).

Temporary day shift assignment

An employee regularly assigned to a night shift who is temporarily assigned to a day shift is entitled to the night differential while on the temporary day shift. 53 Comp. Gen. 814 (1974). The question of what constitutes a temporary assignment is a determination primarily for the administrative agency involved and we will not question the agency's determination as long as it is reasonable. B-175957, July 27, 1972. Where a night shift employee was temporarily assigned to a day shift pending selection of a permanent day shift employee, and due to administrative delays did not return to the night shift for approximately 64 weeks, GAO did not object to the administrative determination that the assignment was temporary. B-185793, September 8, 1976.

Upon conversion to General Schedule

For a discussion on the treatment of the night differential when an employee is converted from a wage board position to a General Schedule position see this Chapter, Subchapter II.

D. SUNDAY PREMIUM PAY

Generally

A wage board employee whose regular work schedule includes work on Sunday is entitled to 25-percent premium pay in accordance with the following provision of 5 U.S.C. § 5544(a):

> "* * *An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service."

The above-quoted language is substantially similar to 5 U.S.C. § 5546(a) applicable to General Schedule employees.

Maximum rate payable

5 U.S.C. § 5544(a) is the only authority for payment of Sunday premium pay to wage board employees, and that provision limits the amount of premium pay to 25 percent. Employees of the Saint Lawrence Seaway Development Corporation who had previously been paid 50-percent premium compensation for Sunday work based on prevailing rates and practices in the industry may not be paid that higher rate of premium pay. 46 Comp. Gen. 176 (1966).

No minimum period of worktime required on Sunday

Employee whose regularly scheduled tour of duty includes an 8-hour period beginning at 11 or 11:30 p.m. Sunday and terminating on Monday is entitled to Sunday premium pay for the entire 8-hour period. There is no requirement for a minimum period of work on Sunday as a condition of entitlement to Sunday premium pay benefits under 5 U.S.C. § 5544(a). 46 Comp. Gen. 158 (1966).

Two Sundays in a workweek

Where a wage board employee's regularly scheduled workweek includes two Sundays, an 8-hour tour of nonovertime duty beginning at 11 or 11:30 p.m. on the first Sunday, and the last 8-hour tour of nonovertime duty commencing at the same hours on the next Saturday, 5 U.S.C. § 5544(a) applies to both regularly scheduled 8-hour periods of work and the employee is entitled to Sunday premium compensation limited to 8 hours work actually performed during each regularly scheduled 8-hour period of service, any part of which falls within the period of Saturday midnight to Sunday midnight. 46 Comp. Gen. 158 (1966).

Leaves of absence

Wage board employees who work a regularly scheduled 40-hour week that includes Sunday are entitled to Sunday premium pay under 5 U.S.C. § 5544(a), but may not be paid premium compensation for periods of leaves of absence during the regularly scheduled 8-hour Sunday work period. 46 Comp. Gen. 158 (1966).

E. ENVIRONMENTAL DIFFERENTIAL

Generally

Prior to November 1, 1970, factors such as hazard, physical hardship, and unusual working conditions were generally considered in prevailing rate determinations and compensation therefor was "built-in" to the prevailing rate structure, resulting in higher rates for such positions. With adoption of the Coordinated Federal Wage System environmental pay plan effective November 1, 1970, a system of separately stated environmental differentials was implemented for certain defined hazards, physical hardships and unusual working conditions. The CSC instructions pertaining to the payment of environmental differential to wage board employees are set forth at FPM Supplement 532-1, subchapter S8-7 and Appendix J. B-176051, July 14, 1972.

Conversion to separately stated environmental differentials

Rate of pay pending conversion

Navy employees who, prior to November 1, 1970, had been receiving a "built-in" environmental differential plus a separately stated differential for work with TNT or tetryl continue to be entitled to their former higher rates of pay plus the separately stated differential

until their positions are properly downgraded and converted to the new Coordinated Federal Wage System, even though that conversion action is delayed beyond November 1, 1970. B-176051, July 14, 1972.

Improper conversion action

Where CSC directed that wage board employees be restored retroactively to their former positions because of procedural defects in downgrading their positions to conform with the Coordinated Federal Wage System of separately stated environmental differentials, employees are entitled only to their former higher rates of pay during the period of retroactive reinstatement and are not entitled to be paid the separately stated differentials authorized under FPM Supplement 532-1 on top of those higher rates which themselves are based on environmental factors. B-176051, July 10, 1974.

Environmental differential as basic pay

A separately stated environmental differential may be regarded as basic pay for purposes of computing overtime and Sunday rates, for purposes of civil service retirement deductions, and for purposes of determining the annual rate of pay for group life insurance. The differential may be paid to wage board employees while in a leave status. 50 Comp. Gen. 66 (1970) and B-170182(2), July 24, 1970.

Entitlement under Appendix J

Effective date

Wage board employees who performed work from personnel boxes suspended from cranes, and who were held by arbitrator to be entitled to an environmental differential of 25 percent for work at "lesser heights," were entitled to payment of the differential retroactively to November 1, 1970, under Appendix J of FPM Supplement 532-1. The arbitrator's holding that employees are entitled to the differential prospectively only from the date of award is without effect. B-170182, December 26, 1973.

Alleviation of discomfort

In response to Veterans Administration's argument that wage board employee who performed work in a cold storage area is not entitled to the 4-percent environmental differential for cold work inasmuch as the employee was

provided protective clothing to alleviate cold discomfort, it was held that cold work differential is payable. Cold work is not one of those categories of differential under Appendix J of FPM Supplement 532-1 for which payment is specifically conditioned upon the risk or discomfort not being alleviated and, hence, the differential is payable regardless of protective action taken. 53 Comp. Gen. 789 (1974) and B-180109, January 2, 1976.

Duplication of payments

Wage board employees in Vietnam who receive a 25 percent post differential under 5 U.S.C. § 5925 for "conditions of environment," including consideration of service in a combat area, may not in addition be paid an environmental differential for exposure to war risks since payment of such enviromental differential would be duplicative of the post differential already authorized under the Department of State's Standardized Regulations (Government Civilians/Foreign Areas). B-174341, February 28, 1972.

F. OVERSEAS DIFFERENTIALS AND ALLOWANCES

See COMPENSATION Chapter 4, Subchapter III. For a discussion of the treatment of the overseas differential and cost-of-living allowance when an employee is converted from a wage board position to a General Schedule position, see this Chapter, Subchapter II.

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