Military Personnel Law Manual

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FOREWORD

This Military Personnel Law Manual has been prepared to give an overview of important decisions of the Comptroller General of the United States in the broad, complex field of military personnel law. It is arranged in nine chapters covering the areas of basic pay and military status, special pay, allowances, members' and their dependents' travel and transportation benefits, payments on separation or death, retired pay, and survivor benefits. It includes pertinent Comptroller General decisions issued up to January 1, 1983, and is designed to replace the Military Personnel Law Manual issued by this Office in 1978.

We have attempted to ensure the accuracy and relevancy of the material and we have attempted to arrange it in logical and useful order. However, we would welcome any comments or suggestions for improvement that you may have concerning any aspect of the Manual.

We recommend that you read the Introduction which contains information on how to use the Manual as a research tool.

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INTRODUCTION

The Military Personnel Law Manual is published by the Office of General Counsel, U.S. General Accounting Office, to give an overview of the military personnel legal areas handled by the Office. The Manual should function also as a ready research aid for initial legal research in this field. It is important to remember that the Manual is essentially a research tool, and it should not be cited as legal authority. Citations should be to the cases digested in the Manual. Every effort has been made to ensure the accuracy of those digests; however, the researcher should examine the full text of the decision in question for a complete analysis of the case in question and the principle for which it stands.

Following this Introduction is a short Table of Contents listing the nine chapters of the Manual. Following that table is a detailed Contents listing each chapter with all subheadings and applicable page numbers. Page numbers in the short Table of Contents refer to pages in the detailed Contents. Pagination in the Manual is on a chapter basis. To use the Manual effectively the user should first become familiar with these tables.

The Manual will not provide the answer for every question that arises. Users may also use 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 to be 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) 275-6241.

In the event that use of the above procedures does not 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 the agency in which the claim arose, and then, if not satisfied with the result, request that the matter be submitted to the Accounting and Financial Management Division, Claims Group, General Accounting Office, Washington, D.C. 20548. Claimants are warned, however, that under the

provisions of 31 U.S.C. § 3702 claims must be received in the General Accounting Office within 6 years of the date they first accrue or they are barred from consideration. Since filing a claim with another Government agency does not satisfy the requirement of that law, any claim on which the 6-year period is nearing expiration should be filed directly with the Claims Group of the General Accounting Office where it will be recorded as received and then referred to the Government agency in which it arose for an administrative report. Claimants should also 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 Group.

Under 31 U.S.C. § 3529, disbursing officers, certifying officers, or the head of an agency 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 person involved (if an individual case) is provided an opportunity to submit comments. Also, the name and telephone number of someone familiar with the case should be provided. Usually cases involving questions arising in the Uniformed Services are coordinated with the Department of Defense Military Pay and Allowances Committee or the Per Diem, Travel and Transportation Allowances Committee, whichever is applicable, before submission to the Comptroller General.

Cases are normally acknowledged shortly after receipt by this Office. Thereafter, the status of a case may be checked by calling (202) 275-5436 and referring to the case number on the acknowledgement letter.

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CHAPTER 1

BASIC PAY AND MILITARY STATUS

I. ENTITLEMENT TO AND ADJUSTMENTS IN PAY

A. Entitlement to Military Pay - Statutory Right

Common-law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon a statutory right and generally he is entitled to the statutory pay and allowances of his grade and status, however ignoble a soldier he may be. Bell v. United States, 366 U.S. 393, 401-402 (1961). Such pay is not generally dependent upon the duties he performs but upon the status he occupies. Ward v. United States, 158 F. 2d 499 (1947), cert. denied, 331 U.S. 844 (1947). Therefore, in determining whether an individual is entitled to the pay and allowances of a member of the Armed Forces, it is first necessary to determine whether he has achieved a military status. 54 Comp. Gen. 291, 294 (1974). See also United States v. Larionoff, 431 U.S. 864, 869 (1977); 56 Comp. Gen. 943 (1977); 60 Comp. Gen. 257 (1981); B-205339, June 15, 1982, 61 Comp. Gen. ___.

B. Active Duty Status

Entrance on duty

Pay during litigation over military status--An enlisted member of the United States Naval Reserve who after being ordered to active duty, filed a petition for habeas corpus on grounds that he was not a member and was determined by Federal court order to have been lawfully enlisted and in a military status is entitled to pay and allowances during the litigation, regardless of whether he performs military duties. However, settlement of the member's claim for such pay and allowances is subject to a deduction of gross civilian earnings when he performed no meaningful or useful services for the United States Government during the period. 55 Comp. Gen. 507 (1975).

Illegal recall to active duty--Two retired Navy enlisted men who were recalled to active duty and later permitted to return to their homes, upon a determination by a United States District Court that they were illegally recalled to active duty, are to be regarded as having been released "from any and all active duty status" and are not entitled to active duty pay after the court order, notwithstanding the absence of written orders which would cancel or terminate their active duty status; however, on the day following the court order, the members are entitled to retired pay provided their right thereto has not otherwise been lost. 36 Comp. Gen. 228 (1956).

Call to active duty versus placement on the active list--An officer who was reappointed to the active list of the Regular Army from the temporary disability retired list, effective 1 day, and on the same day retired, effective the following day, may not be regarded as having been recalled to active duty under the appointment when no active duty was contemplated for entitlement to active duty pay and allowances for one day in view of paragraph 1-5a(1) of Army Regulations 37-104, which provides that the pay of an officer of the Regular Army commences on the date the officer begins to comply with the orders calling him to active duty regardless of date of appointment, and the orders calling him to active duty regardless of date of appointment, and the Armed Forces Leave Act of 1946, which changed for military officers the general rule that compensation attaches to an office and accrues without regard to the performance of duty. 39 Comp. Gen. 787 (1960).

Reserve constructively entering on active duty--A discharged member of the Naval Reserve who under orders issued in the belief he was still a member rather than a civilian proceeded from his home to the place he was ordered to report for a physical examination to determine his fitness for active duty, at which place he immediately reenlisted in the service and was transferred to a permanent duty station, is entitled to active duty pay and allowances for travel time to the point of reenlistment, including travel allowances and transportation for dependents, the member having constructively entered upon military duty in a de jure status on the day he departed from his home to comply with his orders. 45 Comp. Gen. 218 (1965). See also B-168645, February 10, 1970, B-164116, June 20, 1968, and 35 Comp. Gen. 564 (1956).

Termination of active duty

Discharge based on intentions of member and service--Although 10 U.S.C. 1168(a) provides that a member of an Armed Force may not be discharged until his final pay and certificate of discharge are ready for delivery to him, the statute does not operate to invalidate an otherwise proper discharge when both the member and the service intend that and act as if a discharge or separation has occurred even though actual delivery of the discharge document is delayed. B-212684, March 13, 1984.

Discharge upgrade without restoration to duty--A service member's discharge absolutely terminates his entitlement to military pay and allowances, and a subsequent upgrading of the character of the discharge does not change the date of the former member's separation from service, nor does it create any right to military pay for periods after the date of discharge; therefore, a former Marine Corps member given a bad conduct discharge on September 7, 1956, gained no entitlement to active duty pay for periods after that date as

a result of action taken later to upgrade the discharge from bad conduct to general (honorable conditions). To be entitled to military pay and allowances for the period following a discharge to the end of the enlistment in which the former member was serving, his service records must reflect not only the upgrading of the discharge, but also a voiding of the original discharge and a determination that he remained on active duty. B-207041, September 8, 1982.

See also B-203752, March 2, 1982; B-201944, March 26, 1981; and B-198168, April 16, 1980.

Restored to active duty -- severance payments--When an Army member is involuntarily separated from but later retroactively restored to active duty under the statute authorizing the correction of military records, 10 U.S.C. 1552, the monetary claims settlement to be concluded under that statute depends upon the member's legal entitlements and liabilities based solely upon proper application of the pertinent laws and regulations to the corrected record; thus, in the claims settlement the member is entitled to military backpay but is liable to refund any severance payments previously received under the corrected record showing he was not separated from active duty. B-195558, January 6, 1981.

Restored to active duty--interim civilian earnings--Army members separated from but later retroactively restored to active duty by administrative record correction action (10 U.S.C. 1552) thereby become entitled to retroactive payment of military pay and allowances; and while interim civilian earnings may properly be set off against amounts due members, such civilian earnings are deductible only from net balance due members after set off of their debts to the Government and are not recoupable in excess of the net balance. 56 Comp. Gen. 587 (1977), 57 Comp. Gen. 554 (1978).

Restored to active duty--date for claim settlement purposes--When service members are restored to active duty by the Army Board for Correction of Military Records, back-pay claim settlements are by statute to cover all periods of constructive active duty arising "as a result" of the correction. The period of constructive active duty from the date of the Board's determination to the date of actual restoration to duty arises directly from the correction action and, as such, should be included with other periods of constructive active duty covered by the claim settlement, with appropriate deduction of all interim civilian earnings. Hence, claim settlements are to be predicated on the date of actual restoration to duty rather than the earlier date of the Board's determination. B-213883, May 30, 1984.

Restored to active duty--Reserve pay--Army members separated from extended active duty, who thereafter earn military pay and allowances as members of Reserve components, but whose records are corrected to reflect continued active duty with no break in service, are liable to repay such interim Reserve pay and allowances. 56 Comp. Gen. 587 (1977).

Restored to active duty--interim military pay and medical care--When an Army member is found to have been erroneously separated from active duty and is retroactively restored to active duty status under the provision of law authorizing the correction of military records, he thereby becomes entitled to retroactive payment of his interim military active duty pay and allowances, and also to reimbursement of his ascertainable interim medical expenses covering the period when he was deprived of free military medical care. 10 U.S.C. 1552(c) (1976). B-195558, December 14, 1979. See also, B-195129, April 28, 1980.

Restored to active duty--value of commissaries, recreational facilities, etc.--An Army member involuntarily separated from but later retroactively restored to active duty by administrative record correction action, may not be

reimbursed on account of his being deprived on the use of military commissaries, exchanges, and entertainment facilities during the interim period, since the value of the privilege of using those facilities cannot be definitely ascertained and reduced to a sum certain. 10 U.S.C. 1552(c) (1976). B-195558, December 14, 1979.

Restored to active duty--jobhunting expenses--An Army member's claims for indemnification for jobhunting expenses and compensation for hardships experienced in civilian employment following his erroneous separation from active military service, are claims sounding in tort premised on the wrongful acts of Government agents in causing his severance from military service in contravention of a statute or regulation. Such claims are not payable under 10 U.S.C. 1552(c) incident to a correction of the member's military record retroactively restoring him to active duty. B-195558, December 14, 1979.

Restored to active duty--taxes on interim earnings--An Army member involuntarily separated from but later retroactively restored to active duty through the correction of his military records under 10 U.S.C. 1552, does not under that or other provisions of Federal law thereby become entitled to compensation from Federal funds for State income taxes he paid on his interim civilian earnings. The State tax consequences of a military records correction action under 10 U.S.C. 1552 are matters for consideration by the concerned State authorities. B-195558, December 14, 1979.

Restored to active duty--deduction of interim civilian earnings--If an Army member is involuntarily separated from but later retroactively restored to active duty through the correction of his military records under the authority of 10 U.S.C. 1552, his interim earnings from civilian employment do not thereby become a debt that the member owes to the Government. However, under applicable regulations the gross amount of those interim civilian earnings must be deducted from the retroactive military pay and allowances due to him, as mitigation of the Government's monetary obligations in such circumstances. B-195558, December 14, 1979. See also, B-195129, April 28, 1980. And compare B-207299, October 6, 1982.

Restored to active duty--uniform allowances--If an Army officer is separated from active service but is later retroactively restored to active duty under the statute authorizing the correction of military records (10 U.S.C. § 1552), he thereby becomes entitled to credit for active duty military backpay covering the period of his nullified separation from service. However, he is not entitled to credit for uniform allowances authorized for officers newly entering on active duty in connection with his actual return to Army service after his records are corrected to

show that he had never been separated from active duty. B-195129, April 28, 1980.

Restored to active duty--collection of VA payments--When an Army member is separated from but later retroactively restored to active duty status through administrative military records correction proceedings, and this causes the Veterans Administration (VA) to recompute the VA educational assistance benefits he received during the interim period at reduced "inservice" rates, the member's resulting indebtedness to the VA may properly be collected by setoff of the debt against any military backpay due to him. Any disagreement the member might have concerning the validity or amount of the debt would be a matter for consideration by VA authorities. B-195129, April 28, 1980.

Restored to active duty--Social Security taxes--The Federal and State tax consequences of military records correction proceedings concluded under 10 U.S.C. § 1552 are matters primarily for consideration by the concerned revenue authorities; hence, if a retired Army member's records are corrected nullifying his retirement and retroactively restoring him to active duty status, his application for a tax refund believed due for Social Security (FICA) taxes debited against the active duty military backpay credited to him in the settlement of his military pay accounts would be a matter for submission to the United States Internal Revenue Service. B-195129, April 28, 1980.

Restored to active duty--interest on backpay--Provisions of statutory law contained in 10 U.S.C. 1552 governing military records correction proceedings contain no authority for the payment of interest on backpay awards; hence, interest does not accrue on military backpay due to a service member on account of a correction of his records under 10 U.S.C. § 1552, since interest on unpaid accounts may not be assessed against the United States in the absence of express statutory authority. B-195129, April 28, 1980.

Restored to active duty--interim erroneous payment--If an erroneous overpayment of military pay and allowances is made to an Army member at the time of his separation from active duty, and that separation from service is later nullified through the correction of his records under the authority of 10 U.S.C. § 1552, the erroneous overpayment should be included as a debit to be set off against credits for military backpay due the member in the monetary settlement concluded under 10 U.S.C. § 1552, and it should not be collected through deductions from the member's current pay and allowances. B-195129, April 28, 1980.

Restored to active duty--District Court recovery limitation $10,000--Air Force member who successfully sues in Federal District Court for reinstatement to active duty and damages

may not recover on an administrative claim for backpay in excess of $10,000 jurisdictional limitation of district court under 28 U.S.C. § 1346(a)(2). Since claim filed concerns same parties and issues, including amount of damages, as decided by district court, doctrine of res judicata precludes consideration of this claim. 59 Comp. Gen. 624 (1980).

Ineffective discharge--A discharge of an enlisted man, which was to be held in abeyance in the event that further hospitalization was required for a new disability not present when the member went before the Physical Evaluation Board but which, nevertheless, was effected, even though prior to the effective date of the discharge the member was hospitalized for a new disability, is a conditional discharge which does not terminate the member's active status and, therefore, the enlisted member is entitled to active duty pay until subsequent placement on the temporary disability retired list. 39 Comp. Gen. 766 (1960).

Ordered home to await retirement--A member who is ordered to his home in an awaiting order status pending action on whether he will be placed on the temporary disability retired list is entitled to active duty pay and allowances for the period he is in that status retirement or of official advice that he has been retired. B-183625, August 20, 1975. Compare 42 Comp. Gen. 158 (1962).

Active duty performed due to failure to receive retirement orders--While the retirement of a Navy officer placed on the retired list voluntarily for length of service pursuant to section 6 of the act of February 21, 1946, is effective on the first day of such month as the President may designate, an officer who did not receive notice of such retirement until after the effective date thereof and who currently was paid active-duty pay and allowances may be regarded as having been in a de facto status and entitled to retain such pay and allowances or recover any amounts which may have been refunded less any retired pay received. 30 Comp. Gen. 195 (1950). See also 35 Comp. Gen. 225 (1955), and 49 Comp. Gen. 429 (1970).

National Guard member; implied consent to remain on active duty--A member of National Guard who was court-martialed for offenses committed after terminal date of his active duty for training is entitled to pay and allowances for period subsequent to such terminal date, including period of confinement, except as forfeited under courtmartial sentence, since consent to remain on active duty (constructive extension) may be implied from totality of circumstances, B-184829, April 15, 1976.

After expiration of active duty period; hospitalization--An enlisted reservist who subsequent to the scheduled

termination of his active duty tour under 10 U.S.C. 263 note was declared mentally incompetent due to an illness that existed prior to the tour of duty and retained as a hospital patient until honorably discharged for physical disability without severance pay is not entitled to active duty pay and allowances or leave credit for any period after the termination of his active duty in the absence of a statute providing otherwise, for a person suffering from mental illness not incurred in line of duty accrues no greater right to pay and allowances than he would accrue if he were suffering from a physical illness not incurred in line of duty, and the general rule that pay and allowances do not accrue to an enlisted man held beyond the expiration date of his enlistment or scheduled tour of duty unless such holding is for the convenience of the Government or for the purpose of making good time lost applies. 43 Comp. Gen. 380 (1963).

After expiration of enlistment - hospitalization for disability--An Army enlisted man who incident to an injury reported to be due to his own misconduct is hospitalized for a period subsequent to the expiration of his term of enlistment is nevertheless entitled to pay and allowances for the period, an administrative determination under 10 U.S.C. 1216 that the physical condition of the member which resulted from corrective surgery at an Army hospital at the time of the injury is a disability incurred or aggravated during active service, not the result of misconduct and incurred in line of duty, governing his rights, and the member having executed the medical and hospitalization care affidavit required by 10 U.S.C. 3262, and having been recommended for physical disability retirement, may be regarded as being retained in the service for medical treatment and hospitalization within the meaning of section 3262 so as to entitle him to pay and allowances for the period of hospitalization following the expiration of his enlistment. 47 Comp. Gen. 351 (1967). See also 40 Comp. Gen. 664 (1961), and 54 Comp. Gen. 33 (1974).

After expiration of enlistment--court-martial review pending--Army enlisted member sentenced by courtmartial to dishonorable discharge, confinement for life, reduction in grade, and forfeiture of all pay and allowances, was retained in confinement after expiration of his enlistment pending review of his sentence. On appeal his sentence was reversed and rehearing held, which resulted in his conviction for lesser offense involved in earlier conviction. Reversal did not entitled him to "restoration" of pay and allowances under 10 U.S.C. 875(a) for period subsequent to expiration of his enlistment since his lack of entitlement to pay during that period was due to expiration of his enlistment, not execution of court-martial sentence. B-192082, December 21, 1978.

After expiration of enlistment - while in parole status--A service member whose enlistment expired while in confinement pending appellate review of his court-martial sentence is not entitled to pay and allowances for period of confinement subsequent to expiration of his enlistment unless the conviction is completely overturned or set aside. Where it is so overturned or set aside and a portion of confinement time is served in a parole status, since the military exercises constraints on parolee's action, even though to a lesser degree than actual confinement, such constraints are just as real. Therefore, the individual is entitled to pay and allowances for his parole period. Compare Cowden v. United States, Ct. Cl. No. 242-78, decided June 13, 1979. 59 Comp. Gen. 12 (1979)

Parole status - civilian earnings--The rules governing parole of a service member confined by military authorities as a result of a courtmartial sentence require as a prerequisite to that parole that the parolee will have gainful employment. Therefore, in the absence of a statute so authorizing, it would be improper to set off civilian earnings against military pay due for a parole period which becomes a period of entitlement to pay and allowances, unless the earnings are from Federal civilian employment which is considered incompatible with military service. 59 Comp. Gen. 12 (1979).

Members retained after eligible for retirement--The authority vested in the Secretaries of the military departments to retain members of the uniformed services on active duty or in one of certain reserve components under 10 U.S.C. 676 after the members have qualified for retired pay under Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948 was intended to have limited application to permit the Secretaries to order a member retained in the service because of some special qualification, ability, or situation; however, in those cases where members have been retained after qualification and there is a doubt as to whether retention was effected by a specific order or instruction, no question will be raised. 38 Comp. Gen. 648 (1959).

Cadets, midshipmen disenrolled from service academies

Cadet or midshipman who resumes his enlisted status--A disenrolled service academy cadet or midshipman who returns home to await reassignment to active duty as an enlisted man is entitled to active duty pay and allowances from the date his separation is approved and his reassignment orders are issued to the date he receives notification of the action, the cadet or midshipman pursuant to 10 U.S.C. 516(b) "resumes his enlisted status" when separated for any reason other than appointment as a commissioned officer or for disability, and he is required to complete the period

of service for which he enlisted or for which he is obligated, unless sonner discharged. As the member while at home awaiting orders will not be subsisted at Government expense, he is entitled pursuant to 37 U.S.C. 402(d) to a basic allowance for subsistence. 49 Comp. Gen. 407 (1969).

Cadet or midshipman awaiting transfer to Reserves-A disenrolled service academy cadet or midshipman who while awaiting transfer by the Secretary concerned under 10 U.S.C. 4348(b), 6959(d), and 9348(b), to a Reserve component returns home, is not entitled to pay and allowances until he is required to comply with new active duty orders, as the transfer has the effect of discharging the cadet or midshipman from his enlisted contract and, therefore, the member is not in an active duty status for pay and allowances purposes until he complies with his new orders. 49 Comp. Gen. 407 (1969).

Delay between termination of cadet status and resumption of enlisted status--The fact that several days elapsed between the time a Regular enlisted man of the uniformed services reverted to that status pursuant to 10 U.S.C. 516(b) upon termination from the Air Force Academy and the date he received his active duty orders at his home in Los Angeles does not affect the member's entitlement to pay and allowances as of the date of resuming Regular enlisted status. If the member should, however, be transferred to active duty as a reservist and ordered to Andrews Air Force Base in Maryland, his enlisted status having terminated when disenrolled from the Academy, his right to pay and allowances would commence on the day he departed from home by the means of transportation authorized, and should the member's orders reach him while visiting in the vicinity of the Base, pay and allowances would commence on the ordered reporting date. 49 Comp. Gen. 407 (1969).

Members in a missing, interned, etc., status

When a member of the uniformed services enters a missing or other status covered by the Missing Persons Act, as amended, 50 U.S.C. App. 1001-1015, permanent items of pay and allowances, except temporary allowances, may continue to be credited to his account provided no change occurs in conditions of entitlement, section 2 of the act authorizing the same basic, special and incentive pay, basic allowances for subsistence and quarters, and station per diem allowances, not to exceed 90 days, for a period of absence that a member was entitled to at the beginning of his absence. 44 Comp. Gen. 657 (1965).

A member of the Air Force designated his father, who was not dependent upon him for support, to receive an allotment of all his pay and allowances in case he became missing.

After the member became missing the Secretary of the Air Force had authority under the Missing Persons provisions to change the allotment to the father when he determined it was in the interest of the member to put pay and allowances into the Uniformed Services Savings Deposit Program rather than pay them over to the father. B-196808, July 17, 1980.

Members killed in action--The father of a member in a missing status is not entitled to the accrued pay and allowances, including amounts deposited in the Uniformed Services Savings Deposit Program (USSDP), when the member is determined to have been killed in action, even though he was designated to receive an allotment of 100 percent of the member's pay and allowances if he went in a missing status, since the Secretary concerned has the authority under 37 U.S.C. 551-558 to discontinue such an allotment. The amounts accruing to member's account, including deposits in the USSDP are then distributed in accordance with 10 U.S.C. 2771, in this case to the designated beneficiares, his sisters. B-196808, July 17, 1980.

C. Induction or Enlistment

Erroneous induction; voidable status

The reclassification and immediate induction of an individual because he failed to keep his draft board informed and, therefore, he was declared delinquent, does not make the induction void but merely voidable, and upon discharge from the Marine Corps, under honorable conditions by reason of erroneous induction, the member who was absent without authority in a nonpay status for 1 year, 7 months, and 13 days out of the 2 years, 3 months, and 9 days of service, is considered a de jure member of the Corps until his discharge for pay purposes, and he is entitled to the full pay and allowances credited to his account and remaining unpaid, subject, of course, to 37 U.S.C. 503(a), which provides for the forfeiture of all pay and allowances for a period of absence without leave or over leave, unless the absence is excused as unavoidable. 52 Comp. Gen. 542 (1973).

Where an individual has been held by a military court to be outside the jurisdiction of the UCMJ and the validity of the individual's enlistment has not been administratively determined to be invalid, the individual's military pay and allowances may be continued until the administrative determination is made. 57 Comp. Gen. 132 (1977).

Decision by a military court that it does not have personal jurisdiction over an individual for purposes of military law because the Government has failed to prove that the individual was validly enlisted does not automatically void the enlistment for purposes of determining the person's

entitlement to pay and allowances. 57 Comp. Gen. 132 (1977).

Dejure enlisted status

Constructive enlistments may arise for purposes of pay and allowances generally when individuals "otherwise qualified" to enlist enter upon and voluntarily render service to the armed forces and the Government accepts such services without reservation. A member serving under a constructive enlistment is regarded as being in a de jure enlisted status and entitled to pay and allowances. 57 Comp. Gen. 132 (1977).

When an enlistment contract is found to be voidable by either the Government or the individual because of a defect in the enlistment, either the Government or the individual may waive the defect and affirm the enlistment so as to confer upon the individual de jure member status for pay and allowances. 57 Comp. Gen. 132.

Medically unfit person inducted

A member of the uniformed services who, after having performed active duty, is found to have been medically unfit at the time of entry into the service is not deprived of the right to military pay and allowances or of the status of being entitled to basic pay because of the administrative failure to discover his physical condition, absent an affirmative statutory prohibition against the induction of persons on the basis of physical or mental disqualification, and in view of the fact 50 U.S.C. App. 454(a) provides that no person shall be inducted into the armed services until his acceptability has been satisfactorily determined, and section 456(h) prescribes that a physical or mental condition constitutes a basis for deferment from induction rather than an absolute disqualification. 48 Comp. Gen. 377 (1968). See also 49 Comp. Gen. 77 (1969) and 54 Comp. Gen. 291 (1974).

Persons judicially declared insane inducted or enlisted

Although there is no prohibition against the induction of insane persons into the military service similar to the prohibition against enlistment of insane persons (10 U.S.C. 3253; id. 5532), inductees should be treated in the same manner as enlistees who do not acquire any right to pay and allowances when an existing judicial adjudication of mental incompetence is not discovered until after enlistment; therefore, persons enlisted or inducted who, after having performed active duty for some time, are discovered to have been declared mentally incompetent by a court prior to entrance into the military service are not entitled to pay and allowances through the date

determination of mental competency is made or until release from military control or to any unpaid pay and allowances for such periods. However, such persons who, after having received active duty pay and allowances, are discovered to have been declared mentally incompetent by a court prior to entrance into the military service are entitled to retain the pay and allowances received under the rule that a person who can establish that he received pay and allowances in a de facto status may retain the pay and allowances received if the payments are otherwise proper. 39 Comp. Gen. 742 (1960). See also 54 Comp. Gen. 291 (1974).

Mentally incompetent persons (not judicially declared) inducted or enlisted

Persons who after induction or enlistment in the uniformed services, are found by qualified medical doctors to have been mentally incompetent on the date of enlistment or induction may not be regarded as insane persons, the same as persons who have been judicially determined by a court to be insane prior to enlistment or induction; therefore, such persons are regarded as members of the uniformed services until the date of release from military control and are entitled to pay and allowances, paid and unpaid, and to travel and transportation allowances authorized for members who are discharged on account of a mental condition; also, such members are liable for debts due the United States at the time of release. 39 Comp. Gen. 742 (1960). See also 54 Comp. Gen. 291 (1974).

Under age enlistments

The enlistments of individuals enlisted below the minimum statutory age, who are still below that age when that fact is discovered, are void and upon a definite determination of such facts the individual's pay and allowances are to be stopped and he should be released from military control. However, if that fact is not discovered until after the individual has reached the minimum age, he enters a voidable status and his enlistment may be avoided at the option of the Government. 54 Comp. Gen. 291 (1974). See also 39 Comp. Gen. 860 (1960).

Under age enlistee discharged upon application of parent

Under 10 U.S.C. 1170, a member enlisted between the ages of 17 and 18 years and who is discharged upon application of parent or guardian made within 90 days of enlistment, is entitled to pay and allowances through the date of discharge. 54 Comp. Gen. 291 (1974). See also 39 Comp. Gen. 860, 867 (1960).

Fraudulent enlistments

General rules--Members who fraudulently enlist (voidable enlistments) are entitled to receive pay and allowances until the fact of the fraud is definitely determined, at which time either the fraud should be waived and the member continued in the service with pay and allowances, or the enlistment should be avoided by the Government and the member released from military control with no entitlement to pay and allowances beyond the date of determination of the fraud. The date of determination of the fraud and the date of the decision to either waive the fraud or avoid the enlistment and release the individual from military control should be contemporaneous or as close to contemporaneous as possible so as to avoid retaining control over an individual whose status as a military member is void. Regulations may be changed in line with 47 Comp. Gen. 671 to place the authority to waive fraud in enlistment on the same level as the authority to determine the fact of a fraudulent enlistment. 54 Comp. Gen. 291 (1974). See also 55 Comp. Gen. 1421 (1976) and 47 Comp. Gen. 671 (1968).

Fraudulently concealed prior dishonorable discharge--An enlisted member of the Army who fraudulently concealed a prior dishonorable discharge upon enlistment and who was given a dishonorable discharge after discovery of the fraud is not entitled to pay and allowances for any period served under the fraudulent enlistment upon receiving an honorable discharge as result of action taken by an Army Discharge Review Board, even though he may have been temporarily restored to duty for several days prior to the date of the dishonorable discharge. 30 Comp. Gen. 528 (1951).

Fraudulently concealed criminal record--An enlisted member of the Army who on entry into the service fraudulently concealed a criminal record which disqualified him for enlistment, and who was discharged under other than honorable conditions upon discovery of the fraud, is not entitled to pay and allowances for the period served under the fraudulent enlistment, even though the discharge was reviewed by an Army Discharge Review Board and changed to a discharge under honorable conditions. 30 Comp. Gen. 18 (1950).

D. Termination of Officer's Commission for Holding Civil Office

Regular military and civil office are incompatible

Whether a position is a civil office within the meaning of 10 U.S.C. 973(b) is not determined by the importance of the duties alone or whether the duties can be performed by a military officer without interfering with his military duties, since the statute makes the two offices (Regular military and civil) incompatible as a matter of law. B-173783.149, October 9, 1975. See also 44 Comp. Gen. 830

(1965), 29 Comp. Gen. 363 (1950), 25 Comp. Gen. 377 (1945), and 20 Comp. Gen. 885 (1941).

Civil office defined

Special policeman at Library of Congress--An officer of the Regular Army who while in an excess leave program attending law school accepts a temporary appointment as a special policeman in the Library of Congress under 2 U.S.C. 167 is regarded as having a position which is created by statute with prescribed duties and which requires some exercise of sovereign powers so that such a position is considered as a "civil office" within the civil office prohibition under 10 U.S.C. 3544(b), regardless of the temporary nature of the appointment, and, therefore, the officer not only forfeits his Regular Army commission but he also loses his entitlement to pay and allowances upon recall to active duty on termination of the school te:m. 44 Comp. Gen. 830 (1965).

State notary public--The office of notary public in the State of Colorado is a civil office within the meaning of 10 U.S.C. 973(b) in that it is created by law and has certain duties imposed by law which involve some exercise of sovereign power. An Air Force officer stationed in Ohio went to Colorado on leave, accepted Colorado notary public appointment admittedly for purpose of terminating his military commission under 10 U.S.C. 973(b), and returned to Ohio. In view of certain Colorado constitutional and statutory provisions and a Federal District Court decision in similar case, the ComptrollerGeneral will not object to continuing officer's military pay and allowances since substantial doubt exists as to his notary public status. B-173783.149, October 9, 1975. See also B-173783.191, March 1, 1976, and B-127798, June 8, 1956.

Commissioner of Roads for Alaska--A Regular officer who accepts appointment as Commissioner of Roads for Alaska, a position established administratively and not by statute, which does not require an oath of office or have compensation or title fixed by law does not vacate his commission or hold a "civil office" within the meaning of section 1222, Revised Statutes, and may continue to draw his active duty pay and allowances while so assigned. 29 Comp. Gen. 363 (1950).

Member of Alaskan Engineering Commission--Under the provisions of section 1222, Revised Statutes, an Army officer who accepts a regular appointment from the President as a member of the Alaskan Engineering Commission thereby vacates his Army commission and is not entitled to pay as an Army officer while serving as a member of that commission. 1 Comp. Gen. 499 (1922).

Public Health Service officer appointed to Interstate Commission--The act of April 9, 1930, assimilating Public Health Service officers with Army Medical Corps officers, did not subject the former to rules of military discipline and status, so that, unless detailed to the Army, a Public Health Service officer is not precluded by the prohibition in section 1222, Revised Statutes, against an Army officer accepting a civilian office, from accepting, and taking the oath of office under an appointment by the President without compensation as a member of the Interstate Commission on the Potomac River Basin. 11 Comp. Gen. 356 (1932), distinguished. 20 Comp. Gen. 885 (1941).

Assistant to the President--The position of Assistant to the President created by 3 U.S.C. 106 meets the criteria for a civil office within the meaning of 10 U.S.C. 973(b). The exercise of the functions and duties of such an office by a Regular Army officer on active duty would terminate his military appointment. B-150136, February 7, 1974. See also B-150136, July 2, 1974.

Assistant Secretary and Deputy Assistant Secretary of Defense positions--The Deputy Assistant Secretary of Defense positions which are created administratively and not by statute are not civil offices within the meaning of 10 U.S.C. 973(b) and, therefore, Regular military officers serving in such positions would not be in violation of that statute. However, the Assistant Secretary of Defense positions are civil offices and if a Regular military officer on active duty were to exercise the functions of such an office, he would be in violation of 10 U.S.C. 973(b). See B-146890, March 13, 1975, and June 6, 1975.

Civil office while on terminal leave

Should a commissioned officer of the Regular Air Force on terminal leave pending retirement accept a civil office under a State Government or perform the duties of the office during such leave, the sanctions of 10 U.S.C. 973(b), which provides for termination of his military appointment, would apply to him. Since the civil office is under a State Government, the provisions of 5 U.S.C. 5534a which authorizes dual employment during terminal leave in other circumstances, would not exempt the member from those sanctions. 56 Comp. Gen. 855 (1977).

E. Additional Pay - Limitations

Acceptance of payments from Government

Medical officers receiving medicare fees--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. 1071-1085, 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 doctor 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. 70 (1958 ed., now codified as 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 the character as Government funds nor cure the illegality of the fee-splitting arrangement. 41 Comp. Gen. 741 (1962). See also B-207109, November 29, 1982.

Medical and dental officers receiving Veterans' Administration fees--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 limited medical practice after hours with the permission of his commanding officer, may 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). See also B-207109, November 29, 1982, to the same effect concerning dental officers.

Personal expenses incident to military duties--Service members not in a travel status incurred personal expenses at their permanent duty station for meals and lodgings incident to their military duties during a snowstorm and seek reimbursement. The entitlement of members of the armed services to be so reimbursed for expenses incident to their military service is contained in title 37, United States Code. In the absence of specific authorization, there is no legal basis upon which this Office may authorize reimbursement. B-194499, October 31, 1979.

In the absence of legislation an enlisted member of the Air Force who is ordered to secure a commission as a notary public in connection with his military duties is not entitled to be reimbursed for any expenses associated with becoming one since these expenses are personal and are to be paid by the member. B-196533, April 22, 1980.

Although official duties of the District Commander of the Seventh Coast Guard District require that he be available 24 hours a day to respond to problems arising from the Cuban Refugee Freedom Flotilla, 31 U.S.C. 679 prohibits the District Commander from being reimbursed by the Government for the costs associated with installing and maintaining a telephone in his residence. 59 Comp. Gen. 723 (1980). Compare also 60 Comp. Gen. 490 (1981), and 56 Comp. Gen. 767 (1977).

Acceptance of payments from sources other than the Government

Reserve officers on active duty as interns in private hospitals--Naval Reserve officer on active duty as an intern in a municipal hospital who is paid compensation for the performance of the service required of him as a Reserve officer on active duty, receives the compensation incident to his duties for the benefit of the United States, and therefore, the compensation should be collected from the officer and covered into the Treasury a miscellaneous receipts. 32 Comp. Gen. 454 (1953). See also 30 Comp. Gen. 246 (1950).

Officers assigned to educational institutions as a part of ROTC program may accept certain nonpay benefits--The acceptance by senior commissioned officers to the uniformed services assigned to educational institutions having a Reserve Officers' Training Corps program of some of the benefits offered civilian members of the staff-- free or reduced rates for tuition, tickets to school activities, parking privileges, and books and supplies--would not violate 18 U.S.C. 209(a), prohibiting receipt of salary from any source other than the United States, the benefits which are peculiar to educational institutions having no counterpart in the military compensation system nor involving conflict of interest or loyalty on the part of the officers, who assigned to educational institutions with the academic rank of professor (10 U.S.C. 2102), should be given some school status by the institution; therefore, as no direct payments are involved in the acceptance of the proposed additional benefits, Department of Defense Directive No. 5500.12, dates August 4, 1965--"Acceptance by ROTC Staff Members of Payments or Other Benefits Offered by Educational Institutions"--may be amended to include tuition assistance, tickets to school activities, and parking and book provileges. 45 Comp. Gen. 308 (1965).

Honorarium for lecture given by active duty officer--A check which was received by an Army officer a an honorarium for a lecture he was designated to give in his capacity as an officer on active duty constitutes eanings, in excess of regular pay and allowances, which belong to the regular pay and allowances, which belong to the United States as employer, and therefore, the officer is required to endorse the check for deposit into the Treasury. 37 Comp. Gen. 29 (1957).

Fees for jury duty--A military member on active duty receiving full pay and allowances served as a juror in a State court. He received $35 in fees for his jury duty. The member may not keep the fees because he was not in a leave status and he is therefore receiving additional compensation for performing his duties presumably during normal working hours. B-207034, November 4, 1982.

F. Application of Adjustments Increases to Pay

Increase comparable to civilian employees

Effective date of adjustment under PL 90-207--Members of the uniformed services entitled, pursuant to Public law 90-207, approved December 16, 1967, to pay increases comparable to those prescribed for civilian employees under the Federal salary Act of 1967, the second of a three-stage upward adjustment that is effective for civilian employees on the "first day of the first pay period beginning on or after July 1, 1968," may be made effective for military personnel on July 1, 1968, as the monthly pay basis fixed by 37 U.S.C. 203(a) meets the standard that the pay increase for both civilian and military personnel commence on the first day of the first pay period starting July 1, 1968. 47 Comp. Gen. 549 (1968).

Retroactive pay adjustment - active duty requirement--The fact that a reemployed civilian who while on military furlough served on active military duty was on a civilian roll on April 15, 1970, the date of enactment of the federal Employees Salary Act of 1970, Public Law 91-231, does not entitle him under the act to a retroactive adjustment in basic pay for the active military duty performed during the period January 1, 1970, through March 15, 1970, as the act provides compensation increases for Federal classified employees only. However, although Public Law 90-207, December 16, 1967, provides for an increase in basic pay for military personnel whenever the General Schedule of compensation for Federal classified employees is increased, the Secretary of Defense, in implementing the 1970 act pursuant to Executive Order No. 11525, prescribed that a member must have been on active duty on April 15, 1970, to be entitled to a retroactive adjustment in pay. 50 Comp. Gen. 226 (1970). See also 50 Comp. Gen. 868 (1971), 50 Comp. Gen. 99 (1970), and 49 Comp. Gen. 796 (1970).

Pay increase - member in missing status

The widow and designated beneficiary of an Air Force captain held to be in a missing in action status from March 28, 1969, until that status was terminated on March 19, 1970, on the basis of evidence establishing his death, may be paid the increase in basic pay provided by the Federal Employees Salary Act of 1970, and implemented by Executive Order No. 11525, for the period January 1, 1970, the retroactive effective date of the act, through March 19, 1970, absent a contrary determination under 37 U.S.C. 556(c) by the Secretary of the Air Force. While the Department of Defense Memorandum implementing the Executive order permits a retroactive increase in pay for any active service performed in the case of a person "who died" after December 31, 1969, but before April 15, 1970, such authority

together with section 5 of the salary act on which it is based is considered to have reference to a termination of pay because of death. 50 Comp. Gen. 148 (1970).

Military pay increases - frozen under Economic Stabilization Act

The claim of an Air Force sergeant for a retroactive increase in basic pay and quarters allowance from the effective date of the act of September 28, 1971, Public Law 92-129, through November 13, 1971, the end of the 90-day wage-price freeze--August 15 to November 13, 1971--imposed by Executive Order 11615, dated August 15, 1971, issued pursuant to the Economic Stabilization Act of 1970, as amended, may not be allowed since freezing military pay and allowances at the rates in effect on August 14, 1971, is within the broad scope of authority vested in the President by the Economic Stabilization Act and, furthermore, the increase for the wage-price freeze period not having been provided by law prior to August 15,1971, and by appropriations to cover the increase does not meet the requirements of section 203(c) of the Economic Stabilization Act Amendments which authorize retroactive payment of increases. 52 Comp. Gen. 15 (1972).

G. Active Duty for Part of a Month - Computation of Pay

Member obligated to serve 30 days or more but released early - payment basis

A member of a uniformed service, who was obligated to serve on active duty for 30 days or more but who was released from the service before performing such active duty for at least 30 days, is entitled to receive pay and allowances on a day-to-day basis including the 31st day of the month, computed in accordance with the provisions of 37 U.S.C. 1004 (1970) and not under the provisions of 5 U.S.C. 5505, since these latter provisions establish the general rule relative to the computation of pay for those individuals who performed such active duty for 30 days or more before being released. 54 Comp. Gen. 952 (1975).

Member on active duty for part of a month - payment basis for 31st day of the month

A Regular Army officer who during a 6 calendar month period performed active duty for part of each month, reporting for duty on other than the first day of the month, and attended a civilian educational institution on excused leave for the other part of the month, is entitled to pay and allowances for the 31st day of a month, 37 U.S.C. 1004 prescribing for "a member of a uniformed service" pay and allowances for each day of a continuous period of less than 1 month's service, including the 31st, at 1/30 of the monthly amount

of pay and allowances, applying to members of all components, and the term "member" defined to include a commissioned officer and the term "uniformed service" to include the Army, both Regular and Reserve members pursuant to 10 U.S.C. 3062(c), the Regular Army officer is entitled to pay and allowances for each 31st day within the 6 calendar month period during which he performed active duty for part of the month. 46 Comp. Gen. 100 (1966). See also 47 Comp. Gen. 575 (1968).

II. NON PAY OR REDUCED PAY STATUS

A. Civil Arrest or Confinement

Member restricted to the state by civilian authorities--Navy member who while on authorized leave was arrested by civilian authorities and then restricted to State of South Dakota while awaiting trial, at which he was convicted, and who apparently performed no duties commensurate with grade or specialty is not entitled to pay and allowances during period subsequent to authorized leave, as absence was result of own misconduct and was not excused as unavoidable. B-179866, July 31, 1974.

Administrative determination as to whether absence is unavoidable is necessary--A Marine Corps enlisted member was charged with a crime by civilian authorities and placed in civil confinement pending trial. At trial he was found not guilty by reason of insanity and transferred to a state mental institution for an indefinite period of time. An administrative determination should be made in each individual case of absence from duty while in civil confinement as to whether it os to be excused as unavoidable as required by the Military Pay and Allowances Entitlements Manual. Payment for the period in question may be made if an administrative determination favorable to the individual is made. B-194949, November 7, 1979.

Indicted but released due to mental incompetency-A Marine Corps member who while in an authorized absence status is confined and later indicted by civilian authorities and who on the basis of a court finding of mental incompetency is retained in a Medical Center for Federal Prisoners until discharge of the indictment and his return to military control, is not entitled to credit in his final military pay record with pay and allowances for the period of absence in view of the Commandant of the Corps determination that the absence may not be excused as unavoidable, and that the member's absence in the hands of the civil authorities must be considered "time lost" for pay purposes. 48 Comp. Gen. 792 (1969).

Paroled to custody of military authorities--A member of the uniformed services under a sentence of confinement by civil authorities who while paroled to the custody of military authorities on a daily basis performed duties with his unit in accordance with the court's work release recommendation, satisfactorily serving in the capacity of a noncommissioned officer squadron leader, a position commensurate with his grade, military specialty, and length of service, is, pursuant to 37 U.S.C. 204(a) and 101(18), which govern entitlement to basic pay, eligible to receive pay and allowances commensurate with his grade and specialty for each day of full-time duty performed while paroled to the military authorities. 52 Comp. Gen. 317 (1972).

Army member who was under sentence of civil confinement for 6 months but only had to serve sentence on weekends under a work release program is not entitled to pay and allowances for weekends actually confined, since he is only entitled to receive pay and allowances in such circumstances for week days that he was paroled into custody of military authorities and then performed or was available to perform full-time duties commensurate with his grade and specialty. B-191301, May 17, 1978. 52 Comp. Gen. 317 distinguished.

Pretrial custody at U.S. installation for foreign authorities--A service member charged with commission of a civil offense on foreign soil is entitled to his pay and allowances for any pretrial custodial period at a U.S. military installation where the decision to incarcerate or to merely restrict the member to duty station and assign him to perform duties on full-time basis remains in installation commanders. However, a service member charged with commission of a civil offense on foreign soil is to be considered constructively absent from duty and not entitled to pay and allowances when member is actually incarcerated on the basis of request for incarceration by foreign civilian authorities under the provisions of a treaty or other international agreement. 55 Comp. Gen. 186 (1975). See also 51 Comp. Gen. 380 (1971), and 45 Comp. Gen. 766 (1966).

Where incarceration in U.S. Military Correctional facility is at request of Japanese authorities, no discretionary authority exists in military installation commander to incarcerate or merely to restrict to installation, member is deemed to be constructively absent during period of acutal incarceration subsequent to indictment and other than to extent that such time is covered by unused accrued leave, no entitlement to pay and allowances accrues. B-169366, November 29, 1977, sustaining 51 Comp. Gen. 380. Cf. 55 Comp. Gen. 186.

Absence from duty due to foreign judicial proceedings--A service member charged with commission of a civil offense on foreign soil is not entitled to pay and allowances for period when actually absent from military installation for purposes of judicial proceedings by foreign civil authorities unless such absence is excused as unavoidable. 55 Comp. Gen. 186 (1975).

B. Confined for Military Offense

Member in "full duty" status--"Full duty" for purposes of 10 U.S.C. 972 is attained when member, not in confinement, is assigned useful and productive duties (as opposed to duties prescribed by regulation for confinement facilities) on a fulltime basis which are not inconsistent with his grade, length of service and military occupational specialty (MOS). While placement in the same MOS is not essential, the decision to place a member in that MOS or to assign him available duties consistent with his grade and service is a question of personnel management best left to judgment of appropriate military commander. Full duty status for purposes of 10 U.S.C. 972, once attained, cannot be lost by virtue of restraint short of confinement; accordingly, assignment to useful and appropriate service either after release from confinement or in lieu of confinement pending trial could constitute full duty status for purposes of the statute. 54 Comp. Gen. 862 (1975). See also 37 Comp. Gen. 228 (1957). Compare B-173065, July 7, 1971.

Member returned to military control assigned full-time duties--Navy enlisted member, who voluntarily returned to military control from absence without-leave status, was assigned appropriate full-time duties in lieu of confinement pending trial, convicted by court-martial, confined and reassigned to further duties after release until date of discharge, is entitled to pay and allowances for both pre- and post-confinement periods of duty, since assignment to full-time duties consistent with member's rank and service is deemed "full duty" for purposes of 10 U.S.C. 972 and implementing Department of Defense regulations. 54 Comp. Gen. 862 (1975). See also 37 Comp. Gen. 228 (1957).

After expiration of enlistment - court-martial review pending--Army enlisted member sentenced by courtmartial to dishonorable discharge, confinement for life, reduction in grade, and forfeiture of all pay and allowances, was retained in confinement after expiration of his enlistment pending review of his sentence. On appeal his sentence was reversed and rehearing held, which resulted in his conviction for lesser offense involved in earlier conviction. Reversal did not entitle him to "restoration" of pay and allowances under 10 U.S.C. 875(a) for period subsequent to

expiration of his enlistment since his lack of entitlement to pay during that period was due to expiration of his enlistment, not execution of court-martial sentence. B-192082, December 21, 1978. Compare 59 Comp. Gen. 12 (1979), for rule when conviction completely set aside.

After expiration of enlistment - not restored to duty--Enlisted member who returns to military control after deserting and whose term of enlistment had expired prior to his return to duty is not entitled to pay and allowances until he is officially restored to duty for the purpose of making good time lost during the period covered by the contract of enlistment. 54 Comp. Gen. 862 (1975).

After expiration of enlistment - restored to duty--Enlisted member who deserted, was returned to full duty, tried by court-martial, convicted and confined but whose court-martial conviction did not include a forfeiture of pay is entitled, in accordance with paragraph 10316b(4) of the Department of Defense Military Pay and Allowances Entitlements Manual, to pay and allowances for the period of confinement. 54 Comp. Gen. 862 (1975). B-192082, December 2, 1975.

Pay of absent member begins upon placement under military control--A Marine Corps Reserve who upon failing to report on March 1, 1964, for involuntary active duty for training is apprehended and placed under the jurisdiction of military authorities in the area of his home on March 6, and delivered into custody at his duty station on March 14, is entitled to pay from March 6, in accordance with paragraph 044250-1 of the Navy Comptroller Manual which provides that a member absent without authority is entitled to pay from the date he returns to the jurisdiction of the Armed Forces, and the delay in transferring him to his assigned duty station after he was placed under military control is considered to have been for the convenience of the Government. 44 Comp. Gen. 80 (1964).

On duty while court-martial sentence under appeal--An enlisted man who is sentenced by a court-martial to dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor for five years, and who is retained in the service after the expiration of enlistment and released from confinement and "restored to duty pending completion of appellate review," pursuant to a court martial order which provided that the portion of the sentence adjudging forfeitures was not applicable to future pay and allowances, is entitled to pay while performing duty after such date, even though, upon appellate review, the sentence of dishonorable discharge is ordered executed. 33 Comp. Gen. 281 (1953). See also 36 Comp. Gen. 564 (1957).

Making good time lost

Time lost due to court-martial conviction--A Marine Corps enlisted man who, while in confinement imposed by a general court-martial made application to make good time lost by reason of the conviction, and whose application was approved on the date his enlistment normally would have expired, is entitled, upon restoration to full duty status after completion of the sentence, to pay and allowances from the date of restoration. 34 Comp. Gen. 390 (1955). See also 37 Comp. Gen. 380 (1957).

Confinement period during "making-up" lost time period--An enlisted man who is restored to duty to make up lost time as provided by 10 U.S.C. 972, having resumed his obligated service contract, his enlistment extends beyond the normal expiration of his term of service to include the make good days and, therefore, fixes a new termination date, even though a period of confinement may have commenced during the extended period. However, the restoration to duty status to make up lost time does not continue indefinitely when a status changes from duty to confinement, whether pretrial or pursuant to a court-martial sentence. Therefore, a member who was placed in pretrial confinement during a make good lost time period extending from the date his enlistment expired to the adjusted expiration date is not entitled to pay and allowances subsequent to the new termination date. 47 Comp. Gen. 487 (1968).

C. Absence Without Leave

Absence excused - mental incompetency--For an absence without leave of a mentally incompetent enlisted member of the uniformed services to be excused as unavoidable under section 4(b) of the Armed Forces Leave Act of 1946, as amended, the absence not only must be unavoidable insofar as the enlisted man is concerned but it must be unavoidable insofar as the Government is concerned, the test being whether the absence could have been prevented by the member or by the military authorities' exercise of due diligence in attempting to discover, apprehend and return the member to military control; therefore, when an unauthorized absincompetent enlisted member could not have been prevented by the member or the military authorities and is excused as unavoidable, the member is entitled to pay and allowances for the excused leave periods. 40 Comp. Gen. 366 (1960).

Absence unexcused - civilian psychiatric treatment--Member's claim for pay and allowances for period in which he was in an unauthorized leave status (part of which he was under psychiatric treatment in civilian hospitals) is disallowed since the administrative determination required

by 37 U.S.C. 503(a) (1970) was not made that the absence was excused as unavoidable, which determination is primarily administrative and based on the actual facts involved. B-187272, November 4, 1976. See also 47 Comp. Gen. 214 (1967).

Individual who is in "absence without leave" status for more than 30 days, even though it is determined by medical authority that he is medically incompetent, is not entitled to pay and allowances for that absent period unless absence isexcused as unavoidable (37 U.S.C. 503(a)) by officer exercising general courts-martial jurisdiction. B-192444, October 30, 1978, cf. 40 Comp. Gen. 366 (1960).

Change in type of discharge - absence unexcused--Although the undesirable discharge given an enlisted man for reasons including absence without leave was, upon later disclosure of the circumstances, corrected to an honorable discharge for the convenience of the Government by a Naval Board of Review, Discharges and Dismissals pursuant to section 301 of the Servicemen's Readjustment Act of 1944, such enlisted man is nevertheless not entitled to receive pay for the period of the unauthorized absence. 29 Comp. Gen. 339 (1950).

Criminality versus misconduct--The question of whether sufficient grounds exist for excusing absences of members of the uniformed services as unavoidable under section 4(b) of the Armed Forces Leave Act, is primarily for administrative determination based on the individual facts. There may be cases where absences of members are not due to any misconduct on the part of the member but result from events beyond the member's control, such as, if following detention by civil authorities members are released without trial upon agreement to make reparation for the civil offense. In such cases excusing the absence as unavoidable so forfeiture of pay and allowances would not be necessary, would be justified. The basis for excusing as unavoidable such absences should be an absence of misconduct on the part of the member rather than a lack of criminal culpability. 39 Comp. Gen. 781 (1960).

D. Change in Type But Not Date of Discharge

Claim for active duty pay from date of discharge under other than honorable conditions, to date claimant would otherwise have retired, and for retirement pay thereafter based on court ordered change in charterization of discharge to general is denied since Court of Appeals decision did not render discharge "null and void" but merely directed a change in the character of the discharge not a change in its date. Without change in the date of

discharge, no additional rights to active duty pay accrued. B-181904, December 24, 1974.

Member's discharge absolutely terminates his enlistment to military pay and allowances and subsequent change in character of discharge does not affect former member's status with respect to separation from the service, nor does it create any right to military pay for periods after date of discharge. B-207041, September 8, 1982, B-203752, March 2, 1982, B-201944, March 26, 1981, B-198168, April 16, 1980. B-193417, February 16, 1979, B-188041, April 22, 1977, B-189212, July 5, 1977, B-193635, January 17, 1979, B-178320, August 9, 1977.

III. FORFEITURES AND COLLECTIONS OF PAY

A. Forfeiture of Pay by Court-Martial Sentence

Execution of sentence

Effective date of forfeiture--A Marine Corps officer whose sentence for violating the Uniform Code of Military Justice on November 22, 1972, was approved, as to the forfeiture of pay and allowances, but not as to dismissal, and finally executed on December 18, 1972, following which the officer was detached from duty and ordered to travel to his home of record without entitlement to active duty pay and allowances, where he was released on December 31, 1972, and transferred to the Reserves with 45 days' unused leave, is entitled to pay and allowances through December 17, 1972, pursuant to the interpretation of 10 U.S.C. 857 and 871 that the day of the execution of a sentence controls. He is entitled to mileage for authorized travel by privately owned automobile as provided by paragraph M4157 of the Joint Travel Regulations, but not to payment for the unused leave as the forfeiture imposed was "all pay and allowances." 52 Comp Gen. 909 (1973).

Accrued pay prior to court-martial sentence--In the absence of court-martial conviction and sentence which includes forfeiture of accured but unpaid pay and allowances, that which accrues but is unpaid at the time the member enters absent without leave status may be paid following his return to military control. B-192444, October 30, 1978.

Sentence set aside by appelate review-- A court-martial sentence which was set aside by appellate review prior to the execution of the pay and allowance forfeiture provisions of the sentence may not be considered a valid sentence for forfeiture purposes, and pay and allowances may accrue to the member until approval of the second

court-martial sentence which required forfeiture of pay and allowances accruing thereafter. 36 Comp. Gen. 512 (1957).

Where United States Court of Military Appeals orders court-martial finding and sentence set aside and charges dismissed, member is entitled to pay and a allowances of grade from which that sentence purported to reduce him. B-190761, March 31, 1978.

Two or more forfeitures--The deferment of the execution of the forfeiture of pay provisions of a second courtmartial sentence until the expiration of the forfeiture provisions of a previous courtmartial sentence may be approved by the convening authority under Article 71(d) of the Uniform Code of Military Justice, 10 U.S.C. 871(d), in the absence of a statutory requirement that two or more sentences of forfeiture of pay and allowances run concurrently and, although the deferment is not for probationary purposes within the meaning of United States v. May, 10 USCMA 358, 27 CMR 432, and United States v. Cecil, 10 USCMA 371, 27 CMR 445, in view of Article 57(a) of the Code, 10 U.S.C. 857(a), providing for application of a forfeiture of pay or allowances on "or after" the date of approval of a court-martial sentence, the convening authority may direct that the second forfeiture sentence apply when the currently existing sentence has been fully executed, however, he may not direct the interruption of the previous sentence of forfeiture until the new sentence has been satisfied. 42 Comp. Gen. 279 (1962). See also 36 Comp. Gen. 755 (1957).

Restoration to duty awaiting appellate review--The restoration of an enlisted member to duty awaiting appellate review of a court-martial sentence of forfeiture of all pay and allowances makes inoperative the total forfeiture sentence, and the member is entitled to pay and allowances on restoration to duty. 37 Comp. Gen. 591 (1958).

Computation and collection of forfeiture

Amount which may be forfeited without punitive discharge--The ruling of the United States Court of Military Appeals in United States v. Jobe, 27 C.M.R. 350, 10 U.S.C.M.A. 276, on March 13, 1959, that imposition of total forfeitures by a general court-martial without a punitive discharge is not expressly forbidden by the Uniform Code of Military Justice has the effect of declaring a sentence of total forfeiture of pay and allowances without a punitive discharge a legal sentence, so that the right of a service member to have reserved one-third of the pay and allowances for the period covered by a sentence of a general court-martial to total forfeitures but not including a punitive discharge is too

doubtful to warrant payment, and, therefore, disbursing officers may not effect payment in such cases. 39 Comp. Gen. 46(1959), modified. 39 Comp. Gen. 637 (1960).

Class Q allotment established after forfeiture is effective--The marriage and establishment of a class Q allotment by an enlisted member of the armed services after the effective date of a forfeiture of two-thirds of his rate of pay in the pay grade to which reduced under a court-martial sentence does not affect or increase the pay the member is entitled to as a result of the courtmartial sentence and, therefore, a refund of the amount withheld in excess of two-thirds of the basic pay of the member after deduction of the mandatory monthly contribution to the class Q allotment may not be authorized, the member not having been subject to class Q allotment deductions on the effective date of the pay forfeiture, the pay to which he became entitled as a result of the courtmartial sentence is not affected by the allotment deductions. 44 Comp. Gen. 633 (1965).

Debts incurred after forfeiture is effective--The requirement that items of indebtedness due the Government by members of the Armed Forces should be reimbursed to the Government by making deductions of the amount of the indebtedness from forfeitures of pay and allowances or fines imposed by courts martial sentences before transfer of the forfeitures or fines to the Soldiers' Home Permanent Fund, pursuant to 24 U.S.C. 44, for the support of the Home, has no application to any indebtedness which accrues or is incurred after the courts-martial forfeiture has been executed, thereby avoiding delay in transferring the amounts of forfeitures or fines to the Fund, which in some instances might defeat the purpose of the statute, and the deductions of amounts due for the reimbursement of Government which are required to be made from forfeitures or fines applies as well to an indebtedness due a Government instrumentality, and to advances of pay or travel expenses or allowances, but does not apply to an income tax liability, payment of which does not constitute a "reimbursement of Government." 42 Comp. Gen. 486 (1963). See also 39 Comp. Gen. 46 (1959).

Forfeiture - loss of entitlement to pay--A forfeiture of pay imposed on a member of the uniformed services under the 1951 Manual for Courts-Martial constitutes a loss of entitlement to pay rather than an indebtedness to the United States, and such forfeitures now take precedence over other items of indebtedness. 36 Comp. Gen. 79 (1956).

Government failure to collect forfeiture--The failure of the Government to collect from an enlisted member of the uniformed services a court-martial forfeiture during the period of the sentence does not give rise to an administratively ascertained debt which may be canceled or

remitted under 10 U.S.C. 4837(d); id. 6161(d) and id 9837(d), even though the uncollected forfeiture is considered as an erroneous payment of basic pay, such debt remission authority not extending to a remission of a punishment adjudged by court-martial; however, where a forfeiture may not be extended beyond the period fixed in the sentence, there is no unexecuted forfeiture which may be remitted so that all that remains due from the member is the amount of the forfeiture that must be transferred for the support of the Soldiers' Home under 24 U.S.C. 44. 41 Comp. Gen. 269 (1961).

While an uncollected court-martial forfeiture is not an administratively ascertained debt under the military debt remission provisions in 10 U.S.C. 4837(d); id. 6161(d); id. 9837(d), the failure to reduce the enlisted member's pay as required by the court-martial sentence results in an erroneous payment and where the court-martial sentence is not timely remitted under 10 U.S.C. 874(a), and the member's pay account is not timely reduced, the resulting indebtedness may be involuntarily collected in monthly installations under authority of the act of July 15, 1954, 5 U.S.C. 46(d), governing collection of erroneous payments from enlisted members. 41 Comp. Gen. 269 (1961).

Ambiguous sentence - nullity--A court-martial sentence issued on January 22, 1959, which reduced a master sergeant, pay grade E-7 because of the changes in titles and pay grades effected by the act of May 20, 1958, is at least an ambiguous sentence, and under the rule that an ambiguity in a courtmartial sentence should be resolved in favor of the accused, the purported reduction must be regarded as a nullity. 40 Comp. Gen. 79 (1960).

Review of sentences

Sentence partially affirmed--Action of a general court-martial review board which did not affirm a Navy enlisted man's bad conduct discharge but did affirm one of the charges of disobedience may not be regarded as an acquittal to entitle the member to pay and allowances after the expiration of his enlistment while he was in a confinement and restricted status. 37 Comp. Gen. 228 (1957).

Sentence set aside prior to expiration of enlistment--An enlisted member in the grade of sergeant first-class who was confined pending appellate review of a court-martial sentence which included dishonorable discharge, forfeiture of pay and allowances and confinement to hard labor, and who had the action of the convening authority set aside on the basis that it erred in the consideration of the sentence did not have an executed forfeiture of pay; and, therefore, from the date of the action of the first convening authority until the date ofthe normal expiration of enlistment, the member was entitled to accrue pay and

allowances in the grade of sergeant first-class in the absence of an approved sentence as used in Executive Order No. 10652 which would effect a reduction in grade. 39 Comp. Gen. 42 (1959). B-190761, March 31, 1978.

Sentence set aside after expiration of enlistment--An enlisted member of the uniformed services who was confined beyond the normal date of expiration of enlistment pending review of a court-martial sentence which included dishonorable discharge, forfeiture of all pay and allowances and confinement to hard labor, and who had the action of the first convening authority set aside even though the sentence was consistently approved except for reduction of period of confinement at hard labor, is not entitled to pay and allowances beyond the normal date of expiration of enlistment until restored to duty. 39 Comp. Gen. 42 (1959). B-192082, December 21, 1978.

Sentence approved--An enlisted member of the uniformed services in the grade of sergeant first-class whose court-martial sentence, which included dishonorable discharge, forfeiture of all pay and allowances, and confinement to hard labor, was approved by the second convening authority on July 7, 1958, after the member had been restored to duty pending appellate review is entitled to pay and allowances of a sergeant first-class until July 6, 1958, thereafter the reduction in grade to private automatically became effective as prescribed in Executive Order No. 10652 and the member is entitled only to the pay and allowances of a private or a higher grade, if subsequently promoted, until date of discharge or until the sentence was ordered executed, whichever occurred first. 39 Comp. Gen. 42 (1959).

Member dies after expiration of enlistment pending appellate review--An enlisted member of the uniformed services who dies subsequent to the expiration of his enlistment and while a prisoner in confinement pending appellate review of an unexecuted court-martial sentence is regarded as having his enlistment expire by operation of law rather than as the result of the imposition of the court-martial sentence then pending appellate review, so that the issuance after the member's death of a court-martial order by the Secretary of the Army to restore the rights, benefits, privileges and property of which the deceased may have been deprived by virtue of the findings of guilty and sentence could not have the effect of placing the member in a pay status after the expiration of the enlistment to permit payment of arrears of pay for the following period of confinement or of the death gratuity. 40 Comp. Gen. 202 (1960).

B. Reductions in Grade Other Than by Court-Martial

Commanding officer's authority to restore grade and pay

Upon restoration 11 months subsequent to reduction from staff sergeant to sergeant under Article 15, Uniform Code of Military Justice, the member of the uniformed services reduced in grade is entitled to the difference in basic pay and allowances between the grades E-5 and E-6 for the period of the reduction, notwithstanding restoration was made by the successor of the commanding officer who imposed the sentence, the reference in paragraph 134, Addendum to the Manual for Courts-Martial to a 4-month period for the exercise of a commander's authority to set aside a punishment imposed under Article 15, prescribing a guideline and not a limitation on the authority to restore all rights, privileges, and property affected by a reduction in grade. 46 Comp. Gen. 880 (1967).

Effective date of restoration

An enlisted member of the uniformed services who is reduced in grade for misconduct or inefficiency and then restored to his former grade is entitled to retroactive restoration if the reduction was imposed as a punishment which would entitle the member to redress under Article 15 (d) of the Uniform Code of Military Justice, authorizing the setting aside of any punishment and restoration to all rights affected by the punishment, but if the reduction is a "wrong," the member's redress is under Article 138, which merely reguires the superior officer to take measures for redressing the wrong and does not authorize restoration to all rights affected, and therefore the restoration to the higher grade is effective only from the date the restoration action is taken. 36 Comp. Gen. 137 (1956).

C. Debt Collections from Pay

Debts owed the United States

Statutory authority required to withhold from enlisted member's current pay--In the absence of specific statutory authority for withholding current pay of members of the uniformed serices to liquidate general debts due the United States, the only action which may be taken with respect to an indebtedness resulting from loss or damage to Government property, under 31 U.S.C. 89, 90, by a Marine Corps enlisted man, who disputes the debt and declines to make arrangements for debt liquidation, is to note the debt in the member's service record so that set off may be made from the final pay due on separation from the service 37 Comp. Gen. 353 (1957). See also 42 Comp. Gen. 619 (1963), 58 Comp. Gen. 501 (1979).

Service member receiving early discharge--A service may withhold from pay due a member with the member's consent, amounts expacted to become due to the United States because of paid bonuses and advance leave which are expected to become unearned bonuses and excess leave due to the member receiving an early separation from the service. However, such amounts may not be withheld from current pay without the member's consent since no actual debt exists until the member is discharged. And any collection for advance leave which becomes excess leave on discharge must be computed based on pay received by the member at the time the leave was taken and not on pay rates in effect at time of the member's discharge. 60 Comp. Gen. 51 (1980).

Court-martial fine--A court-martial fine, like any general indebtedness to the United States may not be collected by involuntawrily withholding the current pay due an Army officer in the absence of statutory authority for withholding of current pay and compensation--as distinguished from final pay--from military and civilian personnel without their consent. 38 Comp. Gen. 788 (1959).

Marine's debt to nonappropriated fund activity--The debt owing a commissioned officer's mess by an enlisted man of the Marine Corps, the situation giving rise to the debt having occasioned his bad conduct discharge upon conviction by special court-martial that he had violated Article 121 of the Uniform Code of Military Justice, may not be offset against the final pay due the member, an indebtedness to a commissioned officer's mess--a nonappropriated fund activity--not being equivalent to an indebtedness due the United States there is no basis for withholding the member's final pay as an involuntary set-off against the debt in the absence of a statutory provision authorizing deductions from pay that is similar to the authority in 37 U.S.C. 1007(c) and (d) granted to the Departments of the Army and Air Force. 43 Comp. Gen. 431 (1963).

Civilian when debt incurred--military officer when collected--Under 5 U.S.C. 82 which states that "no money" shall be paid to any person for his "compensation" who is in arrears to the United States, the compensation subject to withholding is not limited to remuneration received as an incident to the position held when the arrearages occurred, and, therefore, the fact that an individual who becomes indebted while serving as a civilian deputy to a disbursing officer is later called to active military duty as an officer does not affect application of the statute, as restricted by 10 U.S.C. 2772, but whether the stoppage of his military pay is total or partial is dependent on whether the arrearage is admitted by the officer or shown by a judgment of a court, in which case it would be total, or is effected by order of the secretary concerned, in

which case it would be total or partial as indicated in such order. 42 Comp. Gen. 83 (1962). See also 37 Comp. Gen. 344 (1957).

Accountable officer's debts--The discretionary authority vested in the Secretaries of the military departments in 10 U.S.C. 2772 to withhold parts of the pay and allowances of military officers for debts to the United States for which they are accountable applies only where there is no admission of the debt or a judgment of a court; therefore, in the case of an accountable officer who admits a debt or is subject to a judgment of a court, it is mandatory that the total compensation be withheld until the debt is satisfied. 42 Comp. Gen. 83 (1962). See also 37 Comp. Gen. 344 (1957).

Debt for Health Profession Scholarship--Doctor participating in Armed Forces Health Profession Scholarship Program received medical school assistance, including cost of tuition and books, and $400 in monthly stipends in return for active service obligation on graduation. He applied for and was granted conscientious objector discharge after graduation before fulfilling any of service obligation. Doctor must reimburse Navy for full amount of financial assistance he received, including monthly stipend. Monthly stipend payments are included in term "other education costs" that he agreed to repay when he was accepted into program, if he did not fulfill his service commitment. B-190935, January 25, 1979.

Member bankrupt--The deductions from the pay of an enlisted member of the uniformed services without his consent after he had filed a petition in bankruptcy listing his debt to the Government for the excess cost of shipping a housetrailer on his schedule of debts were improper in view of the pending bankruptcy proceedings, which later terminated in a discharge, providing legal protection for the bankrupt against any action to recover the debt, and the amount collected from the member subsequently discharged under other than honorable conditions for failure to pay just debts, should be refunded to him, and upon the final audit of the member's account through date of discharge, although no right of set-off exists to recover the excess cost of shipping the housetrailer, the discharge in bankruptcy protecting the bankrupt from recovery of the indebtedness, a debt to the Government incurred after the filing of the bankruptcy proceedings and not included in the discharge may be collected by set-off against the final account, the bankruptcy proceedings having no bearing on the liquidation of subsequent debts. 45 Comp. Gen. 342 (1965).

United States debts to Members - Member bankrupt--Member of the Navy filed a voluntary petition in bankruptcy in which he listed the Government as a creditor. Prior to the date

the petition was filed the United States was indebted to the member for accrued leave rations. Before the petition was filed the Government deducted the amount owed for leave rations from an outstanding debt the member owed the Government. The filing of the petition did not affect the Government's action to set off and that action effectively constituted payment of the amount due the member and reduction of his debt prior to the date the petition in bankruptcy was filed. B-195066, September 22, 1980.

Remission

Reserve members not on active duty--Remission and cancellation of debts of enlisted members of the armed forces specifically authorized under 10 U.S.C. 4837(d) (Army), 6161 (Navy) and 9837(d) Air Force, may not be extended to cover debts of members of Reserve components not on active duty. B-187078, March 28, 1977.

Member retired--A retired Air Force chief master sergeant requests reimbursement for excess transportation costs deducted from his retirement pay. The costs were incurred when he shipped his mobile home from his duty station in Massachusetts, to his home in Michigan. The claim is denied since debts of enlisted members of the Air Force, which accrued during active duty, may not be remitted or cancelled by the secretary of the Air Force under 10 U.S.C. 9837(d), after the member has retired. B-205218, March 19, 1982.

Waiver

In general--Reserve veterinary and optometry officers of the uniformed services, who were wrongly advised about their basic and special pay entitlement and who were then mistakenly overpaid, may receive favorable consideration under the statute authorizing waiver of claims arising out of such erroneous payments; however, overpayments received by an officer after he received notice of the error may not properly be waived, since upon notice the officer would become partially responsible for correcting the error, at least to the extent of setting aside subsequent overpayments for eventual return to the Government. 10 U.S.C. 2774. 56 Comp. Gen. 943 (1977).

Member not without fault--Excess Leave--A service member who upon retirement had excess leave charged to him totaling a number of days in excess of the number of days pay to which he was entitled, should not have expected to receive the payment erroneously made to him at retirement. Since the member is not without "fault", he may not be granted waiver for the debt under 10 U.S.C. § 2774. B-196226, August 30, 1984.

Member not without fault-failure to deduct allotment--A former Coast Guard member received erroneous payments due to failure of the Coast Guard to deduct a dependency allotment and an appropriate amount for a bond allotment from his pay. As a result his biweekly net pay increased by $100 during a period when there was no increase in his entitlements. This should have alerted him to the fact that his pay may have been erroneous. Since he failed to make prompt inquiry of the appropriate finance officials when he received an unexplained increase in pay he is partially at fault for the erroneous payments thus precluding waiver of the Government's claim against him. B-214932, May 29, 1984.

Member not without Fault--Erroneous Basic Allowance for Quarters--A Navy member received erroneous payments of a Basic Allowance for Quarters due to administrative error during a period when he was occupying Government family quarters. His Leave and Earnings Statements during the period clearly showed he was receiving Basic Allowance for Quarters. Although he initially questioned the accuracy of his pay, he did not advise finance personnel that he was receiving the quarters allowance while living in Government quarters until 7 months after the erroneous payments began. Therefore, he was partially at fault in the matter in failing to promptly notify the finance officer that he was occupying Government quarters and not entitled to Basic Allowance for Quarters, thus precluding waiver of the Government's claim against him for refund of the overpayment. B-214770, May 14, 1984.

Upon records correction action--Acceptance of settlement by an Army member incident to the administrative correction of his military records would not operate to bar his subsequent request for waiver of erroneous payments of military pay and allowances shown as debits to his account in the settlement statement; and the gross amount of such erroneous payments could be considered for waiver under 10 U.S.C. 2774. 57 Comp. Gen. 554 (1978).

IV. GRADE OR RANK

A. Pay is Generally Based on Grade or Rank to Which Member Assigned

Enlisted member who performed officer duties

Claimant's contention that Air Force was unjustly enriched because, for almost 3 years, he assumed duties reserved for officers but received compensation only in enlisted pay grades is rejected, since military members are only entitled to pay and allowances authorized by statute for their grade and years of service, not according to their duties, under 5 U.S.C. 5535(b)(1) and 5536. B-181788, November 11, 1974.

Member reduced in grade

Although the reduction of a petty officer from first class E-6 to second class E-5 for incompetency to perform the duties of the higher grade was based on two special evaluations rather than on the required waiver of the condition precedent to a reduction--"the evaluation of a member for at least two consecutive marking periods," the member is not entitled upon advancement to E-6 to the rate of pay of that grade for the period of reduction in the absence of a correction of records pursuant to 10 U.S.C. 1552. Reduction orders issued by competent authority are valid even though not issued in strict conformity with administrative regulations and, therefore, under 37 U.S.C. 204(a) the member is entitled only to the pay and allowances of grade E-5 while serving in that grade, unless his record warrants correction. 48 Comp. Gen 416 (1968).

Officers serving in certain positions/grades

Army Chief of Staff--Upon retirement, effective July 1, 1968, an Army Chief of Staff whose appointment to a 4-year term on July 3, 1964 expires July 2, 1968, may be recalled to active duty in his retired grade pursuant to 10 U.S.C. 3504, assuming confirmation under 10 U.S.C. 3962, to complete the 4-year term as Chief of Staff, and he may be paid as Chief of Staff for July 1 and 2, 1968. 47 Comp. Gen. 696 (1968).

Navy Assistant Judge Advocates--Court of Claims in Selman v. United States, 204 Ct. Cl. 675 held that naval officers ordered to serve in positions of Assistant Judge Advocates General are entitled to at least the pay of a rear admiral (lower half) while serving in such positions whether they were "detailed" or "assigned" to such positions. Our decision at 50 Comp. Gen. 22 which determined that such officers were not entitled to pay of rear admiral (lower half) will no longer be followed. Consequently, the successors to the plaintiffs in Selman in the statutorily

created positions are also entitled to receive the pay of rear admiral (lower half). 55 Comp. Gen 58 (1975). But see B-204267, March 19, 1982, affirmed in B-204267, March 1, 1983, concerning the 1981 repeal of extra pay for these officers.

Navy rear admiral retained on active duty--A naval officer who at the time he is placed on the retired list and retained on active duty has served more than 2 years in the grade of rear admiral of the lower half may not have the 2 years of active duty performed prior to retirement regarded as qualifying service for active duty pay or subsequent retired pay of the upper half under 37 U.S.C. 202(e) and 10 U.S.C. 6487, which require that the 2 years of qualifying service be performed after rather than prior to retirement and, therefore, if the officer is retained on active duty for 2 years after placement on the retired list he will be entitled to the pay and allowances and subsequent retired pay for a rear admiral upper half. 44 Comp. Gen. 93 (1964).

Coast Guard "extra numbers" rear admirals--Coast Guard officers serving on active duty as "extra numbers" in the grade of rear admiral under the authority of 14 U.S.C. 432 and 433 who are specifically excluded, pursuant to 14 U.S.C. 42(e), in determining the authorized strength of that grade are, nevertheless, entitled to receive the active duty basic pay of a rear admiral of the upper half in the order of their seniority in the grade, in view of the unqualified provision of 37 U.S.C. 202(f) that one-half the number of officers on the active list of rear admirals are entitled to the basic pay of a rear admiral of the upper half the extra numbers officers are considered rear admirals within the meaning of 37 U.S.C. 202(f) and should be included in determining the number of rear admirals on the active list of the Coast Guard entitled to receive the basic pay of the upper half. 44 Comp Gen. 317 (1964).

Navy officers whose special appointments expire--Naval officers whose appointment or details to offices which entitle them to a higher rank and pay, while so serving, expire or terminate in the month preceding the effective date of voluntary retirement are not entitled by reason of the provision in the Uniform Retirement Date Act of April 23, 1930, 5 U.S.C. 47a(a), for the computation of retired pay at the rate of active duty pay as of the date of retirement, to a continuation of the higher active duty pay and allowances after the expiration or termination of the office or detail. 38 Comp. Gen. 543 (1959).

Surgeon General, Public Health Service--The provision in section 206(a) of the Public Health Service Act (1944) that the Surgeon General of the Public Health Service (PHS) "during the period of his appointment as such, shall be of the same grade, with the same pay and allowances, as the

Surgeon General of the Army" does not require the promotion of the PHS Surgeon General to pay grade O-9 (lieutenant general) on the basis the Army Surgeon General was advanced by Public Law 89-288 (1965) to the grade of lieutenant general and assigned to pay grade O-9, as the assimilation requirement of the 1944 act was impliedly repealed by the assignment of the PHS officer to pay grade O-8 by section 201(b) of the Career Compensation Act of 1949. The condification of the 1949 act then eliminated the phrase "with the same pay and allowances" from section 206(a) of the 1944 act and the term "grade" no longer relating to "pay grade," there is no basis for promoting the PHS officer to pay grade O-9. 49 Comp. Gen. 722 (1970). B-169262, March 22, 1978.

Army warrant officer accepting appointment as commissioned officer in Air Force--Army warrant officer accepted an appointment as a commissioned officer in the Air Force following his completion of training at the Air Force Officer Training School. Under the revised language of 37 U.S.C. § 907 he is entitled to saved pay as a warrant officer, notwithstanding the fact that he began officer training 6 days after he was released from active duty in the Army and the fact that he was paid as a staff sergeant while attending Officer Training School. B-203401, March 18, 1982.

Retired members recalled to active duty

Naval Reserve temporary rear admiral--An officer of the Naval Reserve holding the temporary grade of rear admiral whose name was placed on the United States Naval Reserve Retired list pursuant to the retirement benefit provisions of Title III of the act of June 29, 1948, as amended, would be entitled, under the act of March 17, 1949, as amended by section 408 of the Armed Forces Reserve Act of 1952, on recall to special active duty for training to receive the pay and allowance prescribed for a rear admiral of the upper half, provided an officer of the active list of the line of the Regular Navy, junior to him, is in the upper half of the list of rear admirals. 33 Comp. Gen. 406 (1954).

Navy captain advanced on retired list to "honorary" rear admiral--Orders which were issued to a Navy captain prior to his retirement and contemporaneous advancement on the retired list to the honorary rank of rear admiral directing a continuation on active duty after placement on the retired list, are construed as continuing the officer on active duty as a captain, and the officer should receive active duty pay as captain until released from active duty. 35 Comp. Gen. 557 (1956).

Navy captain advanced to "honorary" admiral grade serving in on active duty based on orders--A retired Navy captain who was advanced on the retired list pursuant to section

12(1) of the act of June 23, 1938, to the rank of rear admiral and recalled to active duty as a captain and by subsequent orders which stated that he would "continue to serve on active duty in the rank of rear admiral" served in such rank, is entitled to active duty pay of a rear admiral only from the date of the subsequent orders. 34 Comp. Gen. 387 (1955).

Member holding higher Reserve grade recalled in AUS grade--A disability retired officer who was recalled to active duty in the grade currently held in the Army of the United States (colonel) but who held the higher Reserve rank of major general which was recognized in an amendatory order may not be regarded as having been called to or as serving on active duty in the higher grade; even though the higher grade may be considered in the computation of retired pay, it does not entitle the member to active duty pay and allowances based on the higher grade and the amendatory orders may not be regarded as a promotion but merely as recognition of the higher grade for retired pay purposes. 38 Comp. Gen. 398 (1958).

B. Promotions to Higher Grade or Rank

Effective date of promotion

Appointment made with advice and consent of Senate--An appointment (dated March 31, 1961) of a Coast Guard officer to the permanent rank of rear admiral under 14 U.S.C. 222 to be effective on a prior date (March 24, 1961) the officer to have such rank from an earlier date (February 1, 1961) on which a vacancy in the grade occurred, is an appointment required by 14 U.S.C. 221 to be made by and with the advice and consent of the Senate and in the absence of some specific statute comes under the long-standing rule that Presidential appointments made by and with the advice and consent of the Senate do not become effective until a commission has been issued after Senate confirmation so that the officer's promotion which was confirmed by the Senate on the date (March 24, 1961) specified in the appointment letter may not be considered effective prior thereto, but that date may be considered the effective date for pay purposes even though the commission was not received until a later date. 41 Comp. Gen. 43 (1961).

Appointment delayed pending investigation--No basis exists for payment of difference in pay between that of pay grade 0-5 and 0-6, when officer's promotion is delayed under 10 U.S.C. 3363(e) even though President has signed promotion list but thereafter returns it to the Secretary of the Army pursuant to his request prior to submission to Senate for confirmation, since Secretary has authority to delay promotion at any time prior to completion of promotion process if investigation is in progress. In any event President

clearly has such authority, and return of list prior to forwarding to the Senate is tantamount to agreement with Secretary. B-187759, February 17, 1978.

Reserve promoted by letter while on active duty--A letter of appointment of a Reserve Army officer to a higher grade is an "order" announcing a promotion within the meaning of the act of October 14, 1942, and therefore an officer ordered to active duty for training as a lieutenant colonel, Army Reserve, who by letter of appointment while on such duty was promoted to a colonel in the Army Reserve effective the date of the letter is entitled to the pay of the higher grade for active duty training performed on and after the date of said letter, however, a new oath of office is required unless the officer's service has been continuous from the date of taking an earlier oath. 33 Comp. Gen. 612 (1954).

Reserve notified of temporary promotion but disabled before acceptance--A Marine Corps Reserve officer who was notified of a temporary appointment after having been examined and found physically qualified for promotion, but who, before acceptance of the appointment, suffered a disability in line of duty, is entitled to the pay and allowances of a lieutenant colonel, retroactive to date of eligibility for promotion pursuant to section 408(a) of the Reserve Officer Personnel Act of 1954. 35 Comp. Gen. 649 (1956). Compare 33 Comp. Gen. 349 (1954).

Removal of officer's name from promotion list after approval--Action by Secretary of the Army under 10 U.S.C. 3363(f) removing member's name from promotion list on basis of investigation revealing that Reserve officer seeking unit vacancy promotion under 10 U.S.C. 3384, did not intend to serve in unit but contemplated being ordered to active duty, appears to be within authority of Secretary although officer had not yet accepted active duty orders. B-187759, February 17, 1978.

Retroactive promotion of Reserve officer--The retroactive promotion of a first lieutenant in the Air Force Reserve under 10 U.S.C. 8363(f) to the grade of captain for a period that included service in the Air National Guard of the United States by reason of the Federal recognition of the Air National Guard of the State of Washington, 10 U.S.C. 101(13), 8351(a), was ineffective to change the status of the officer as a member of the Air National Guard of the United States and he may not be paid the difference in the pay and allowances between the two grades for that period of service, and the officer not having been promoted to the grade of captain in the Washington Air National Guard by the Governor under 10 U.S.C. 8379, and not having been recognized as a captain in the Air National Guard of the United States, his Air Force Reserve promotion did not

affect his right to pay for the training assemblies attended as a member of the State Air National Guard. 42 Comp. Gen. 340 (1963).

Orders purporting to retroactively place officer on active duty in higher grade--A first lieutenant of the Air Force Reserve who while on extended active duty is promoted as a Reserve officer to the grade of captain under authority of 10 U.S.C. 8360 and 8366, and subsequent orders purport to retroactively change his active duty orders to show his grade as of the effective date of those orders as that of captain instead of first lieutenant is only entitled to the pay and allowances of the higher grade prospectively from the date of the amendatory orders, notwithstanding that section 8363(f) provides that a Reserve officer on extended active duty may be promoted to a higher Reserve grade before, on, or after the date of the order, section 8380(a) continuing the pay and allowances of such officer at the lower grade unless he is ordered to serve on active duty in the higher Reserve grade or is temporarily promoted to the higher grade; however, although the amendatory orders purporting to change the officer's active duty orders to refer to him as captain are not retroactively effective to create the right to the pay and allowances of the higher grade, they are prospectively effective. 42 Comp. Gen. 445 (1963). See also 43 Comp. Gen. 400 (1963). Compare 46 Comp. Gen. 121 (1966).

Navy Dental Corps officer appointment--A dentist who accepted an appointment as lieutenant (junior grade) in the Navy Dental Corps upon graduation from dental school (June 4, 1958) and who was assigned a line officer as running mate who was eligible for promotion to lieutenant 3 days prior to the date of appointment may not have the initial appointment regarded as erroneously made in the junior grade rather than in the grade of lieutenant, because initial appointments of dental graduates are required to be made in the junior grade and under paragraph (f) of section 201 of the Army-Navy Public Health Service Medical Officer Procurement Act of 1947, assignments of line running mates are required to be made in the same grade (junior grade); however, since the officer accepted an appointment as lieutenant on July 3, 1958, as a result of the vacancy, the officer's right to pay of that grade from the date the line officer who should have been assigned as runninq mate was promoted will not be questioned. 41 Comp. Gen. 406 (1961).

Temporary promotions of Navy ensigns and Marine second lieutenants--To meet the problems arising by reason of the absence in 10 U.S.C. 5784, authorizing the temporary promotion of Navy ensigns and Marine Corps second lieutenants, of language similar to that contained in section 5787 entitling temporarily promoted Navy and Marine Corps officers to the pay and allowances of the higher

grade from the date the promotion is made, and providing that upon the termination or expiration of the temporary appointment, the officer shall have the grade he would hold if he had not received a temporary promotion, will require remedial legislation that would be retroactively effective to the extent, at least, of rectifying any legal deficiency in superseding appointment actions issued under section 5784 to the officers serving under prior promotions effected pursuant to section 5787. 47 Comp. Gen. 587 (1968).

Promotion resulting from Correction Board action--The fact that a Correction of Military Records Board on April 11, 1969, directed a change of records pursuant to 10 U.S.C. 1552, to show that an Air Force captain had not been twice passed over for promotion to the temporary grade of major, and that if selected for promotion by the next regularly scheduled board, the promotion was to be effective from the date the first selection board convened, although at the same time denying his request for promotion, does not entitle the officer promoted pursuant to 10 U.S.C. 8442 and 8447(b) on June 27, 1969, effective February 20, 1958, to increased pay prior to June 27, 1969, for until promoted, no date could be established for the commencement of higher pay, and the Correction Board limited to making changes in an existing record, its attempt to control the future contingent event of a promotion is not within the purview of 10 U.S.C. 1552. 50 Comp. Gen. 125 (1970).

Coast Guard member whose service records were changed by Board for Correction of Military Records to show he had retired on July 1, 1971, in grade of warrant officer (W-3) rather than petty officer (E-7), and who accepted amount tendered to him in satisfaction of his claim incident to that change in his records, may not be allowed additional amounts based on his theory that had he actually been a warrant officer in 1971 he would not have retired and would later have been promoted to W-4, since correction board actions are "final and conclusive" and member's acceptance of amounts tendered "fully satisfies" his claim in the matter. 10 U.S.C. 1552 (1976). B-198266, May 9, 1980.

Promotions while in missing status

Requiring "acceptance" of promotion defeats purpose of Missing Persons Act--Although in view of the absence of language similar to that contained in section 5787, an acceptance is required to make a temporary promotion under 10 U.S.C. 5784 legally effective for the purpose of receiving the pay and allowances of the higher grade, to deny Navy ensigns and Marine Corps second lieutenants in an "missing status" the benefits of the temporary promotions prescribed by section 5784 on the basis of the acceptance requirement would defeat the objective of the Missing

Persons Act. Therefore, the pay account of a Marine Corps second lieutenant temporarily promoted under section 5784 to first lieutenant while in a missing status may be credited with the increased pay and allowances of the higher grade from the date administratively determined under the authority of 37 U.S.C. 556 to be the date the officer would have accepted the promotion. 47 Comp. Gen. 587 (1968).

Promotion to sergeant while missing-later reenlisted as private--A redetermination of grade of an Army enlisted man under the provisions of the Missing Persons Act, as amended, promoting him to the grade of first sergeant while in a missing in action status may not operate to entitle him to the pay of such higher grade under a reenlistment contract in the grade of private first class voluntarily entered into subsequent to the date he was returned to military control. 31 Comp. Gen. 118 (1951).

Promotions while in missing status - effective for all purposes--Any amounts due a member of the Marine Corps who when he entered a missing status, as defined by 37 U.S.C. 551(2), on April 30, 1967, was a private first class E-2, and who by September 10, 1971, the date his death was established as April 30, 1967, had been promoted successively to sergeant E-5, are payable at the rate in effect on September 10, 1971, for pursuant to Public Law 92-169, the promotion of a member while in a missing status is "fully effective for all purposes," notwithstanding 10 U.S.C. 1523 or any other provision of law and even though the Secretary concerned or his designee under 37 U.S.C. 556(b) determines the member died before the promotion was made. 51 Comp. Gen. 759 (1972).

Temporary promotions and saved pay

Navy enlisted man appointed warrant office - later promoted in enlisted grade--Under the provisions of section 302(e) of the Officer Personnel Act of 1947 saving to regular Navy or Marine Corps personnel the pay and allowances to which entitled at the time of temporary promotion, an enlisted man of the regular Navy temporarily appointed a warrant officer under said act whose duty assignment did not change after the temporary appointment may continue to receive the pay and allowances of his enlisted grade if greater than those of the warrant officer grade. 31 Comp. Gen. 180 (1951).

Coast Guard warrant officer serving as temporary lieutenant - promoted in permanent grade--A Coast Guard commissioned warrant officer who, while serving as a temporary lieutenant and receiving the pay and allowances under the saved pay provisions of 34 U.S.C. 350f(a), is advanced in his permanent grade of commissioned warrant officer but continues serving in his temporary grade of

lieutenant is not, under the provisions of 34 U.S.C. 135a (b), entitled to the higher pay and allowances of his permanent grade. 35 Comp. Gen. 276 (1955).

Coast Guard temporary grade service--When a Coast Guard officer who is advanced in grade under the temporary promotion system authorized in 14 U.S.C. 275 reverts to his permanent promotion system grade, the time in the temporary service grade, absent specific legislation, may not be used as time in a grade higher than the permanent grade from which originally appointed for temporary service in view of the fact that when read together, sections 275(h) which prescribes that upon the termination or expiration of a temporary appointment "the officer shall revert to his former grade," and 257(b) which provides that service in a temporary grade is service "only in a grade that the officer concerned would have held had he not been so appointed," permit only the counting of the temporary service as time in the officer's permanent grade held immediately preceding the temporary service officer's permanent grade held immediately preceding the temporary service appointment. 48 Comp. Gen. 390 (1968).

Acceptance of permanent-termination of temporary appointment--Upon the acceptance of a permanent appointment pursuant to 10 U.S.C. 5579 as an ensign in the Medical Service Corps, Regular Navy, and the termination of the temporarily held rank of lieutenant (jg) to which appointed subsequent to serving under a permanent appointment as a line ensign the officer is not entitled to saved pay, for not having suffered a reduction in pay "because of his former permanent status"--also that of ensign--he is unable to meet the criteria in 10 U.S.C. 5579(d) for eligibility to have the higher pay and allowances received under the temporary appointment as lieutenant (jg) saved to him. 50 Comp. Gen. 279 (1970).

Enlisted member temporarily appointed warrant officer--A member of the uniformed services in the permanent enlisted grade E-8, who when temporarily appointed a warrant officer elects to receive saved pay pursuant to 10 U.S.C. 5596, and who, therefore, when assigned overseas is not eligible to receive hostile fire pay, family separation allowance, and cost-of-living allowance, nor the statutory increase in pay grade E-8 that became effective after his temporary promotion, may not be paid the difference between the saved pay and the pay of his permanent grade which would have accrued to him if he had not received his appointment as a temporary officer. However, notwithstanding the member's election, 37 U.S.C. 204 requires that when and if the pay and allowances of the temporary grade equal or exceed those of his permanent grade saved under 10 U.S.C. 5596(f), the member must be paid the pay and allowance of the temporary grade. 47 Comp. Gen. 491 (1968). Compare 45 Comp. Gen. 763 (1966).

Enlisted member appointed temporary officer--A Navy enlisted member appointed as a temporary officer under 10 U.S.C. 5596 may not receive an Incentive Bonus authorized for officers under 37 U.S.C. 312c in addition to the "saved pay and allowances" of an enlisted member. Such bonus is only an item of pay of the temporary officer grade to which the member is appointed or promoted. However, if his pay and allowances in his officer status, including the bonus, exceeds his pay and allowances as an enlisted member (under saved pay) he is entitled to be paid as an officer including the Nuclear Career Annual Incentive Bonus. 57 Comp. Gen. 643 (1976).

Warrant officer temporarily appointed lieutenant later assigned overseas--A warrant officer in the Navy who was not transferred to an overseas duty station until some time after he received a temporary appointment as lieutenant (jg) entitling him to saved pay and allowances may not have the saved pay and allowance provisions in 10 U.S.C. 5596(f) construed as authorizing a subsequent increase in the amount of saved pay and allowances by reasons of the changed conditions of overseas duty and, therefore, although cost-of-living allowances and family separation allowances are for consideration in computing saved pay, the member, upon transfer overseas, is not entitled to a cost-of-living allowance and family separation allowance in addition to the saved pay and allowances he was entitled to at the time of the temporary promotion, but is only entitled to such allowances as a part of the pay and allowances of his temporary grade. 44 Comp. Gen. 121 (1964).

Warrant officer in public quarters - temporarily appointed lieutenant--A Navy chief warrant officer who, when given a temporary appointment as lieutenant, was occupying public quarters so that
his monthly take-home pay, without the quarters allowance, is greater than the pay and allowances of the temporary grade is entitled to have the actual conditions of the service considered in determining the amount of total compensation under the savings provisions of 10 U.S.C. 5596(f) as well as under the temporary appointment, and, therefore, he may continue to receive the greater take-home pay under his permanent grade until such time as public quarters are no longer available and it is to his advantage to elect the pay and allowances of a lieutenant. 42 Comp. Gen. 750 (1963).

Erroneous Appointments or Promotions

May retain pay received in a de facto status

Second lieutenant erroneously serving as first lieutenant--Second lieutenant in a Reserve component of the

Army who erroneously served on active duty in higher grade of first lieutenant under color of authority and without knowledge, either actual or constructive, of the fact that he had been ordered to such active duty in a grade higher than actually held by him as a reserve commissioned officer in the Army, is entitled to retain the pay and allowance received in good faith for service in that capacity. 33 Comp. Gen. 475 (1954). See also 34 Comp. Gen. 266 (1954), and 31 Comp. Gen. 335 (1952).

Serving under erroneous promotion--A Naval Reserve officer whose name--without other identifying data--appeared on a Navy promotion list announcing that the President had appointed certain officers to a higher temporary rank, but who was subsequently notified that the promotion applied to another officer of the same name, is entitled to retain the higher pay and allowances received by him in good faith while serving, without knowledge, actual or constructive, of the defect in his appointment, in such higher rank under the color of a valid appointment from the date of the appointment to the date notice of the improper appointment was received by the officer. 27 Comp. Gen. 730 (1948).

Erroneously serving in higher grade - not in de facto status

A de facto officer is one who serves under an appointment which he was justified in believing was competent to invest him with such office so that a captain in the Reserves who continued to receive the pay and allowances of that grade after he had accepted an appointment in the Regular Army under orders expressly providing that acceptance of appointment as a second lieutenant would automatically terminate his appointment in the Reserves may not be considered as having served in good faith on active duty in the grade of captain and entitled to retain such payments. 34 Comp. Gen. 132 (1954). See also 34 Comp. Gen. 263 (1954).

Ineligible officer - de jure status

A person who was appointed and ordered to active duty as a major in the National Guard of the United States under section 111 of the National Defense Act, as amended, but who subsequent to going on active duty was determined to be ineligible to hold that grade and was tendered an appointment as aptain, which he accepted, was in a de jure status while on active duty as a major and entitled to the pay and allowances of major until acceptance of the appointment as a captain. 32 Comp. Gen. 414 (1953).

V. SERVICE CREDIT - BASIC PAY PURPOSES

A. Officers With Enlisted Service

Enlisted training duty

The inclusion of active duty for training in the definitions of "active duty" and "active service" in 10 U.S.C. 101 justifies the crediting of enlisted training duty in the computation of service to entitle officers who have over 4 years' active service as enlisted members to the increased rates of pay provided in section 201(a) of the Career Compensation Act of 1949, as amended by Public Law 85-422, effective June 1, 1958. 38 Comp. Gen. 68 (1958).

Enlisted members - temporary officers

Enlisted members of the Navy and Marine Corps who continue to serve under enlistment contracts when temporarily appointed to officer status but who are paid as officers and receive credit for active service as officers have an inactive enlisted status which precludes the crediting of such enlisted service in the computation of active enlisted service to entitle officers who have over 4 years' active enlisted service to the increased rates of pay provided in section 201 (a) of the Career Compensation Act of 1949, as amended by Public Law 85422, effective June 1, 1958. 38 Comp. Gen. 68 (1958).

Dual status - enlisted and aviation cadet

In the computation of enlisted service to entitle officers who have over 4 years' active service as enlisted members to the increased rates of pay provided in section 201(a) of the Career Compensation Act of 1949, as amended by Public Law 85-422, active service as a naval aviation cadet in the Naval Reserve or the Marine Corps Reserve prior to the Naval Aviation Cadet Act of 1942, which established the special enlisted grade of avaition cadet, may not be included as enlisted service. Further, members of the uniformed service who had a dual enlisted and aviation cadet status prior to the Naval Aviation Cadet Act of 1942 may not have aviation cadet service credited as active enlisted service for computation of service for entitlement to the increased rates of pay provided in section 201(a) of the Career Compensation Act of 1949, as amended by Public Law 85-422. 38 Comp. Gen. 68 (1958). Compare 31 Comp. Gen. 3 (1951).

Dual status - temporary officers and enlisted or service academy

Enlisted members of the uniformed services who have dual status as temporary officers and as permanent enlisted

members or a dual status as members of a service academy and as enlisted members may have the inactive enlisted service credited in the computation of cumulative years of enlisted service for basic pay purposes under section 201 (c) of the Career Compensation Act of 1949, as amended by Public Law 85-422, effective June 1, 1958. 38 Comp. Gen. 68 (1958).

Concurrent enlisted status while cadet or midshipman

Reserve service while at a military academy--Service in the Reserves during a period in which the member concurrently held the status of cadet or midshipman at one of the military academies may be counted, under section 202 of the Career Compensation Act of 1949 and the Armed Forces Reserve Act of 1952, for basic pay purposes with the exception of naval reservists appointed to one of the academies prior to January 1, 1953, whose reserve status was automatically terminated by such appointment under section 4 of the Naval Reserve Act of 1938, which prohibits naval reservists from being members of any other military organization, however the prohibitory provision of the said statute for naval reservists was repealed by the Armed Forces Reserve Act of 1952, effective January 1, 1953. 32 Comp. Gen. 548 (1953).

Enlisted member disenrolled from academy--An enlisted member of the Navy who did not receive a formal discharge when he accepted an appointment at the Naval Academy and who, when discharged because of academic deficiency, resumed his enlisted duties until a subsequent appointment to the Naval Academy is considered in a de facto enlisted status during the period between discharge and the second Academy appointment, it being assumed that the resumption of duties as an enlisted member of the Navy was done upon official direction and, therefore, the member: may have such enlisted service credited for basic pay purposes as an officer. 43 Comp. Gen. 176 (1963).

Enlisted member at Naval Academy--An enlisted member in the Naval Reserve who accepted an appointment as a midshipman at the Naval Academy on June 25, 1956--the date of approval of an act continuing enlistment contracts for members accepting midshioman appointments thereafter--but who did not receive a formal discharge from the Naval Reserve is regarded as having continued in the enlisted Reserve service notwithstanding that he concurrently held the status of a cadet and, therefore, the member may have the enlisted Reserve service credited under section 202 of the Career Compensation Act of 1949, in computation of service for pay purposes. 43 Comp. Gen. 176 (1963). See also 41 Comp. Gen. 578 (1962).

Naval Reserve member appointed Coast Guard cadet--An appointment as a cadet, U.S. Coast Guard, is an appointment

in a military or naval organization which, under section 4 of the Naval Reserve Act of 1925 and under section 4 of the Naval Reserve Act of 1938, automatically terminates the cadet's preexisting Naval Reserve status even though an honorable discharge is not issued until later, and therefore the member may not count for pay purposes service in the Naval Reserve subsequent to his appointment as a Coast Guard cadet. 35 Comp. Gen. 202 (1955).

Enlisted member appointed NROTC cadet--An enlisted member of the Navy who accepts a permanent midshipman appointment in the Naval Rese:ve Officers' Training Corps on June 25, 1956--the date of approval of an act continuing enlistment contracts for members thereafter accepting midshipman appointments--is required, under an administrative regulation barring members of the Regular Armed Forces from enrollment as students in NROTC while retaining status in the Regular service, to have the acceptance of the permanent midshipman appointment regarded as vacating the earlier status even though formal discharge papers are not issued. 43 Comp. Gen. 176 (1963).

Enlisted Reserve member in ROTC but not in last 2 years--The enlisted Reserve service of a member of the uniformed services who although concurrently "a member of the program" authorized by the Reserve Officers' Training Corps Vitalization Act of 1964, enacted October 13, 1964, has not started the advanced officer training prescribed in 10 U.S.C. 2104 for the last 2 years of the 4-year ROTC program authorized is creditable to an enlisted member for basic pay purposes, 10 U.S.C. 2106(c) and 2107(g) and 37 U.S.C. 205(e), added by the 1964 act, not prohibiting enlisted members from counting concurrent enlisted service while a member of the ROTC program; however, an officer may not be credited with enlisted service performed on and after October 13, 1964, either before or after starting advanced training, 10 U.S.C. 2106(c) prohibiting credit for the period of advanced training "for any purpose," and 37 U.S.C. 205(e) prohibiting credit in computing basic pay for any period of service performed concurrently as a member of the uniformed services and as a member of the Senior Reserve Officers' Training Corps. 45 Comp. Gen. 103 (1965).

Enlisted Reserve in last 2 years of ROTC--The service creditable for basic pay purposes to an enlisted reservist, concurrently a Contract student in the third or fourth year of a 4-year Naval Reserve Officers' Training Corps program on the date of enactment of the Reserve Officers' Trainino Corps Vitalization Act of 1964, having been authorized to be counted on October 12, 1964, continues to be authorized after that date, the restriction in 37 U.S.C. 205(e), added by the 1964 act, barring credit for "any period of service after the enactment of this subsection" that an officer

performed concurrently as a member of the Senior Reserve Officers' Training Corps, effective October 13, 1964. 45 Comp. Gen. 103 (1965).

B. Enlisted Members With Officer Service

Warrant officer service is not enlisted service

The placement of warrant officers of the uniformed services in a separate category from enlisted members in recent legislation and in custom and practice precludes regarding warrant officer service as enlisted service and, therefore, an officer may not have warrant officer service added to enlisted service to bring him within the category of an officer with over 4 years' active enlisted service for the special pay rate provided by section 201(a) of the Career Compensation Act of 1949, as added by section 1 of the act of May 20, 1958. 38 Comp. Gen. 497 (1959).

Officer service not includable for enlisted grades E-8 and E-9

The term "enlisted service" in section 1(3) of the act of May 20, 1958, which amended section 201(c) of the Career Compensation Act of 1949, to provide for the placement of enlisted members in pay grades E-8 and E-9 after completion of at least 8 years or 10 years of cumulative enlisted service precludes inclusion of active service as a commissioned or warrant officer in the computation of cumulative enlisted service in the absence of evidence of a contrary congressional intent and notwithstanding that for certain purposes enlisted members are entitled to count officer service as enlisted service. 38 Comp. Gen. 598 (1959).

C. Time on the Temporary Disability Retired List

In determining the number of years of service creditable under section 202(b) of the Career Compensation Act of 1949 in computing the rate of monthly active duty basic pay for members of the uniformed services restored to active duty in conformity with 10 U.S.C. 1210(f) and 1211, the time spent on the temporary disability retired list after the expiration of the 5-year period prescribed in 10 U.S.C. 1210(b) may be included, section 202(b) authorizing accrual of additional service credits for basic pay purposes for periods the members were on a temporary disability retired list, without regard to whether the period extends beyond the 5-year limitation prescribed in 10 U.S.C. 1210(b). 42 Comp. Gen. 52 (1962). See also 37 Comp. Gen. 823 (1958).

D. Cadet, Midshipman Service

U.S. Naval, Military or Coast Guard Academy

Status of Midshipmen--The monthly pay of midshipmen at the U.S. Naval Academy is not basic pay within the meaning of that term as used in chapter 61 of title 10 and title 37, United States Code. Thus, a Navy officer may not have included in his disability rating for retired pay purposes the percentage of disability existing or incurred while he was a midshipman since such disability was not incurred as a member entitled to basic pay as required by 10 U.S.C. 1201. B-213238, May 9, 1984.

Enlisted members may count academy service--In computing the pay of enlisted members of the uniformed services, under section 202 of the Career Compensation Act of 1949, cadet and midshipman service in the Army, Navy and Coast Guard academies, on and after October 1, 1949 (effective date of the act), may be counted as creditable service in determining the amount of their basic pay. 31 Comp. Gen. 528 (1952).

Time between graduation from U.S. Military Academy and commissioning--Army officer who, prior to graduation from United States Military Academy, was determined to be physically disqualified for Regular Army appointment but, nevertheless, was permitted to graduate and who, after an operation which removed the disqualification, received a commission is entitled to count service as a graduated cadet from graduation to acceptance of commission in the computation of basic pay. 35 Comp. Gen. 630 (1956).

Time between graduation from Coast Guard Academy and commissioning--Notwithstanding that members of the Coast Guard Academy graduating class of 1927 were permanently detached from the Academy on the day of graduation, given duties normally performed by commissioned officers, and authorized to wear the uniform of an ensign, such members, having been continued in their cadet status for administrative reasons pending receipt of their commissions, did not acquire a de facto status as ensigns so as to include such cadet service under section 202(a) of the Career Compensation Act of 1949 in the computation of their cumulative years of service for pay purposes. 30 Comp. Gen. 228 (1950).

Non-naval academy midshipman service

A naval officer who served as a midshipman under the authority of the act of August 13, 1946 (10 U.S.C. 6903) is not entitled to credit for such service in determining his active duty basic pay rate, the midshipman service not coming within the purview of section 202 of the Career Compensation Act of 1949 (37 U.S.C. 205), providing for crediting

"all periods of active service as an officer, Army field clerk, flight officer, or enlisted member of a uniformed service," and absent authority to allow credit for midshipman service in determining the rate of basic pay to which a member is entitled, the officer's entry base date may not be adjusted to include credit for his midshipman service. 43 Comp. Gen. 577 (1964). See also B-171519, March 11, 1971, and 40 Comp. Gen. 473 (1961).

NROTC midshipman service

An officer's pay entry base date as a matter of law may not be adjusted to include credit for any service based solely on service as a midshibman in the Navy Reserve Officer Training Corps. B-185451, February 20, 1976. See also 29 Comp. Gen. 331 (1950).

Aviation cadet service

In view of the specific authority for aviation cadet as commissioned service for computation of increases in pay for length of service of officers of the uniformed service under the laws in effect p:ior to September 30, 1949--the day before the effective date of the Career Compensation Act of 1949--and the absence of any provision for crediting inactive service as an appointive aviation cadet, such inactive cadet service may not be credited for longevity pay purposes under section 202(a)(6) of the 1949 act which provided that all service creditable under laws in effect on the date of the Career Compensation Act of 1949 was authorized to be credited for longevity pay purposes. 41 Comp. Gen. 141 (1961). Compare 31 Comp. Gen. 3 (1951).

Midshipmen, Merchant Marine Reserve service

Service not creditable for officers--Time during which cadets at the United States Merchant Marine and State Maritime Acadamies held appointments as midshipmen, Merchant Marine Reserve, U.S. Naval Reserve, not being creditable in the case of officers for longevity pay purposes under the Pay Readjustment Act of 1942, is not creditable for basic pay purposes under the Career Compensation Act of 1949. 38 Comp. Gen. 797 (1959). See also B-172053, April 16, 1971.

Service creditable for enlisted members--In view of the authority for enlisted members of the uniformed services to have active and inactive Naval Reserve service credited in the computation of years of service for longevity purposes contained in section 9 of the Pay Readjustment Act of 1942 and the savings provisions in section 202(a)(6) of the Career Compensation Act of 1949, service as a midshipman, Merchant Marine Reserve, Naval Reserve, may be included in the compensation of service for basic pay purposes for enlisted personnel, but no service may be credited for any period during which a Naval Reserve status did not exist, unless a status otherwise recognized for longevity purposes existed. 38 Comp. Gen. 797 (1959).

E. Constructive Service

Reserve commissioned nurses

Army Air Reserve commissioned nurses who in the basis of letters of appointment erroneously showing credit for

"years of service in an active status" received the basic pay of a first lieutenant (O-2) with over 4 years of service are not entitled to retain the difference between the basic pay received and that of a first lieutenant (O-2) with no years of service, notwithstanding the overpayments were accepted in good faith, 10 U.S.C. 3353 authorizing credit upon appointment with service performed in an active status that reflects combined years of experience and education, and such other qualifications as the Secretary of the Army may prescribe by regulation, having no application to cumulative years of service for basic pay purposes, 37 U.S.C. 205 prescribing that only active Federal service may be counted for the purpose of computing the basic pay of a member of the uniformed services, and the officers not entitled to constructive credit for experience and education are indebted for the overpayment received. 44 Comp. Gen. 764 (1965).

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Constructive service aithorized by section 201, Reserve Officer Personnel Act of 1954, 14 U.S.C. 773, for promotion purposes may not be counted in the computation of basic pay. B-167666, August 22, 1969.

Medical and dental officers

1981 repeal of constructive credit for basic pay purposes--The Defense Officer Personnel Management Act, Public Law 96-513, repealed 37 U.S.C. 205(a)(7) and (8), which had authorized constructive longevity of service credit for medical and dental officers of the uniformed services based on their years of professional education. The constructive service credit was terminated because the Congress had concluded that it resulted in an anomalous receipt of elevated basic and retired pay by medical and dental officers, and inaptly encouraged their early retirement. Also, the Congress had developed a special pay system for all uniformed health professionals to increase their current income, and it was concluded that the constructive service credit for medical and dental officers was therefore no longer appropriate. B-205339, June 15, 1982, 61 Comp. Gen.____.

Same - saving provision-- The Defense Officer Personnel Management Act repealed constructive longevity of service credit for medical and dental officers of the uniformed services effective September 15, 1981, and it contained a saving clause with plain and unambiguous language specifically preserving the credit only for service members who on that data were enrolled in the Uniformed Services University of the Health Sciences or the Armed Forces Health Professions Scholarship Program (10 U.S.C. ch. 104 and 105). The saving clause may not be extended to participants in

the National Health Service Corps Scholarship Program or the Senior Comissioned Officer Student Training and Commissioned Officer Student Training and Extern Program (42 U.S.C. 284t, 218a)a, since there is no justification for a conclusion that their omission was clearly inadvertent. B-205339, June 15, 1982, 61 Comp. Gen._____.

Reserve medical or dental officers who perform inactive duty training--Reserve medical and dental officers of the uniformed services who perform inactive duty training with compensation or active duty for training on and after May 1, 1956, the effective date of the act of April 30, 1956, which added subparagraph (7) to section 202(a) of the Career Compensation Act of 1949, are entitled to the constructive longevity credit, authorized in the 1956 act, included in the computation of pay during such periods of service. 36 Comp. Gen. 146 (1956).

Reserve medical or dental officers - subsequent training duty--Reserve medical or dental officers who continue on active duty from May 1, 1956, to December 31, 1956, when released to inactive duty, and who may thereafter perform inactive duty for training or active duty for training, are entitled to retain the constructive longevity credit for basic pay provided in section 202(a)(7) of the Career Compensation Act of 1949 as added by section 2 of the act of April 30, 1956, for any subsequent training duty. 36 Comp. Gen. 146 (1956).

Retired medical or dental officer ordered to active duty--A retired medical officer, either Reserve or Regular who is ordered to Reserve active duty after May 1, 1956, is entitled to the constructive longevity service credit authorized by section 2 of the act of April 30, 1956, which added subparagraph (7) to section 202(a) of the Career Compensation Act of 1949, for purposes of increasing his active duty pay during such period. 36 Comp. Gen. 146 (1956); but see B-205339, June 15, 1982, 61 Comp. Gen.___.

Naval dental officer who was Reserve enlisted member while in dental school--A Naval Dental Corps officer who, while attending dental school for successive regular terms for a period in excess of 4 years, was also an enlisted member of the Naval Reserve on inactive duty during that period is entitled, under section 202(a)(7) of the Career Compensation Act of 1949, to constructive longevity credit of 4 years, less the actual period while attending dental school, that he was an enlisted member of the Naval Reserve on inactive duty. 36 Comp. Gen. 146 (1956); but see B-205339, June 15, 1982, 61 Comp. Gen.___.

Naval Medical officers in Reserves during medical school or while interning--A Naval Medical officer who graduated from medical school after 4 years and spent 1 year in medical

internship, but 1 year during the medical school attendance he was an enlisted member of the Naval Reserve on inactive duty, is entitled under section 202(a)(7) of the Career Compensation Act of 1949, to constructive service credit of 5 years; 4 for medical school plus 1 for medical internship, less 1 year for the period while attending medical school that the officer was an enlisted member of the Naval Reserve on inactive duty.

A Naval Medical Corps officer who spent 4 years in medical school, 1 year in medical internship, and 2 years in residency training, during which he was also an enlisted member of the Naval Reserve Corps, is entitled, under section 202(a)(7) of the Career Compensation Act of 1949, to a total constructive service credit of 5 years; 4 for medical school and one for internship; the period of residency training when he was a member of the Reserve is not for inclusion in the period of professional education and internship for which constructive longevity service is creditable and, therefore, no deduction for Reserve membership during the residency training is required.

A Naval Medical Corps officer who attended medical school for 3 years and 9 months and trained as an intern for 9 months, the equivalent of 1 year medical internship, but during the intern period the officer was also an enlisted member of Naval Reserve on inactive duty, is entitled, under section 202(a)(7) of the Career Compensation Act of 1949, to a constructive service credit of 4 years based on 5 years for professional education and internship, less 1 year for the inactive duty in the Naval Reserve.

A Naval medical officer who attended medical school from September 1, 1941, through May 31, 1945, then, after a period of 2 months when he was not engaged in either education or internship, began an internship on September 1, 1945, which continued until May 31, 1946, is entitled to a constructive service credit of 5 years; however, since the officer was a member of the Naval Reserve from March 1, 1945, through May 31, 1946, the constructive credit must be reduced by the actual period covering the officer's membership in the Naval Reserve when he was actually attending medical school or was an intern. 36 Comp. Gen. 146 (1956); but see B-205339, June 15, 1982, 61 Comp. Gen._ __.

Army medical officer who was a reservist while interning--An Army Medical Corps officer who attended medical school for 4 years and trained as an intern for 2 years, during which 2-year period he was also a member of the Army Reserve on inactive duty, is entitled, under section 202(a)(7) of the Career Compensation Act of 1949, 37 U.S.C. 233(a), to a constructive service credit of 4 years, based on his 4 years in attendance at medical school, which period may not be reduced on account of Reserve

membership during subsequent internship. 37 Comp. Gen. 237 (1957); but see B-205339, June 15, 1982, 61 Comp. Gen.___.

F. Civilian Service

Women's Medical Specialist Corps

A member of the Women's Medical Specialist Corps is entitled to credit for pay purposes under section 110 of the Army-Navy Nurses Act of 1947, as amended by the act of May 16, 1950, for civilian War Department service as an occupational therapist. 32 Comp. Gen. 24 (1952).

Member of Armed Forces serving under the Foreign Assistance Act

Although a member of the Armed Forces when assigned to duty outside the United States under section 625(d)(1) of the Foreign Assistance Act of 1961, is entitled only to the compensation, allowances, and benefits prescribed for the Foreign Service Reserve and Staff by the Foreign Service Act of 1946, the suspension of his active duty military pay and allowances during the period of the assignment does not terminate his membership in the Armed Forces of the United States, and such period is creditable for subsequent computation of military pay when the officer resumes a pay status under the Career Compensation Act of 1949, as amended. 42 Comp. Gen. 296 (1962).

G. Absences - Service Credit

Reserve officer absent while serving as enlisted member

Since officers of the uniformed services may have periods of absence while serving on active duty credited for pay purposes, inactive service as an officer in a Reserve component during the same period the member, while serving on active duty as enlisted man in the Regular Army, was absent because of sickness in line of duty need not be excluded in the determination of years of creditable service for basic pay purposes. 38 Comp. Gen. 553 (1959).

Officers absent due to their own misconduct

Commissioned and warrant officers who lose time from active duty because of sickness due to their own misconduct, absence without leave or absence because of confinement while awaiting trial, as distinguished from enlisted members absent under similar circumstances, may not, in the absence of additional legislation, have such lost periods excluded from determinations of creditable service for basic pay. 38 Comp. Gen. 352 (1958).

H. Illegal or Improper Service

Service prohibited by law

Reserve inadvertently retained on active duty--The active military duty performed in good faith in a de facto status that is not prohibited by law is poses and for determining retirement eligibility in all cases similar to that of an Air Force office: who having been inadvertently retained on active duty for approximately 6 months after he should have been released from the temporary appointment he held under section 515(c) of the Officer Personnel Act of 1947, when the underlying Reserve appointment on which his temporary appointment was based was terminated is considered to have rendered service not prohibited by law in good faith and in a de facto status and, therefore, entitled to count the service performed after the expiration of his commission in computing cumulative years of service for active duty pay. 44 Comp. Gen. 277 (1964).

Discharged member inadvertently ordered to active duty--Person who enlisted in Marine Corps Reserve and was discharged, without having performed any active duty, but who, notwithstanding such discharge, was subsequently ordered to and did go on extended active duty may be considered as having performed such duty in a de facto status and is entitled, upon subsequent enlistment in Regular Marine Corps, to count such service in computing his cumulative years of service for pay purposes. 32 Comp. Gen. 397 (1953).

Dual enlistments - different services--Although an enlistment in the Naval Reserve prior to discharge from an Army enlistment was in violation of section 4 of the Naval Reserve Act of 1938, 52 Stat. 1176, which provided that no member of the Naval Reserve should be a member of any other naval or military organization except the Naval Militia, the member's action, after his discharge from the Army, in notifying the commandant of the naval district concerned of his change of address and his subsequent tour of active duty in the Naval Reserve may be construed as a ratification by the member of his enlistment contract as of the date of notification of change of address, and therefore, the member may be credited for longevity pay purposes with service as an enlisted member of the Naval Reserve from and after the date of such notification. 40 Comp. Gen. 428 (1961).

Illegal service - alien

Alien who enlisted in Marine Corps Reserve at time the law required that the Reserve be composed of "male citizens of the United States" and who served on active duty is not entitled, upon subsequent legal enlistment in Regular Marine Corps, to service credits for period of illegal service. 32 Comp. Gen. 397 (1953).

Retired Reserve member - serves on active duty in National Guard

A member of the uniformed services whose retention on the retired list, after advancement in grade, is terminated by transfer to the Retired Reserve and who subsequently is appointed and serves on active dutv in the Army National Guard of the United States on the basis of Federal recognition in a State National Guard under 10 U.S.C. 3351 may not be regarded as a person retained on active duty or in service in a Reserve component under 10 U.S.C. 676 and, therefore, credit for the active service after retention on the retired list following qualification for age and service retirement was terminated by transfer to the Retired Reserve is too doubtful for authorization of additional service credit. 41 Comp. Gen. 118 (1961).

I. Certain Coast Guard Service

Lighthouse service

Members of the Coast Guard Reserve who were formerly in the Lighthouse Service are entitled to credit for such Lighthouse Service in determining length of service for basic pay purposes. 35 Comp. Gen. 675 (1956).

Temporary member of Coast Guard Reserve

Since active duty performed as a temporary member of the Coast Guard Reserve was considered creditable for longevity purposes on September 30, 1949, the day preceding the effective date of the Career Compensation Act of 1949, it may also be credited for purpose of computing basic pay under section 202(a) of the Career Compensation Act of 1949, 37 U.S.C. 233(a). 37 Comp. Gen. 838 (1958).

J. Computing Service Credit - Lost Time

Time lost which has been made up

In computing length of service for pay purposes when time lost has been made up to complete enlistment contracts pursuant to 10 U.S.C. 629a, the time should be accounted for on a day-for-day basis in those cases where the 30-day-month method would not be to the member's advantage by virtue of service in months with less or more than 30 days. 37 Comp. Gen. 455 (1958).

Members required to make up lost time

In the computation of length of service for enlisted members of the uniformed services who are required to make good time lost to complete their enlistment contracts, a proposed rule which would permit the computation of time lost and not made good on a day-for-day basis would be in

conflict with the act of June 30, 1906, 5 U.S.C. 84, which requires computation of service on a 30-day-month basis. 38 Comp. Gen. 824 (1959).

VI. RESERVES

A. Duty Status

Status dependent on advance written or verbal orders--A National Guard member may not be placed in a duty status in the absence of advance written or verbal orders, nor may he issue such orders to himself. Hence, an Air National Guard officer who stated that he planned to perform military duty on October 20, 1978, may not be regarded as being in a duty status at the time of his death on that date where no advance orders authorizing the performance of such duty had been issued. B-194189, January 7, 1980.

Written confirmation of verbal orders--Army National Guard members, for whom written orders were requested but not received prior to duty period, performed annual training on verbal orders of unit commander. Since the oral orders were subsequently confirmed in writing within a reasonable time by the Adjutant General who had authority to order the annual training, payment may be made to the individual members for the duty performed. B-208346, November 9, 1982. However, confirmatory written orders are invalid if issued after an unreasonable and unexplained period of delay. 43 Comp Gen. 281 (1963).

B. Entitlement to Pay Based On Statute

Some action by member required--Member of an Army Reserve unit who was given general discharge which was later upgraded to honorable and who was told not to attend inactive duty drill periods or active duty for training while discharge proceedings were in progress is not entitled to pay for the period in which he did not attend the drill periods and the active duty for training. A military member's entitlement to pay is based on statute and the relevant statutes, 37 U.S.C. §§ 206(a), 204(a)(2), require a Reserve member to attend meetings or perform other equivalent duty or be ordered to active duty or active duty for training in order to be paid. See B-187167, December 23, 1976. B-196462, May 5, 1980.

Combined active duty and inactive duty pay--Air Force reservist who served 355 days of active duty and 10 periods of inactive duty training in fiscal year 1981 is entitled to receive pay for all service performed. Although active duty pay is paid on a daily basis inactive duty pay is paid for drill sessions which may be less than a day. Therefore, in the absence of regulations to the contrary the total pay need not be restricted based on the combined total. B-207339, February 8, 1983.

Agreed Duty Without Pay--Retroactive Change--Orders of an Army reservist who agreed to perform inactive duty training and active duty without pay, may not be amended to retroactively place the member in a pay status if the intent was clearly that his orders were for duty in a nonpay status. The general rule is that only when orders are incomplete or ambiguous or when a provision is omitted through error or inadvertence, may they be amended retroactively to increase the liability of the Government. B-216466, November 14, 1984.

Agreed Duty Without Pay--Lack of Funds--Assurances by superior officers to an Army reservist that if funds became available he would be paid for duty, when orders are to the contrary, are not a basis for allowing a claim for pay since, absent specific authority, the United States is not liable for the erroneous advice given by its officers, agents, or employees even though given in the performance of their official duties. B-216466, November 14, 1984.

C. Inactive Duty Pay (Drill Pay)

National Guard - federal recognition requirement

Federally recognized officer entitled to pay--Under the Career Compensation Act of 1949, a federally recognized officer of the National Guard - as distinguished from the National Guard of the United States - is entitled to pay for armory drills and field training actually attended while in a federally recognized status, even though the officer may not have held a commission as a member of the National Guard of the United States during the period involved. 31 Comp. Gen. 482 (1952).

Duty performed after recognition expired--entitled to pay as defacto officer--A person who was appointed as a captain in the Army National Guard received temporary Federal recognition. Since he performed training duty after the period of temporary Federal recognition had expired under color of authority and without knowledge, either actual or constructive, of the fact that the temporary Federal recognition had expired, he is entitled to retain the pay and allowances received by him in good faith for the service as a de facto officer. B-215037, September 18, 1984.

National Guard engineer transferred to Air National Guard--A federally recognized National Guard engineer officer who transferred to the Air Force National Guard and assumed the duties of the Air Force position although not at that time federally recognized as an Air Force officer, is not entitled to Federal pay under the National Defense Act, as amended, for any drills or field training performed in the new position prior to the date he was federally recognized as an officer in the Air Force National Guard. 30 Comp. Gen. 199 (1950).

Voluntary relinquishment of federally recognized rank--An officer in the Illinois National Guard who voluntarily relinquishes his federally recognized commission as colonel upon the acceptance of a commission as brigadier general is not entitled to Federal pay for armory drill and performance of administrative functions as a colonel for the period subsequent to his promotion in which no duties were performed as a colonel. 34 Comp. Gen. 273 (1954).

Duty in lieu of drills (equivalent training)

Drill pay not authorized - attending service school--A regularly scheduled drill of a National Guard officer's unit which takes place while he is attending a service school may not be regarded as a "regularly scheduled drill or assembly" of his unit for appropriate duty pay; and the performance of appropriate duty in lieu of a regularly scheduled drill which an officer has missed, due to attendance at a service school for which he received basic pay, cannot qualify the officer for appropriate duty pay under the provisions of subsection 501(a) of the Career Compensation Act of 1949. 34 Comp. Gen. 679 (1955).

Drill pay authorized by regulations and orders attending service school--National Guard officer who performs equivalent training in lieu of drills held by his unit while he is on active duty for training at a service school may have such duty considered for pay purposes under current regulations which do not preclude payment for equivalent training for active duty training, provided the officer is in an armory drill status and written orders authorized such training. 37 Comp. Gen. 193 (1957).

Equivalent training not performed within prescribed time period--National Guard member who performed equivalent training in October and November 1972, in lieu of scheduled assembly on January 14, 1973, is not entitled to pay for such equivalent training since subparagraph 4-13(f) of AR

140-1, September 15, 1972, provides that equivalent training must be performed within 60 days of training assembly for which it is being substituted. B-180921, September 5, 1974.

Computation of drill pay

Training period of over 8 hours - two drills--A reserve training period of more than 8 hours instead of two training periods scheduled for the next payroll quarter, may be considered as two drill assemblies for pay and allowance purposes rather than as duty in lieu of attendance at training assemblies, which is required by regulation to be held within the same payroll quarter. 36 Comp. Gen. 46 (1956).

Drill pay in lieu of retired pay--Since retired pay accrues on day-to-day basis, member entitled to retired pay who performs duty which entitles him to compensation under 37 U.S.C. 206(a), may elect to receive that compensation in lieu of retired pay pursuant to 10 U.S.C. 684, and although he may be entitled to the equivalent of 2 days' pay for duty performed in 1 calendar day, he is required to waive only 1 day's retired pay. B-179882, December 4, 1974.

Evidence of attendance at training assemblies

Erroneous records not promptly corrected--Although a DA Form 1379 - United States Army Reserve Unit Record of Reserve Training-containing entries of training omitted or erroneously entered on a previous month's DA Form 1379 is acceptable for pay purposes where the corrective entry is promptly made and is supported by a full and complete explanation of the cause of the error, payment may not be made under supplemental payrolls to an officer for attendance at training assemblies which were recorded 4 months subsequent to the training without explanation for the delayed recording, or contemporaneous corroborating evidence to support the correction, the unexplained correction, neither increasing nor decreasing the substantive rights of the officer, is not acceptable as supporting evidence to validate payment of the inactive duty training. 43 Comp. Gen. 281 (1963). See also 34 Comp. Gen. 146 (1954).

Verbal orders - confirmation delayed-- A Reserve officer who attended inactive duty training assemblies under verbal orders which were confirmed after an unreasonable delay and without explanation may not be paid for the assemblies he attended from the date of the verbal orders, the delayed written orders constituting retroactive orders are without effect to increase or decrease the vested rights of the officer, and are not proper assignment orders to authorize payment for the assemblies attended from the date of the verbal orders. 43 Comp. Gen. 281 (1963). See also B-161187, May 3, 1967. Compare B-208346, November 9, 1982.

Missing, interned, captured while on inactive duty for training

Not entitled to credit for pay while missing--A reservist who becomes missing while on inactive-duty training is not entitled to credit for pay and allowances under the Missing Persons Act. 35 Comp. Gen. 422 (1956).

Member subsequently determined to have died--A reservist who is in a missing status while on inactive-duty training and is subsequently determined to have died under conditions which do or do not establish that death resulted from injuries incurred in line of duty is not entitled to have his account credited retroactively with pay and allowances from date of commencement of absence and up to date of determined death under the Missing Persons Act. 35 Comp. Gen. 422 (1956).

Waiver of VA disability compensation

Retroactive Waiver--A Reserve member is required to waive disability compensation paid by the Veterans Administration in order to receive compensation for inactive-duty training. 10 U.S.C. § 684. If retroactive waivers of disability compensation are acceptable under laws and regulations administered by the Veterans Administration, resulting in recoupment of payments made for periods of inactive duty training performed and for which compensation has been paid, the Comptroller General does not object to the member's retention of pay received for training duty. B-207913, April 15, 1983.

Failure to execute waiver--If a wavier of disability compensation required by 10 U.S.C. § 684 is not executed, payment of compensation for inactive-duty training may not be made. Any payments for inactive-duty training in the absence of such waiver are erroneous payments and must be collected from the member unless a retroactive waiver of disability compensation may be accepted by the Veterans Administration. B-207913, April 15, 1983.

D. Reserves - Active Duty or Active Duty for Training

National Guard called to active duty

Member on detached service until discharged by physical disqualification--A member of the National Guard who under competent orders reported for active military service of the United States at an assigned station where he was on detached service until discharged because of physical disqualification for Federal service is entitled under section 201(e), Career Compensation Act of 1949, to receive active duty pay for the period between date of reporting for active duty and date of discharge from service. 29 Comp. Gen. 402, (1950), modified, 34 Comp. Gen. 369 (1955).

Federal civilian employees - members of National Guard--Civilian employees who were members of the Arkansas National Guard when it was federalized pursuant to Executive Order No. 10730 are not entitled to military pay and allowances until the date they actually report to the unit point of assembly or, if absent from the vicinity, from the date they began direct travel to the duty station. 37 Comp. Gen. 655 (1958).

Active duty for physical examination

Physical exam incident to active duty for more than 30 days--A Reserve ordered to active duty to take a physical examination incident to being ordered to active duty for more than 30 days is entitled to pay and allowances for the period of the examination and travel time to and from the examination, provided orders place the member in an active duty status. B-181762, July 18, 1975.

Pay during travel to first duty station after passing physical exam--A Reserve who passes a physical examination incident to being ordered to active duty for more than 30 days is entitled to pay and allowances for travel time to his first duty station when later ordered to active duty for more than 30 days. B-181762, July 18, 1975.

Pay of Reserve who fails physical exam--A Reserve who does not pass the physical examination given incident to being ordered to active duty for more than 30 days is entitled to pay and allowances for the period required for the examination and travel time to and from the examination, provided orders place the member in an active duty status. B-181762, July 18, 1975.

Physical exam not incident to active duty--The calling up of a Reserve for the sole purpose of physical examination to determine his fitness for retention in the Reserve or for medical treatment when such examination or treatment is not incident to the performance of active duty, does not constitute "active duty" for the purpose of entitlement to pay and allowances. B-181762, July 18, 1975. See also 44 Comp. Gen. 521 (1965), 27 Comp. Gen. 490 (1948), 26 Comp. Gen. 107 (1946), and 21 Comp. Gen. 781 (1942).

ROTC cadets/midshipmen - pay while traveling to summer training

Cadets or midshipmen appointed under 10 U.S.C. 2107, or persons enrolled in the advance training program prescribed by 10 U.S.C. 2104, receiving scholarship assistance pursuant to the Reserve Officers' Training Corps Vitalization Act of 1964, who as members of a Senior Reserve Officers' Training Corps participate in the field training and practice cruises provided by section 2109 are not entitled to pay and allowances for travel time to and from summer training, the 1964 act amending 37 U.S.C. 209(c) to authorize pay to the members of the Corps while "attending field training or practice cruises," using language substantially the same as that used in the prior authority for training under which active duty pay for travel to and from training was not paid is to be given the same application absent an indication in the 1964 act that pay for travel was intended, therefore, pay may be authorized only from the day of arrival at the camp or practice cruise to the day of relief from duty. 45 Comp. Gen. 664 (1966).

Release from active duty

Member late picking-up orders--A Naval Reserve officer who was detached from active duty training at the commencement of a day so that he could have departed and reached home the same day by taking the first available air transportation - the mode of transportation used - but who did not

pick up his orders in time to depart by the first available air flight may not receive additional pay and allowances for another day's travel time. 37 Comp. Gen. 792 (1958).

Member dies prior to expiration of travel time--Although under the Career Compensation Act of 1949, as amended by the act of July 12, 1955, a Reserve member of the armed services may be paid pay and allowances for travel time incident to release from active duty prior to departure home from the last duty station. If the member dies prior to expiration of the travel time, the member's right to pay and allowances ceases on the day of death and any overpayment should be collected from the member's estate. 37 Comp. Gen. 103 (1957).

Member delayed in returning home due to weather, etc.--Although a regulation to authorize additional active duty pay to reservists who are delayed in returning to their home upon release from training duty because of weather conditions or mechanical failure of public or Government transportation facilities, without the necessity for issuance of amendatory orders, would be effective under Navy and Marine regulations, which clearly limit pay for active duty for training to the period covered by the orders plus the time necessary for travel, without a release date being stated in the orders, under Army and Air Force procedures which provide for ordering personnel to an overall training period between specified dates, including to and from travel time, there is no basis for computation of necessary or constructive travel time and, therefore, the regulation would be without effect unless the procedures were changed to accord with those of the Navy and Marine Corps. 41 Comp. Gen. 56 (1961).

Member departed duty station prior to termination date in orders--A Reserve officer who, upon completion of a training assignment, departed from the duty station and arrived home prior to the termination date specified in the assignment orders, is entitled to pay and allowances through such termination date. 35 Comp. Gen. 387 (1956).

Late delivery of orders modifying orders releasing member from active duty--Where orders modifying prior orders releasing a Naval Reserve officer from active duty recalled the officer to active duty, but, even though issued in ample time, were not delivered prior to the expiration of his terminal leave under his original orders, the officer may not be considered as having been on continuous active duty so as to be entitled to active-duty pay and allowances during the period between the date of expiration of his terminal leave and the date of compliance with the modifying orders. 26 Comp. Gen. 40 (1946).

Release from active duty orders modified prior to expiration of terminal leave--A Naval Reserve officer who proceeded to his home under orders providing for release from active duty upon expiration of his terminal leave but who, prior to the expiration of his leave, received and complied with modifying orders directing travel to a naval hospital for observation and treatment is to be regarded as in a continuous active-duty status under such orders as modified and entitled to activeduty pay and allowances from the time his terminal leave would have expired to the date he subsequently was released from active duty. 26 Comp. Gen. 40 (1946).

Computation of Reserves active-duty pay

Actual days served - less than 30--A reservist of the Armed Forces who serves on active duty for training from February 1, through 28, in a nonleap year is not entitled under A-71273, March 2, 1936, to a full month's active duty pay and allowances without deduction for the two constructive days at the end of February. The rule in the 1936 decision that reservists ordered to duty for a period of less than 30 days are not within the scope of the act of June 30, 1906, which prescribe a 30-day calendar month for computing the pay of persons paid on an annual or monthly basis, and are therefore, only entitled to pay for the actual number of days served, including the 31st day of the month, not having been changed by the codification in 37 U.S.C. 1004 of the governing statutes, the decision of March 2, 1936, is affirmed. 47 Comp. Gen. 515 (1968).

Day on which pay begins for Reserve called to active duty--The law and regulations contemplate that the date on which pay should begin for a Reserve member called to active duty will be based on a determination of the date he necessarily was required to begin the travel from his home by the mode of transportation authorized and actually used so as to arrive at his duty station on the designated reporting date. B-172856, July 7, 1971. See also 52 Comp. Gen. 482 (1973).

Day on which pay terminates for Reserve called to active duty--A Reserve officer ordered to active duty training (ADT) with a reporting date of 8 A.M., October 16, 1978, travels by air on October 15 to Washington, D.C., and completes his duty assignment by 6:30 p.m. on October 16. Using the directives of the DODPM, constructive travel by air from Washington, D.C., to St. Louis could have been completed before 12 p.m. on October 16, 1978. He is not entitled to an additional day of active duty pay and allowances for October 17 for return travel to his home. B-194938, October 26, 1979.

Leave Credit for Active Duty Without Pay

A Navy Reserve officer claims pay for 2-1/2 days of accrued leave on the basis that he performed 30 days of active duty for training. However, during 13 of those days he was in voluntary non-pay status. The regulations that implement the applicable leave statute require that a member perform 30 consecutive days of active duty while in a pay status in order to be entitled to leave. Since that regulation is reasonably consistent with the purpose and intent of the statute, it is not overly restrictive, and the member is not entitled to leave pay. B-214534, September 5, 1984.

Entitlement based on waiver of retired pay

Retired members of armed services who perform Reserve duty, active or inactive, on the 31st day of a calendar month must waive 1 day's retired pay (or other compensation received on account of their prior service) in order to be entitled to active duty pay or inactive duty pay which would otherwise accrue for that day. This is required by 10 U.S.C. § 684. 62 Comp. Gen. 266 (1983).

E. Reserves Injured or Ill on Duty

Status during hospitalization

A member of the Army National Guard or Army Reserve called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized under the provisions of 10 U.S.C. 3721(c) because of an in-line-of-duty injury not due to own misconduct during that time, remains in an active military status only through the last day of duty as prescribed by those orders, with the right to continue to receive pay and allowances thereafter based on disability to perform military duty as authorized by 37 U.S.C. 204(g)(2). 57 Comp. Gen. 305 (1978). 40 Comp. Gen. 664, modified.

Orders purporting to extend active duty

A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized due to an in-line-of-duty injury not due to own misconduct during that time, would not be placed in a status of being on active duty for 30 days or more even though the period of hospitalization is covered by an amendment to his orders or new orders issued to extend his period of active duty solely for the purpose of such hospitalization, since such a change in status is not authorized. Thus, such orders would not carry him beyond 30 days for active duty purposes and his rights to be retired for physical disability would remain determinable under 10 U.S.C. 1204. 57 Comp. Gen. 305 (1978).

Pay entitlement while disabled

Disabled from disease during full-time duty period of 30 days or less--Members of federally recognized National Guard units and organizations who are disabled by disease while on full-time duty for periods of 30 days or less under 32 U.S.C. § 502(f) are eligible for the incapacitation payments and related benefits prescribed by 10 U.S.C. §§ 3722 and 8722, and the implementing regulations. These benefits include continuation of the basic pay and allowances to which they were entitled at the time the disease was contracted for a period of up to 6 months beyond the end of the tour of duty, plus medical

care and transportation to and from hospitals. Master Sergeant Howard R. Harper, ARNG, B-204347. December 23, 1981, modified. B-204347, August 22, 1984.

Pay continues while member incapacitated for military duty--A member of the Air Force Reserve who is disabled in line of duty from injury while performing annual training is entitled by law to continued pay and allowances during the subsequent period when the member remains incapacitated for the performance of normal military duties, and the determination as to how long the disability continues is left to the exercise of sound administrative judgment. In each case the service concerned is to determine when the injured member has recovered or determine that such member should be separated for disability. 37 U.S.C. 204(g)(2) (1976). B-195470, November 14, 1979.

Pay terminates when found fit for military duty--Upon reconsidering the entitlements of National Guard members and other reservists under the act of June 20, 1949, which prescribes the same benefits for reservists injured or disabled in line of active duty or training as is accorded Regular members, although the holding that the ability to

resume normal civilian employment is not the standard for determining entitlement to disability pay where contemporaneous service medical data are available must be adhered to as termination of disability pay is based upon ability to perform military duty or a final disposition of the matter, decisions that hold physical presence at a regular drill or a conditional temporary assignment to limited duty terminates entitlement to pay and allowances or medical care and hospitalization will no longer be followed, but a member must promptly report injury, disease, and his current disability status to permit action to retire, separate, or refer him to the Veterans Administration. 52 Comp. Gen. 99 (1972). See also 48 Comp. Gen. 1 (1968).

Army National Guard member injured in line of duty during annual training, who was thereby rendered physically unable and--as determined by Army medical personnel--permanently unqualified under Army regulations to perform his normal duties as military policeman, is entitled to disability pay and allowances during period of disability ending when Army authorities acted to change his Military Occupation Specialty from policeman to unit clerk, thus limiting his normal military duties to activities within range of his reduced physical capabilities. B-187049, November 9, 1976.

Member required to promptly report injuries and keep service advised of condition--In the implementation of the changes in the administration of the disability benefits program provided by the act of June 20, 1949, for National Guard members and other reservists, members should be advised to promptly report the incurrence of disability to enable the military services to provide proper medical and hospital care, as well as pay and allowances, to the disabled member. Where a member is not provided medical or hospital care so that a current determination of entitlement to pay and allowances cannot be made, any payment to a member should be supported each month by a report from his civilian physician and by a statement from the member showing the days of military duty or civilian employment together with the name and address of his employer. 52 Comp. Gen. 99 (1972).

Failure to report injuries--A member of Ohio Air National Guard underwent surgery for a herniated disc by a civilian physician and asserts entitlement to disability continuation pay and allowances under 37 U.S.C. 204(h) but did not notify appropriate service authorities until after he was released by his civilian physician nearly 2 years after the injury. Where a member fails to notify appropriate service authorities thereby preventing them from making a contemporaneous investigation of the accident and injury, a determination of his disability and their interconnection, his right to pay and allowances during the period of his disability has not been established and will not be allowed.

B-199837(1), November 10, 1980. Compare 47 Comp. Gen. 716 (1968).

Member not promptly seeking medical care--A member of the Army National Guard is entitled to pay and allowances under 32 U.S.C. 318 only if the injury, disease, and current disability status is promptly reported so as to permit action to retire, separate, or refer his case to the Veterans' Administration. Where a member does not seek medical or hospital care by the Government for over 1 year so that a current determination of entitlement can be made, payment of pay and allowances for such period is not authorized. B-185415, August 4, 1976.

Member postpones treatment--A member of the National Guard may not by postponing treatment or examination extend the period of entitlement to full pay and allowances thus permitting the continued payment of such compensation when right thereto has not been clearly established by a showing of the continued disability. B-185404, August 2, 1976. See also 47 Comp. Gen. 716 (1968) and B-195470, November 14, 1979.

Rehospitalization from recurrence of original injury--The right to pay and allowances of a member of the Army National Guard under 32 U.S.C. 318 applies not only to the period of initial hospitalization and incapacitation resulting from a line of duty injury but also extends through any period of rehospitalization and incapacitation resulting from a recurrence of the original disability even though the recurrence occurred at a time when member was not in the line of duty. B-185439, August 3, 1976. See also 29 Comp. Gen. 535 (1950), 30 Comp. Gen. 185 (1950), and 39 Comp. Gen. 498 (1960).

Subsequent injury - intervening cause--Where record shows that Reserve member who is claiming entitlement to disability pay and allowances under 37 U.S.C. 204(g)(2) for injury sustained while on inactive duty training, was not medically examined prior to subsequent injury for which he claimed benefits as a civilian Government employee and prior to which he had lost no time from his military duty, subsequent injury should be treated as intervening cause, and since member fails to demonstrate that disability was direct result of injury sustained in line of duty, military disability pay may not be allowed. B-184867, August 3, 1976.

Member resumes civilian occupation while disabled--A non-Regular member of the Armed Forces who is disabled by injury incurred while performing active duty training may continue to receive the pay and allowances authorized by 37 U.S.C. 204(g)-(i) when he resumes a civilian occupation, upon the determination, preferably by a service medical

personnel and made in accordance with standards established for regular members, that the injury precludes the reservist from performing the normal military duties of his grade or rank, notwithstanding the member is awaiting final action on retirement proceedings, or that he did not resume his normal civilian occupation but because of his disability took other employment. 47 Comp. Gen. 531 (1968).

Member resumes Federal civilian occupation while disabled--A member of the National Guard who is also a National Guard technician under 32 U.S.C. 709 and who is injured in line of duty while performing training under 32 U.S.C. 502, is entitled in accordance with 37 U.S.C. 204(h)(2) to receive the pay and allowances of a Regular member of the Army during the period of his disability for military duty even though he resumes his Government civilian occupation since he is not considered to be on active military service during period of receipt of bay and allowances under 37 U.S.C. 204(h)(2). 54 Comp. Gen. 431 (1974).

Continued treatment but not hospitalized--A Reserve member who contracted hepatitis while serving on a 2-week period of active duty for training, was hospitalized, but following release from the service hospital was ordered to report for treatment to the service medical facility nearest to his home, the member is entitled to continue to receive basic pay and allowances under 10 U.S.C. 3722(b)(2) from time of his release from the hospital until the attending service medical officer certified that the member had recovered, even though not rehospitalized, because 10 U.S.C. 3722 does not require the status as a "patient" in a hospital, but rather, the continuance of the disability. B-181014, July 10, 1974.

Injuries not manifest until after release from duty--When a member of the uniformed services injured in line of duty while performing annual field training under 32 U.S.C. 503 is permitted after examination and medical treatment on two occasions to return to duty and only after release from military service does he learn from a civilian doctor that the nature and extent of his injuries would have prevented the performance of military dutv, the claim of the member for pay and allowances to cover the period between date of release from active dutv and return to his civilian position may be baid, neither the existence nor the extent of the injuries becoming manifest until after release of the member from active duty, to deny his entitlement to the benefits of 37 U.S.C. 204(h) because he, in ignorance of the seriousness of his injuries, performed military duty in the interim between injury and release from active duty would in effect deprive him of the benefits Congress intended to grant. 45 Comp. Gen. 54 (1965). See also 52 Comp. Gen. 99 (1972), but see B-199837, November 10, 1980.

Disability must be incurred in "line of duty"

The acts of June 15, 1936, and June 20, 1949, authorizing pay and allowances to officers and enlisted men of the National Guard for personal injury or disease suffered during periods of training or active duty are applicable only in cases where the disability is suffered in line of duty so that an enlisted man of the National Guard who was hospitalized while in attendance with his organization at an encampment for a disease not incurred in the line of duty is not entitled to pay and allowances for a period of hospitalization extending beyond such encampment. 30 Comp. Gen. 301 (1951). See also B-175350, June 19, 1972.

A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less who is hospitalized for an in-line-ofduty disability not due to his own misconduct, and who suffers an injury in the hospital during the period of active duty covered by the original orders, so long as that injury is administratively determined to be in line of duty and not due to own misconduct, may be considered as being injured or the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204. 57 Comp. Gen. 305 (1978).

Disability must be incurred while member in duty status

Members injured going to or from active duty for training--A National Guard member is in a travel status for medical and disability entitlements for injury incurred while traveling to and from active duty training when he leaves his living quarters with the intention of going directly to the place where ordered to perform such duty and such travel status continues on completion of his tour when he returns directly from his place of duty to his home until he has entered his living quarters. 58 Comp. Gen. 232 (1979).

Member injured while on excursion with his family--An Air Force reservist ordered to active duty training in the vicinity of his home who on the day he is released from duty is injured while on an excursion with his family 70 miles from his home is not entitled to pay and allowances for the period he is unable to return to civilian employment or to reimbursement for the medical and hospital expenses, the right to the benefits provided by 10 U.S.C. 8721(2) and 37 U.S.C. 204(g)(2) existing only if disability occurs while in an active duty status, and the Reserve member, no travel being involved, having reverted to a civilian status upon release from military control, is not entitled to pay and allowances and reimbursement for medical and hospital expenses incident to an injury sustained after release from active duty and while engaged in civilian

pursuits, notwithstanding that he received pay and allowances for the full day of his release. 44 Comp. Gen. 408 (1965).

Members injured returning home during drill period for forgotten equipment--Three National Guard reservists who after reporting for multiple unit training assembly two incident to the inactive duty training authorized by 32 U.S.C. 502 (a)(1), answering the roll call, and participating for 65 minutes in the first assembly, were ordered home to pick up equipment, and who while traveling in a privately owned car were in a collision in which two members were killed and one injured, passed out of military control when they ceased to perform inactive duty training. Since their 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and the members were not in training for the purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), the situation of the deceased does not meet the requirements of 10 U.S.C. 1481(a)(3), authorizing the disposition of remains, nor entitle the injured member to medical care and pay and allowances. 52 Comp. Gen. 28 (1972). See also 43 Comp. Gen. 412(1963), and B-164204, July 12, 1968.

Member injured after dismissal from drill--A naval reservist sustained an injury outside the Reserve Center building following dismissal from an inactive-duty training drill. He is not eligible to receive benefits (medical care, pay and allowances, etc.) under 10 U.S.C. § 6148 and 37 U.S.C. § 201(i) (1976) since under those statutes the injury must have been incurred while the member was employed in inactive-duty training which extends only from the time the reservist is first mustered in until dismissal from that day's activities. Also, 10 U.S.C. § 1074a and 37 U.S.C. § 204(j) now authorize medical care, etc., in such circumstances, but those statutes contain no authority for basic pay during the period of recuperation. 63 Comp. Gen. 66 (1983).

Member injured After Dismissal--Effect of standby status--National Guard members are entitled by law to pay and allowances and other benefits when called to active duty and disabled by injury "while so employed." They are ineligible for these benefits, however, based on injuries sustained when engaged in civilian pursuits and when no longer "employed" in a military capacity following their release from military control on the last day of an active duty period. Hence, an Air National Guard sergeant may not be allowed pay and allowances for an injury he sustained while engaged in private civilian employment subsequent to his release from military duty and control earlier the same day, notwithstanding that he was in a "standby" status subject to a possible recall to duty during the remainder of that day. B-215512, December 3, 1984.

Member injured After Dismissal--Return Home under Travel Orders--An Army Reserve member injured in an automobile

accident while returning to his permanent station after attending inactive duty training at a training site away from his unit headquarters under travel orders is not entitled to the medical benefits of 10 U.S.C. § 3721(2), since he had completed the training duty involved and he was not under military control employed in inactive duty training at the time of the accident. B-214806, July 23, 1984.

Member ordered home during drill to get records--Military member who during attendance at multiple unit training assembly two (MUTA-2) was instructed by his first sergeant to take the most direct route home to obtain his clothing records and return to the Armory, and who was injured on return trip when he lost control of his motorcycle, is entitled to disability pay and allowances since his return home was not due to an omission on his part with respect to the training schedule. 52 Comp. Gen. 28, (1972), distinguished. 54 Comp. Gen. 165 (1974). See also 43 Comp. Gen. 412 (1963), and B-156628, June 1, 1965.

Members permitted to use Government facilities prior to drills--Injuries sustained by reservists while they are permitted to use Government furnished quarters or Government transportation prior to the performance of inactive duty training drills may not be regarded as injuries suffered while actually performing inactive duty training for entitlement to coverage under the act of June 20, 1949, 34 U.S.C. 855c-1, notwithstanding that reservists receive drill pay and allowances based on the entire drill day. 38 Comp. Gen. 841 (1959). See also 43 Comp. Gen. 412 (1963).

Members disabled while serving without pay

Disabled from disease during active duty period in excess of 30 days--Members of Reserve components of the Armed Forces who, with their consent, are called or ordered to active duty without pay for periods in excess of 30 days under authority of section 240 of the Armed Forces Reserve Act of 1952 and who, while so employed, suffer disability in line of duty from disease are entitled, under the act of June 20, 1949, to pay and allowances during hospitalization, or from the date disease is contracted. 33 Comp. Gen. 411 (1954).

Disabled from injury during active duty for any period--Members of Reserve components of the Armed Forces who, with their consent, are called or ordered to active duty without pay for any period of time under authority of section 240 of the Armed Forces Reserve Act of 1952, and who, while so employed, suffer disability in line of duty from injury are entitled, under the act of June 20, 1949, to pay and allowances during hospitalization, or from date of injury. 33 Comp. Gen. 411 (1954).

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Disabled from injury during active duty for any period--Members of Reserve components of the Armed Forces who, with their consent, are called or ordered to active duty without pay for any period of time under authority of section 240 of the Armed Forces Reserve Act of 1952, and who, while so employed, suffer disability in line of duty from injury are entitled, under the act of June 20, 1949, to pay and allowances during hospitalization, or from date of injury. 33 Comp. Gen. 411 (1954).

CHAPTER 2 - SPECIAL PAY

I. INCENTIVE PAY

A. Aerial Flights

Orders requirements

Orders required--It is the general rule that in order to be eligible to receive incentive pay for hazardous duty under 37 U.S.C. 301, such duty must be performed under orders issued by competent authority. Verbal orders or performance of duty without orders is not sufficient. B-173497, October 27, 1971.

Performance without competent orders--Performance of aerial flights without having been directed by an officer with authority to do so cannot constitute performance of flight duty pursuant to competent orders and a member is not entitled to flight pay therefor. B-173497, October 27, 1971.

Verbal orders--Entitlement to flight pay is dependent upon the existence of competent orders placing a member in a flight status during those periods as well as evidence establishing that the member met minimum flight requirements during the period. Verbal orders will be recognized as competent orders only when they are properly confirmed in writing within a reasonable time after they are issued. Confirming orders issued 21 months to 2 years after the purported verbal orders may not be considered sufficient to meet the requirements of this rule. B-173497, October 27, 1971.

Failure of physical exam--Suspension of flight pay absent orders directing the suspension of flying duties is ineffective and member is entitled to flight pay until the date flying status is officially terminated notwithstanding member failed physical to qualify for flight pay. 48 Comp. Gen. 81 (1968).

Falsified flight physical examination to qualify--An Army officer, who was found to have fraudulently qualified for flight pay and Aviation Career Incentive Pay by submitting falsified flight physical examination records, is not entitled to such pay under applicable statutes and regulations. The de facto rule will not be applied to allow retention of flight pay and Aviation Career Incentive Pay received by an officer who fraudulently qualified for such pay. Therefore, collection action should be taken to recover these payments. B-214584, November 14, 1984.

Continuation while injured

Aviation accident--Section 10 of Executive Order No. 10152 which authorizes continuation of incentive pay for 3 months

for members in flying status who are incapacitated as a result of aviation accident, contemplates that such incapacity results from performance of aerial flights, and therefore a member who is captured by the enemy while in a flight status, and who upon release from captivity is incapacitated for flying because of privation and hardship suffered while a prisoner, may not be granted incentive pay for periods immediately following release, during which he did notparticipate in aerial flights. 33 Comp. Gen. 436 (1954). See also B-168082, December 11, 1969, in which it

was held that authorizing hazardous duty pay in such situations could not be accomplished by amending the Executive Order but that legislation would be required.

Incapacity periods--Members who receive flight pay and who become physically incapacitated for flying for any reason other than as a result of a performance of hazardous duty may, by regulation, be permitted to continue to receive flying pay for 3 months; however, the matter of suspension from flying status at the end of such period is not required under Executive Order No. 10152, but is left to the discretion of the individual Secretaries. 39 Comp. Gen. 604 (1960).

Non-aviation accidents--Members who are suspended from flight requirements and who become incapacitated for flying duty as a result of a nonaviation accident may be authorized by regulation to receive flight pay for a 3-month period provided that such member becomes available for and is physically requalified for flying duty prior to the expiration of the 3-month period and provided that the right to flight pay for any part of such period shall be lost when such members remain incapacitated at the expiration of such period. 41 Comp. Gen. 173 (1961).

Qualifying duties

Enlisted members retained on flight status--Air Force policy, which in unusual cases retains enlisted members on flight status by distributing flight duty among more enlisted members than necessary so as to prevent termination of fliqht status and incentive pay without 120 days notice is questionable administrative practice, but it may not be said as a matter of law that members in such cases are not entitled to incentive pay. 55 Comp. Gen. 121 (1975).

Jumpmasters--The detailed explanation of a jumpmaster's duties during a typical project flight does not establish that he may in fact be classified as a crewmember of the aircraft as opposed to his regular designation and rating as a parachutist. Therefore, no basis exists for entitlement to flight pay rather than parachute pay in connection with duties performed by a jumpmaster. B-164186, August 15, 1969.

Voluntary flying during active duty for training--Reserve officer flying voluntarily during active duty for training is not entitled to aviation career incentive pay since he is not performing aviation service on a career basis as is defined in the Department of Defense Military Pay and Allowances Entitlement Manual. B-193563, April 17, 1979.

Flight requirements

Minimum flight requirements--The regulations implementing the statutory authorized waiver of minimum flight requirements for members of the uniformed services while attending a course of instruction of 90 days or more while serving under certain overseas assignments may be amended to include periods of travel, leave, and temporary duty not in excess of 90 days in cases of consecutive duty assignments between schools and remote places, or vice versa, where the statutory waiver is applicable, and the extension of the waiver of flight performance requirements would be in accord with the congressional intent expressed in the legislative history of the Defense Department Appropriation Act of 1971 to avoid the high cost of providing aircraft that would otherwise be incurred. However, the rule of 34 Comp. Gen. 243 should continue to be applied to travel to the first such assignments and from the last of such assignments. 51 Comp. Gen. 95 (1971).

Flight deficiencies--An officer who failed to meet the minimum flight requirements for 3 months because he was in a proceed, leave, travel, and temporary duty status after departure from an overseas station where officers were not exempted from meeting flight requirements does not come under the provision which permits flight pay to members whose assignment outside the U.S. makes it impracticable to participate in regular aerial flights, nor under regulations applicable to areas where the commander determines that due to operations or the unavailability of air craft, flight requirements cannot be met; therefore, the member is not entitled to flight pay for the 3-month period when the minimum flight requirements were not met. 41 Comp. Gen. 507(1962).

Inactive duty flight credit--Flying time performed during any short tour of active duty for training within the same calendar month may be applied toward the flight requirements for any prior or subsequent short tour of active duty or active duty for training performed within the same calendar month provided the member is under continuous flight orders for the calendar month involved. 37 Comp. Gen. 121 (1957).

Deficiencies make-up--The Act which provides for flight pay to officers assigned to duty outside the United States without the necessity of meeting the minimum requirements of Executive Order No. 10152, covers only the period between the date of reporting for duty at the assigned station where required flights are excused and the date of detachment therefrom and does not affect in any other way the operation of the Executive Order, and therefore, an officer under flying orders assigned toduty outside the United States where aerial flights are impractical is not entitled under the said section to flight pay without

performing flights while going to and from the overseas station. 34 Comp. Gen. 243 (1954).

B. Submarine Duty

Purpose and qualification

Primary duty--A member is not entitled to submarine duty pay on a continuous basis when it is shown that his submarine duty was on an intermittent basis and that his primary duty was in fact elsewhere. B-151075, August 12, 1963.

Staff based ashore--Submarine staff members based ashore or on surface vessels who do not perform a majority of assigned duties on a submarine are not entitled to submarine pay on a continuous basis. 44 Comp. Gen. 241 (1964). See Section 605, Public Law 92-436, 37 U.S.C. 301(a)(2) (A), which authorized submarine pay to such staff members under certain conditions.

Periods for which allowed

Undergoing training--Submarine duty pay may be paid to officers previously qualified in submarines as enlisted members while attending courses of instruction specifically preparing them for positions of increased responsibility in advanced nuclear submarine fleet. 54 Comp. Gen. 1103 (1975).

Leave status--Submarine crew members who have unbroken periods of combined temporary additional duty (TAD) and authorized leave away from their permanent duty on board submarines unless absent on TAD in excess of 15 days or on authorized leave exceeding 30 days, are entitled to incentive pay for a leave period not exceeding 30 days if in a submarine pay status when the leave began. 42 Comp. Gen. 266 (1962).

Off-crew members--Off-crew members of a two-crew nuclear-powered submarine who travel under change of home port orders are entitled to submarine pay for the period of travel to the new home port, the continued operation of the submarine requiring the movement of the off-crew as well as the on-crew members to the new home port. The travel other than by submarine does not terminate the rehabilitation and training status of the members. 44 Comp. Gen. 507 (1965).

Periods of absence--While the 14-man augmentation to the crew of nuclear-powered attack submarines, which allows members of the submarine to remain in port for periods of training and rehabilitation, is not comparable to the two-crew system as used in nuclear-powered ballistic missile submarines, the legislative history of Public Law 86-635, which amended the law relating to the payment of incentive pay for periods of training and rehabilitation away from

the submarine in case of off-ship crew of two-crew nuclear-powered submarines is not so restrictive so as to prohibit payments of incentive pay during periods of training and rehabilitation on a continuous basis in the case of the augment crew of nuclear-powered attack submarines, so long as such training and rehabilitation periods bear a reasonable relationship to periods of duty aboard the submarine and no severe imbalance of assignments occurs among crew members. 53 Comp. Gen. 762 (1974).

Computation: 31st day of the month

The monthly incentive pay authorized in 37 U.S.C. 301 for submarine duty being a percentage increase of the annual pay of members of the uniformed services is within the meaning of the act of June 30, 1906, 5 U.S.C. 84, prescribing that in computing compensation for a fractional part of a month, each month shall consist of 30 days, excluding the 31st of any calendar month and treating February as having 3) days; therefore, an officer in an active duty status for a period in excess of 30 days who performs submarine duty on the 31st of the month may not be paid submarine pay for that day pursuant to 5 U.S.C. 84, and the officer serving on extended active duty is not within the purview of 37 U.S.C. 1004, providing for entitlement to pay and allowances for each day, including the 31st day of the month, when a member serves a continuous period of less than 1 month. 45 Comp. Gen. 395 (1966).

C. Parachute Jumping

Assignment to duty

Assignment status--Officers trained in parachute jumping and the demolition of explosives, who incident to staff billet assignments evaluate training programs and equipment, entailing the observation of actual training exercises by special warfare forces, are not entitled to the dual hazardous duty incentive pay unless they are assigned to an operational team and actually perform parachute jumping in a jump status or perform demolition duty as a primary assignment. The mere evaluation or observation of operation team activities does not qualify the officers for incentive pay; and, in the absence of proper orders, any parachute jumping or demolition of explosives actually performed by the officers would not entitle them to additional pay. 50 Comp. Gen. 425 (1970).

Rating and performance--The law authorizing parachute duty pay prescribes two requirements for qualification for parachute pay--(1) a parachute rating and (2) the actual performance of duty designated as parachute duty. In the absence of evidence that both requirements have been met, there is no authority for the payment of parachute pay. B-158937, May 25, 1966.

Active duty for training assignment--Under current regulations a member of the Reserves receiving parachute pay while assigned to parachute duty on inactive status is not entitled to receive such incentive pay while assigned to active duty for training where the latter position is not designated as parachute duty. 57 Comp. Gen. 392 (1978).

Performance of qualifying jumps

Hostile fire area--When members in a parachute duty status are engaged in combat in a hostile fire area the period for performing minimum parachute jump requirements to qualify for incentive pay may be extended because of the inability of parachutists in combat area to perform parachute jumps. 45 Comp. Gen. 451 (1966).

Requirements as to jumps performed--The jump performed during a period of training may not serve as a basis for paying parachute pay, and the regulation not so providing a member is not entitled to have a jump used to qualify him for inactive duty parachute pay used to qualify him for active duty for training parachute pay. 43 Comp. Gen. 619 (1964).

Temporary duty--A member is not entitled to parachute pay for a parachute jump performed while on temporary duty unless he is "on parachute duty" during the period of temporary duty and he cannot be in a parachute duty status during that period unless temporary duty is performed with a military unit cited in the regulations. Where a member was on temporary duty with no military unit during temporary duty performed at the University of Omaha for the purpose of fulfilling the requirements for a degree in economics, there is no authority for the payment of a claim for parachute pay. B-153957, May 26, 1964.

D. Dual Hazardous Duty

Demolition of explosives - parachute jump

Officers trained in parachute jumping and the demolition of explosives are not entitled to dual hazardous duty incentive pay unless they are assigned to an operational team and actually perform parachute jumping in a jumpstatus or perform demolition duty as a primary assignment. Mere evaluation or observation of operational team activities does not qualify the members for incentive pay. 50 Comp. Gen. 425 (1970).

Low pressure chamber - aerial flights

Member who performs two types of hazardous duty (1) in a low pressure chamber, and (2) in aerial flight in connection with testing and evaluation of aircrew safety equipment but who performs each one of the duties separate

and distinct from the other and at times separated by days or weeks may not by reason of the fact that he is qualified for both and performs both hazardous duties be entitled to dual incentive payments under 37 U.S.C. 301(e). 44 Comp. Gen. 426 (1965). This decision overruled in part by 56 Comp. Gen. 983 (1977).

Aviation - parachute duty

An experienced pilot and parachutist of the uniformed services training for or fulfilling the position of forward air controller, whose duties do not qualify him for flying pay or require the performance of parachute jumps to carry out assigned duties, may not be paid the dual incentive pay. Executive Order No. 11120 limits dual payments of incentive pay to those members required by competent orders to perform specific hazardous duties in order to carry out their assigned missions; therefore, the fact that a member is qualified to perform hazardous duty is not the criterion for entitlement to dual incentive pay. 43 Comp. Gen. 667 (1964).

Simultaneous performance not required

A member is entitled to dual payments of hazardous duty incentive pay, provided he is required to perform specific multiple hazardous duties in order to carry out his assigned mission and otherwise meets the criteria established by departmental regulations. 37 U.S.C. 301(e) (1970) and Executive Order No. 11157, June 22, 1964, as amended. However, such duties need not be performed simultaneously or in rapid succession as was stated in 44 Comp. Gen. 426 which, to that extent will no longer be followed. Air Force parachute team members may qualify for hazardous duty incentive pay as aerial crewmembers, provided they are an integral part of an aircrew contributing to the safe and efficient operation of an aircraft, and their flight duties are not merely incidental to their duties involving parachute jumpings. 56 Comp. Gen. 983 (1977).

E. Demolition

Assignment

Military officer who was not assigned by orders to demolition of explosives as his primary duty and whose work with explosives is not shown to have come within the meaning of "duty involving demolition of explosives" under applicable regulations is not entitled to hazardous duty incentive pay on the basis of working with explosives. 63 Comp. Gen 70 (1963).

Training duty

Members who are taught how to set underwater demolition charges may not have such training duty regarded as a pri-

mary duty involving demolition of explosives to be entitled to incentive pay for demolition duty, notwithstanding that the duty may be performed under extremely hazardous conditions. 39 Comp. Gen. 731 (1960).

Primary duty assignment

If a member is otherwise entitled to incentive pay for demolition duty and actually performs such duty during a

portion of a month involved, conditions such as leave while in a pay status will not affect his eligibility for such pay for the month. However, upon permanent change of station where leave is taken en route, a member's entitlement continues only to date of departure from the old station, and that entitlement at the new station is dependent upon orders issued and duty performed at the new station. B-147915, February 19, 1962.

F. Diving Duty

Qualification requirements

To qualify for special pay for diving duty, under 37 U.S.C. 304(a), an individual must be assigned to, maintain a proficiency in, and actually perform diving duty. Each requirement must be met before special pay begins to accrue. Therefore, where a member was assigned to duty as a student at Officer Candidate School during which he did not actually perform diving duty, although he may have met the other requirements, he may not recieve special pay. 62 Comp. Gen. 612 (1963).

Qualification lapse

A Navy regulation, effective August 17, 1961, which precludes members from qualifying for heliumoxygen diving pay after diving qualifications have lapsed must be viewed as superseding the regulations under which members were given a 3-month grace period to make up diving deficienies; therefore, members who were prevented until September 1961 from making up diving qualifications which lapsed in July 31, 1961, must be regarded as merely having an inchoate right to make up their diving deficiencies until August 17, 1961, and when the regulation was superseded it deprived them of any further right so that the members who failed to meet the diving requirements for August and who were not entitled under the new regulations to make up diving deficiencies in September 1961 may not be credited with diving pay for the period August 1 to 16, 1961. 41 Comp. Gen. 392 (1961).

G. Treatment of Leprosy Patients

Length of assignment

Section 204 (a) of the Career Compensation Act of 1941 (37 U.S.C. 301(a)(7)), and Executive Order contemplate the payment of incentive pay to members of the uniformed services for duty involving intimate contact with persons afflicted with leprosy during any month, or part thereof, when the member concerned is assigned to such duty by orders of competent authority and actually performs some duty of such nature on one or more days of the month, provided that the orders require the performance of duty on either a full-

time basis, or a part or intermittent basis extending over a continuous period of not less than 30 days. 34 Comp. Gen. 55 (1954). See also B-137656, June 2, 1961.

Orders required

Army officer whose orders contemplated the performance of clinic duty at a leprosarium from time to time over an indefinite, but extended period of time of 30 days or more, may be paid one month's incentive pay for each calendar month during which he was under orders to clinic duty at the leprosarium and during which he actually performed such duty on one or more days; however, any part of a month when officer was not under orders to such duty should be

excluded in computing incentive pay. 34 Comp. Gen. 55 (1954). See also B-114992, November 5, 1953.

Facilities recognized as leprosariums

Members of the uniformed services who are assigned to facilities which are medically recognized as asylums or hospitals for lepers, even though the facilities are not officially designated as "leprosariums," are entitled to incentive pay for hazardous duty involving contact with persons afflicted with leprosy. 36 Comp. Gen. 667 (1957).

Intimate contact with lepers

Duty involving intimate contact with persons afflicted with leprosy to entitle military personnel to incentive pay for hazardous duty may not be presumed from the mere assignment to duty at leprosariums; however, if there is evidence that the duty involves personal or intimate contact with lepers or contact with property of patients which would be medically considered as furnishing a method of transmission of the disease, members are entitled to incentive pay. 36 Comp. Gen. 667 (1957). See also B-137656, November 21, 1958.

II. PROFESSIONAL PAY

A. Medical and Dental

No medical duties

Where physician at his own request was permitted to remain on active duty an additional 2 months for hospitalization but did not perform medical duties, he was not entitled to special pay for that period. Pesquera v. United States, 133 Ct. Cl. 899 (1965).

Service requirements

Extensions--Medical and dental officers whose orders to active duty for periods of less than a year are subsequently amended to extend the active duty period to a total of a year or more have met the 1-year prescribed service requirement for entitlement to special pay from the date the amended orders increase the total active duty to more than 1 year. 38 Comp. Gen. 211 (1958).

Internship--An Army officer who upon graduation from medical school served the 1-year period of military internship prescribed by Army regulations for transfer to the Army Medical Corps is not eligible 1 year after transfer to include the period of internship in the "at least 2 years of active duty" required for eligibility to receive the $150 per month rate of special medical pay. 43 Comp. Gen. 724 (1964).

Continuous duty--Since the law requires an order to active duty for a period of at least 1 year before its conditions are met, no amount of service under orders to active duty for period of less than 1 year may be added together to fit the statutory requirement. Unless and until a medical or dental officer in a Reserve component is obligated to serve on active duty for a period of at least a year under a proper order he is not entitled to the special pay. B-149990, October 15, 1962.

Commissioned officers

While the principal purpose for authorizing the additional pay for physicians and dentists was to provide an inducement for qualified medical and dental personnel to serve on active duty in the uniformed services because of the difficulty experienced in securing and retaining on active duty an adequate number of physicians, surgeons and dentists, such professional people become entitled to the special pay only if they fall within one of the categories of "commissioned Officers" who are serving on active duty as medical or dental officers. Although a member remained a commissioned officer in the Retired Reserve subsequent to his release from active duty for age, his subsequent service in the Regular Army under an enlistment for the purpose of acquiring sufficient service to qualify for retirement with pay, could not, in any circumstances, place him in one of the categories of "commissioned officers" entitled to special pay. B-155800, February 1, 1965.

B. Veterinarians and Optometrists

Entitlements

There is currently no statutory authority for the payment of special professional pay to Reserve veterinarian and optometry officers of the uniformed services who entered on active duty after June 30, 1975; hence, such officers are not entitled to special pay notwithstanding any administrative regulations or recruiters' promises to the contrary. 56 Comp. Gen. 943 (1977). Note: This decision was dated September 8, 1977. On September 30, 1977, Public Law 95-114 was enacted reinstating special pay for veterinarians and optometry officers effective October 1, 1977, at the rate of $100 per month. Thus, the above decision applies only to that period between June 30, 1975, and October 1, 1977.

Longevity credit

The Act which authorized the Armed Forces Health Professions Scholarship Program (HPSP) specifically provided that service performed while a member of the program shall not be counted in determining eligibility for retirement other than by reason of a physical disability incurred while on

active duty as a member of the program; or in computing years of service creditable for basic pay purposes other than physicians and dentists. 10 U.S.C. 2120-2127. In view of the clear and unambiguous language of the statute and the contract executed in order to enter the program, we know of no legal basis for the crediting of time spent while particpating in the HPSP for longevity pay purposes for veterinarians. B-188594, April 28, 1977.

C. Judge Advocates General

The Defense Officer Personnel Management Act, Public Law 96-513, repealed a statute authorizing enhanced pay for officer serving a Assistant Judge Advocates General of the Navy. Although that Act contained various transitional provisions protecting the pay of individuals against reduction as a result of enactment, no specific provision related to the pay of these individuals. The general savings provision in the Act relates, as applicable here, to rights which have matured. These officers had no matured right to continuation of their pay at the enhanced rate. B-204267, March 19, 1982.

III. SPECIAL DUTY PAY

A. Foreign Duty Pay

Effective date

For purposes of foreign duty pay, enlisted members who are in a travel status in an area designated for foreign duty pay but who have not reported to their duty stationin the area may not be regarded as on "duty at a designated place" within the meaning of the law and regulations, and, therefore, foreign duty pay is not payable prior to the day on which the member in fact reports to his duty station. 44 Comp. Gen. 396 (1965).

Off-shore islands

Members who are assigned under permanent change of station orders to duty on San Clemente island and Santa Rosa Island, located off the coast of California are not regarded as being assigned to duty beyond the continental United States and may not be paid foreign duty pay. 39 Comp. Gen. 540 (1960).

Artificial islands (Texas Towers)

In the absence of an authoritative court decision, payment of foreign duty pay to enlisted personnel stationed on an artificial island located approximately 40 miles off the coast of the United States is too doubtful to be authorized; however, if the regulations for special pay for sea duty issued by the President are broadened to include

in the definition of sea duty the type of duty on such island, payment of special pay would be proper. 40 Comp. Gen. 414 (1961). See also 39 Comp. Gen. 540 (1960).

Duty Status

A member who, after detachment from an overseas station in an awaiting orders status pending disability retirement, elected to remain in the vicinity of the overseas station and was charged leave to the extent available during the period prior to placement on the temporary disability retired list is regarded as coming within 37 U.S.C. 502(a), which authorizes pay and allowances to members directed to be absent from duty during action on disability retirement for periods longer than the days of authorized leave, so that the member is entitled to the housing and cost-of-living allowances and special sea and foreign duty pay which he would receive at that location even though not in a duty station. 42 Comp. Gen. 689 (1963).

B. Sea Duty

Onboard a vessel

Members who were ordered to Harbor Clearance Unit Two (HCU-2) but who performed temporary duty aboard the YRST-2, a nonself-propelled service craft with berthing and messing available onboard, but which is not a "vessel" for sea duty pay or for travel entitlementpurposes may not receive sea duty pay but are not prohibited from receiving per diem since the temporary duty was, in fact, not performed onboard a vessel. 54 Comp. Gen. 442 (1974).

Time limitation

For purposes of crediting Navy enlisted members with special sea duty pay during periods when messing and berthing facilities, or both, are temporarily out of operation for vessel alteration and repair under Executive Order No. 10821, vessel repair and alteration periods not in excess of 90 days may be considered temporary; however, when alterations and repairs will close the messing or berthing facilities aboard a vessel, so that enlisted members will have to be messed or berthed ashore for a continuous period in excess of 90 days, such period may not be considered temporary and no special sea duty pay for any part of the time may be allowed. 40 Comp. Gen. 618 (1961).

Vessel repair

Sea duty pay to Navy enlisted crewmembers of submarine during the 150-day period the submarine is undergoing alterations and repairs, and berthing and messing facilities aboard the craft are inoperative but available nearby, may

not be paid on the basis that due to peculiarities of construction submarine overhauls present entirely different problems than those considered in 40 Comp. Gen. 618. A departure from the construction of the term "temporarily" as used in Executive Order No. 10821 to mean a period not in excess of 90 days is unwarranted, as the period of time during which facilities are temporarily out of operation within the meaning of the Executive order should not vary on the basis of the type of vessel involved, and also, the extent of the term should be the same for all members whether assigned to vessels or submarines. 42 Comp. Gen. 24 (1962).

C. Administrative Function Pay - Reserve

When a National Guard or Reserve component is not functioning as a separate unit but is a subordinate part of a larger group, the administrative functions of the organization are, for the most part, normally performed by the headquarters of the larger group. Consequently, in such cases, payment of administrative function pay must be supported by clear showing that commanders of the subordinate group units did in fact perform the administrative functions of their unit. B-147755, January 22, 1962. See also B-185426, January 19, 1976.

D. Hostile Fire Pay

Members missing in action

Payment of hostile fire pay to members captured or missing in action as a result of hostile action even though the members had not otherwise qualified for such pay immediately prior to that time, is not authorized under 37 U.S.C. 310 since the legislative history clearly establishes that Congress intended that the special pay not be paid to such members. 44 Comp. Gen. 532 (1965).

Member classified as a casualty

Only when a member is classified as a casualty as the result of hostile fire action may he be paid hostile fire pay for a period not to exceed 3 months while hospitalized. 49 Comp. Gen. 507 (1970).

Cadets and midshipmen

Since cadets and midshipmen are not entitled to basic pay, they do not qualify for hostile fire pay even though serving in an area subject to hostile fire. 47 Comp. Gen. 781 (1968).

Noncombat areas

The Combat Pay Act of 1952, which was repealed by section 9(b) of Uniformed Services Pay Act of 1963, authorized special pay for members of combat units in Korea, provided they were in action for specified periods of time. In 1963, when the hostile fire pay of 37 U.S.C. 310 was authorized, the hostilities in Vietnam did not involve clearly distinguishable line of demarcation between friendly and enemy forces, as in Korea. Instead, there was the possibility of exposure to hostile fire in almost any area or location in Vietnam or in other areas of Southeast Asia. Thus, the concept of exposure to possible hostile activity was used as the basis for the special pay authorized in 37 U.S.C. 310, and is less restrictive in that respect than the Combat Duty Pay Act of 1952 which limited combat pay to combat troops in action. B-168403, March 3, 1975.

Entitlement to convalescent leave

Only a member who incurs an "illness or injury" while eligible to receive hostile fire pay is entitled to travel at Government expense on convalescent leave. B-195234, October 23, 1979.

IV. BONUSES

A. Proficiency Pay

Promotion

Enlisted to commissioned grade--Enlisted member Navy or Marine Corps at time of temporary appointment to commissioned officer grade was receiving proficiency pay is not entitled to saved proficiency pay unless he continues to meet the eligibility conditions prescribed by regulations. A member does not meet prescribed conditions of eligibility for proficiency pay when as part of his duties as an officer he utilizes the skills of his military specialty for which the pay was authorized in the supervision of other personnel with similar skills. 48 Comp. Gen. 12 (1968).

Eligibility for promotion--Regulations which prescribe eligibility for an award of proficiency pay on the basis of qualifying for promotion to the next higher grade are regulations that are not consistent with the law and payments of proficiency pay in superior performance category that do not relate to a member's current pay grade but on eligibility for promotion in grade may not be authorized. 48 Comp. Gen. 86 (1968).

Prohibition

The payment under 37 U.S.C. 307 of superior performance proficiency pay by the Air Force at $30 per month and by

the Army at $50 per month to senior noncommissioned officers entitled to the special pay rate provided in 37 U.S.C. 203(a) should be discontinued since Public Law 90-207, effective October 1, 1967, amended section 203(a) to provide the new special pay rate, regardless of years of service, in lieu of basic pay at the rate of E-9, with appropriate years of service, plus proficiency pay. The improper payments of superior performance proficiency pay having been based on a misinterpretation of the law, and having been accepted in good faith, need not be collected and may be waived under 10 U.S.C. 2774. 53 Comp. Gen. 184 (1973).

Qualifying criteria

Proficiency pay may be authorized for personnel serving in ratings requiring specialized training in a military skill and for superior performance while serving in other military occupational duty assignments involving a military skill for which specialty proficiency pay has not been authorized. However, proficiency pay may not be authorized for duty assignments which do not involve any military grade specialty or military occupation of the service. B-160435, November 25, 1968.

Training

A member selected for the Marine Corps Associate Degree Completion Program (MADCOP) who will not use his military specialty while attending junior college may only be paid a variable reenlistment bonus and proficiency pay if the major course of study pursued is reasonably related to his critical skill, such as a disbursing man studying data processing, and who upon completion of the studies that enhanced his skills will resume the duties he had performed prior to entering the program. 51 Comp. Gen 3 (1971).

Authority to Pay

Section 307 of title 37, United States Code, confers upon the Secretaries concerned a broad and flexible authority to provide for payment of proficiency pay to enlisted members of the uniformed services. Where a member claims he is entitled to a higher rate of proficiency pay than that awarded by official orders but provides no evidence that payment of the higher rate was authorized by appropriate regulations and no regulations to support the member's claim have been found, the claim must be disallowed. B-187713, February 14, 1978.

B. Enlistment Bonus - High School Students

Proposed program for a nonprofit corporation which would be formed and funded by private industry for the purpose of

making payments to selected high school graduates to induce them to enlist and serve satisfactorily in the Army should not be implemented without additional statutory authority in view of the possible applicability of the prohibition against enlistment bounties (10 U.S.C. 514(a)) and the prohibition against receiving extra earnings gained in the course of the soldiers' service to the Army belong to the United Sates and must be paid into the Treasury. B-200013, April 15, 1981.

C. Reenlistment Bonus

Extension of enlistment in order to retain status as member of the armed services

Air Force member whose enlistment is extended in 30-day periods for over 24 months while placed on international hold to give him the benefit of retaining his status as a member of the armed forces while awaiting the adjudication of his criminal trial and appeal by civilian authorities in a foreign country is not entitled to a reenlistment bonus based on such extensions since he was ineligible for reenlistment during that period and the bonus was not intended to be paid in such circumstances. B-193225, December 29, 1978.

Early release

Member who within 3 months of the expiration of his current enlistment or extension thereof, is discharged for the sole purpose of reenlisting, may not have that unexpired term of enlistment or extension thereof considered as "additional obligated service" for the purpose of determining the multiplier for Selective Reenlistment Bonus computation under 37 U.S.C. 308. 55 Comp. Gen. 37 (1975). See also B-200974, March 9, 1981, B-206550, October 27, 1982.

In Matter of Timm, B-206550, October 27, 1982, we held that notwithstanding agency regulations, no recoupment action need be taken when a service member who received a regular reenlistment bonus was discharged early for the purpose of immediate reenlistment for which a selective reenlistment bonus was payable. We effectively held that the recoupment regulations were inconsistent with the governing bonus statute and were therefore void effective on the date of enactment of the statute in 1974. Therefore, the Timm decision is to be applied retroactively, and a service member who had an improper recoupment action taken against him prior to the Timm decision may be refunded the amounts recouped. B-210827, September 21, 1983.

Creditable service

Member's period of authorized excess leave pending appelate review of his court-martial is creditable service for com-

puting period served on term of enlistment and, even though court-martial sentence was approved and discharge effected thereafter, period of such leave is not to be included in unexpired part of enlistment upon which computation of recoupment of reenlistment bonuses is based. 55 Comp. Gen. 1244 (1976).

Critical military skill

Member serving in a critical skill at the time of his reenlistment is entitled to a variable reenlistment bonus notwithstanding the fact that he reenlisted for the purpose of being trained and serving in a new critical skill since

such new skill was within the same occupational field as the old skill and the new skill would require the use of the old skill plus additional training and, thus, the old skill would continue to be utilized and not lost to the service. 53 Comp. Gen. 794 (1974).

Basis of reenlistment bonus

The United States Supreme Court's opinion in United States v. Larinoff, 431 U.S. 864 (1977), concerning military reenlistment bonuses, did not alter the fundamental rules of law that (1) a service member's entitlement to military pay is governed by statute rather than ordinary contract principles, and (2) in the absence of specific statutory authority the Government is not liable for the negligent or erroneous acts of its agents; hence, the amount of any reenlistment bonus payable to a service member depends on the applicable statutes and regulations, and in no event can the bonus amount be established through private negotiaton or contract between the member and his recruiter. 60 Comp. Gen. 257 (1981).

Where service member reenlists in reliance upon alleged representations that he would receive a certain amount as a Selective Reenlistment Bonus (SRB) and Army correctly pays a lesser SRB, member is not entitled to recover the additional amount promised on this basis since Government officers have no authority to contradict or nullify provisons of statutes of regulations. B-200974, March 9, 1981.

Date on which bonus payments are to be based

Selective Reenlistment Bonus payments for extensions of enlistments, authorized by 37 U.S.C. 308 (1976), must be based on the award level multiplier in effect on the date the extension agreement is executed rather than on the date the extension agreement becomes operative, in accordance with United States v. Larinoff, 431 U.S. 864 (1977). Comptroller General decisions to the contrary should no longer be followed. 58 Comp. Gen. 282 (1979).

If an individual enlists in a Reserve component under the Delayed Entry Program with a concurrent commitment to serve in Regular component for a period of at least 4 years in a skill designated as critical, the award level of the enlistment bonus authorized by 37 U.S.C. 308a (1976) must be fixed on the date of enlistment in the Delayed Entry Program, rather than on the date of entry on active duty. Payment of the bonus must, however, be contingent on the member's qualifying and serving in his designated military specialty. 58 Comp. Gen. 282 (1979).

Training for a commission

The variable reenlistment bonus as an additional inducement to first-term enlisted personnel, who possess military skills in critically short supply, to reenlist so the skills are not lost to the service, is not payable to an enlisted member who was discharged and reenlisted while undergoing training in a program which will ultimately qualify him for admission to one of the service academies, as there is no relationship between an enlisted member's critical skill and his successful completion of the academy preparatory program, and the fact that a member would revert to enlisted service in his critical skill if he does not successfully complete the program provides no basis to pay him a variable reenlistment bonus. 52 Comp. Gen. 572 (1973).

Retraining

A reenlistment that was not for the purpose of continuing the use of the critical skill a member held at the time of his reenlistment but was for the purpose of retraining the member does not create entitlement to the variable reenlistment bonus. Since the military service will not receive the exact benefit intended from the bonus because it will neither have the continued use of the critical skill possessed nor avoid the necessity of training a replacement in the skill; therefore, when it is known at the time of reenlistment that a member will not continue to utilize the critical skill upon which payment of the variable reenlistment bonus is based, payments may not be authorized. 52 Comp. Gen. 416 (1973).

D. Medical - Dental - Extended Service

Active duty agreement required

Officer Cannot Produce Copy of Agreement

Where a Public Health Service member claims Variable Incentive Pay but is unable to produce the original or either of the copies of a Variable Incentive Pay agreement executed within a time limitation set by the Public Health Service regulations, the claim for retroactive payment must be denied in absence of some evidence that agreement was executed. B-188963, August 9, 1977.

Officer Failed to Sign Agreement Because he Intended to Retire

An Air Force medical officer seeks retroactive payment of additional special pay covering a period of 1 year, but he did not execute the required written agreement to remain on active duty for that period of time. Although he did remain on active duty for another year, at the time he

should have executed the agreement, he declined to do so because he was planning to retire within less than a year. In the absence of administrative error and the intent on his part to remain in the service for another year, he is not entitled to payment as claimed. B-214118, June 1, 1984.

"Voluntarily" fails to complete commitment

Under the statute authorizing Variable Incentive Pay to medical officers of the uniformed services who undertake active duty commitments and requiring a refund of incentive pay from an officer who "voluntarily" fails to complete his commitment, the early resignation of a Public Health Service (PHS) medical officer must be regarded as "voluntary" despite the officer's assertion that he felt he had no

choice professionally but to resign when the PHS did not provide him with laboratory facilities and secretarial services promised him at the time of his recruitment. B-200113, February 13, 1981.

VIP Contracts Are Binding

An existing Variable Incentive Pay (VIP) agreement under 37 U.S.C. 313, may not be renogotiated to a lesser commitment by executing a second VIP contract, even if it had been received by the proper officials. Terms of the first VIP contract are binding on the parties and where the active service agreed to is not completed the officer is subject to the refund provisions of the contract, 37 U.S.C. 313, and the regulations requiring repayment of amounts received for which service was not performed. 58 Comp. Gen. 77 (1978). See also: B-192285, December 15, 1978.

One Year Requirement

A medical officer of the Public Health Service signed a 1-year variable incentive pay agreement, but voluntarily left the service to accept employment in a civilian capacity with a different agency before completing the agreed-upon service. Since regulations promulgated under 37 U.S.C. 313, apply only to the uniformed services and do not apply to other Government service and since they provide that no part of the payment is earned unless the medical officer serves a minimum of 1 year with the Public Health Service, the payment made upon execution of the agreement must be refunded. B-201118, May 21, 1981 and March 23, 1982.

Extramural Training

Where Public Health Service (PHS) regulations prescribe that training received in a non-PHS facility shall be classified as extramural training, thereby giving rise to an active duty obligation and a reduced entitlement to variable incentive pay (VIP), it is within the authority of the PHS to prescribe such regulations and thus limit an officer who received 45 months of training in non-PHS facilities to a reduced amount of VIP. B-200975, July 20, 1981.

Intention to execute agreement

When, due to administrative error commissioned officer was not considered for continuation pay prior to date he became eligible for such, and, as a result, Continuation Pay Voluntary Service Agreement was not sent to him until months later, entitlement to continuation pay for period from date of eligibility to date when form was actually executed is not precluded since record shows that he did intend to

serve additional year and would have timely executed such agreement had it been sent to him. B-186925, November 4, 1976.

Commissioned officers of the Public Health Service executed Variable Incentive Pay (VIP) contracts on a date later than the date of reporting to active duty because of lack of information or misinformation or lack of forms. These officers may be paid VIP for the period of duty required by their active duty orders. They may also be released from active duty prior to dates of expiration in their VIP contracts, and if the payments have been made and the officers do not complete the duty in accordance with the VIP contract, collection action on these payments need not be taken. B-192338, September 19, 1978.

Exempt from induction

Medical officer's active duty with the Army was deferred under the Berry Plan which permitted deferrals during internship and residency for individuals subject to induction under the Military Selective Service Act; however, since member was exempt from induction he shouldnot be considered to have disqualifying active duty obligation for purposes of variable incentive pay to physicians pursuant to 37 U.S.C. 313, B-169556, November 4, 1976. See also 60 Comp. Gen. 403(1981).

Performance of active duty required

The entitlement to the "continuation pay" authorized by 37 U.S.C. 311 for medical and dental officers who by written agreement consent to extend their active service--payment to be made in installments for each additional year of committed service, contingent upon the performance of active duty--ceases upon the death, whether by misconduct or otherwise, of a medical specialist who had extended his service, and the installments of "continuation pay" due and payable to the officer had he lived may not be paid to any other person, section 311(b) permitting no exception to the requirement for the performance of active duty for entitlement to the special pay authorized for continued active service of medical specialists. 48 Comp. Gen. 122 (1969).

V. ADDITIONAL PAY

A. Naval Enlisted Members Retention Pay

Periods of hospitalization

The retention of enlisted members of the naval service on active duty on vessels in foreign waters after the expiration of enlistment is an involuntary change in the contractual relationship which gives rise to entitlement to

the 25 percent increase in basic pay, whereas the retention of members after expiration of enlistment for an indefinite period while undergoing medical care or hospitalization must be with the member's consent and for his benefit and the element of involuntary retention ends; therefore, upon transfer to a hospital for treatment the increase under 10 U.S.C. 5540 terminates, whether the enlisted man is a member of a Regular or a Reserve component. 38 Comp. Gen. 691 (1959).

Obligated service

The retention of Navy enlisted men on active duty on vessels in foreign waters after the expiration of the term of enlistment is regarded as an involuntary change in the enlistment contract entitling the members to the 25 percent increase in pay provided in 10 U.S.C. 5540 even though by law, 50 U.S.C. App. 454(d), the members are required to continue in a Reserve status for the balance of 8 years of obligatory service after completion of the enlistment contract. 37 Comp. Gen. 178 (1957).

Reserve members

Enlisted members of the Naval Reserve who are serving on vessels in foreign waters when their period of obligated service expires but who are not retained on active duty beyond the termination of enlistment are not entitled to the increased pay provided by 10 U.S.C. 5540; however, if the Reserve member is retained beyond the normal date his term of enlistment would expire, he becomes eligible for the increase pay. 36 Comp. Gen. 709 (1957).

CHAPTER 3 - ALLOWANCES

I. BASIC ALLOWANCE FOR SUBSISTENCE (BAS)

A. Officers

Generally an officer entitled to basic pay is entitled to BAS at all times, regardless of grade or dependency status. However, officers provided with meals by the United States must pay for such meals either by cash or by collections from pay; and officers who are furnished meals by non-Federal sponsoring agencies in connection with student scholarship programs, and as intern or resident physicians or Nurse Corps officers or candidates, are not entitled to BAS. Table 3-1-1, DOD Pay and Allowances Entitlements Manual. 30 Comp. Gen. 246 (1950). See also 40 Comp. Gen. 169 (1960), and B-188256, March 10, 1977.

B. Enlisted Members

Generally

Officers are not subsisted in kind but are paid a monthly subsistence allowance and are required to provide their own meals. However, under normal circumstances enlisted members are subsisted in kind and, under the express language of the law, the allowance does not accrue when enlisted personnel are subsisted at Government expense. 43 Comp. Gen. 94 (1963).

Rations in kind not available or impracticable

Determination of installation commander--The determination of impracticability for subsistence in kind to be furnished by the Government is the responsibility of the installation commander, but where such determination is based on improper factors, the General Accounting Office will refuse to recognize the determination as conclusive. 42 Comp. Gen. 558 (1963).

Distance between residence and mess--While distance and availability of Government transportation between place of duty and place of mess are factors to be considered in determining the availability of rations in kind, distance between place of residence and place of mess are not proper factors for consideration. 42 Comp. Gen. 558 (1963).

Member's marital status--An enlisted member's dependency or marital status, in and of itself, does not constitute a proper basis for determining that furnishing of rations in kind would be impracticable, and the fact that a member does not utilize Government messing facilities because he

desires to dine with his family, which arrangement is necessarily for his own convenience, does not warrant a conclusion that rations in kind are not available or that it would be impracticable for the Government to furnish subsistence in kind within the contemplation of the statute and the regulations. 39 Comp. Gen. 614 (1960).

Permission to mess separately

Where member applied for separate rations because he intended to live off post with his family, and written orders were issued confirming verbal orders authorizing separate rations more than a year after the purported issuance of such verbal orders, claim for spearate rations allowance was properly denied in the absence of full administrative disclosure of all the facts and circumstances surrounding the issuance of verbal orders and the circumstances which prevented a prompt written confirmation. B-169677, May 22, 1970. See also B-197888, November 18, 1980.

II. BASIC ALLOWANCE FOR QUARTERS (BAQ)

A. Availability of Government Quarters

Need to use existing quarters

Commanding officers who in the assignment or nonassignment of public quarters to members of the uniformed services have the duty to accomplish the maximum practicable occupancy of Government quarters and to issue a written statement or certificate to members upon the assignment or nonassignment of quarters--and a member's personal desire provides no basis for the nonassignment of available quarters. However, the commander may be granted some latitude as to whether the assignment of quarters would be more costly to the Government than the payment of BAQ, since there is no requirement that all available quarters must be occupied. Determinations should be made on an individual basis and an approved allowance supported by a written certificate or statement 52 Comp. Gen. 64 (1972). See also 57 Comp. Gen. 194 (1977); and B-187222, May 6, 1977.

Conclusiveness of certificate of nonavailability

Member without dependents who vacated Government quarters and secured private quarters of his choice was not entitled to BAQ, even though the installation commander provided him with a certificate of nonavailability of quarters, since in fact adequate public quarters were available to him and the commander's certification was therefore not conclusive. 39 Comp. Gen. 561 (1960).

Quarters assigned before household goods arrive

Although 37 U.S.C. 403 provides for the payment of BAQ when because of orders by competent authority the dependents of a member are prevented from occupying assigned quarters, where the Government arranges for the movement of the household goods of an Army officer to family-type quarters designated adequate and the move is not accomplished by the effective date stated in the assignment orders, nevertheless payment of BAQ with dependents to the officer may not be continued beyond the effective date of the quarters assignment, as the transportation contract does not constitute the "competent authority" required to create entitlement to the allowance after the effective date of the assignment. 50 Comp. Gen. 174 (1970).

Family quarters available but dependents do not join member

Member who was assigned public family quarters but whose family later elected not to join the member at his new permanent duty station, was properly terminated from assignment to such quarters, and he then became entitled to BAQ as a member with dependents even though adequate Government quarters were available at the duty station. 48 Comp. Gen. 216 (1968). See also 59 Comp. Gen. 291 (1980).

Quarters aboard ship while traveling

The fact that a member occupies accomodations aboard a ship as a passenger en route to his new permanent duty station does not affect his basic allowance entitlement under 37 U.S.C. 403 in view of the rule that accommodations furnished members and their dependents while traveling incident to a change of station are not considered the equivalent of public quarters. 48 Comp. Gen. 40 (1968).

Occupancy of temporary quarters after PCS

Thirty-day rule, generally--The occupancy by member and his dependents of visiting officers quarters for a period of less than 30 days at his new permanent duty station while awaiting the assignment of suitable on-base housing does not deprive him of entitlement to a basic allowance for quarters for the period of the temporary occupancy, section 403 of Executive Order No. 11157, dated June 22, 1964, providing for such temporary occupancy without loss of basic allowance for quarters for a period not to exceed 30 days while a member is in a duty or leave status "incident to a change of permanent station," and the right to the allowance is not affected by a more temporary occupancy of the visiting quarters resulting from the movement of the officer's dependents incident to a permanent change of station. 45 Comp. Gen. 589 (1966).

A member of the uniformed services may not occupy temporary lodging facilities, built and maintained with appropriated funds, in excess of 30 days at his permanent duty station incident to a permanent change of station, without a loss of basic allowance for quarters and variable housing allowance since applicable regulations prohibit it. However, the services may amend the regulations to authorize payment for periods in excess of 30 days in certain deserving cases. B-208762, April 14, 1983.

Temporary occupancy of "rental" vs. "public"quarters--A member of a uniformed service may occupy temporary lodging facilities in excess of 30 days incident to a PCS transfer without loss of BAQ if a substantial "rent" for such quarters is charged to cover direct operating costs, loan repayment, repairs, etc., and which quarters are acquired and operated with nonappropriated funds. 56 Comp. Gen. 850 (1977).

Occupancy of temporary quarters-No PCS

Seven-day rule, generally--Service members married to each other while awaiting adequate family-type housing for 17-day period, resided in transient housing at their duty station for which they paid nominal service charge. Although members who occupy transient quarters for a nominal service charge are considered to be in assigned rent-free and adequate Government quarters, the members are entitled to receive BAQ for 7 days under the authority of Executive Order No. 11157, Part IV, Section 403(a), June 22, 1964, as amended. B-198081, February 26, 1981.

B. Adequacy of Government Quarters

Voluntary occupancy of inadequate quarters

Member who voluntarily elects to occupy inadequate Government quarters should not thereafter be permitted to use their inadequacy as a basis for payment of BAQ. 40 Comp. Gen. 169 (1960).

Duty assignment in barracks

Military member, who is an OSI Special Agent, ordinarily would have been entitled to live off base and receive BAQ did not do so because he was assigned "suitable" Government quarters incident to his duties as an OSI Special Agent performing an investigation. In this case, although he was assigned Government quarters pursuant to his duties as an undercover investigator and not because of his basic military status, he is denied BAQ as he incurred no expense for privately financed housing during the time he occupied Government quarters. B-199728, May 8, 1981.

Members under confinement

Where a member is ordered into pretrial confinement in a guard house or brig and is subsequently either acquitted at the trial or convicted but with any sentence to confinement set aside, such pretrial Government "quarters" may be considered neither adequate nor voluntarily occupied, and the member is entitled to BAQ for the period of confinement. 40 Comp. Gen. 169 (1960). See also 40 Comp. Gen. 715 (1961).

(BAQ) is not authorized when a member, without dependents, is convicted by court-martial, which does not direct forfeiture of allowances, and the member is sentenced to confinement in a guardhouse, brig, correctional barracks or Federal penal institution, regardless of whether the member was receiving BAQ prior to confinement or his assigned quarters were terminated, provided the sentence is not overturned or set aside. 40 Comp. Gen. 169 (1960) and 40 Comp. Gen. 715 (1961) distinguished. 60 Comp. Gen. 74 (1980).

Crew of two-crew nuclear submarines

Navy members without dependents attached to two-crew nuclear-powered submarines who are temporarily serving ashore for more than 15 days during periods of training and rehabilitation at a station where quarters are inadequate for assignment to members on either permanent or temporary duty may be credited with BAQ. 47 Comp. Gen. 527 (1968).

C. Adequacy of Allowance

Generally

The statutory purpose of BAQ authorized by 37 U.S.C. 403 is to reimburse a service member for personal expenses incurred in acquiring non-Government housing when rent-free Government quarters "adequate for himself, and his dependents," are not furnished. The Family Separation Allowance, Type II-R, authorized by 37 U.S.C. 427(b)(1) has a separate and distinct purpose, i.e., to provide reimbursement for miscellaneous expenses involved in running a split household when a member is separated from his dependents due to military orders, and it is payable irrespective of the member's eligibility for a quarters allowance. 60 Comp. Gen. 154 (1981).

Extraordinary expenses

Where a member of a uniformed service stationed overseas incurs expenses for housing in excess of the amount authorized to be paid to him for BAQ and overseas station allowances, his claim for extraordinary expenses to cover the additional cost must be denied. No authority exists for payment of extraordinary expenses and a member may only be paid allowances for housing and living expenses authorized by law and regulations. B-195941, October 18, 1979. B-197982, February 26, 1981.

Utility expense

Member in Government housing for which he pays rent and utilities while assigned to Panama Canal Government may not

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Utility expense

Member in Government housing for which he pays rent and utilities while assigned to Panama Canal Government may not

be reimbursed for electric costs under 10 U.S.C. 4593 in addition to BAQ, since BAQ covers both rent and extra utility expenses. B-194847, June 19, 1981.

D. Members Without Dependents

While on sea or field duty

The prohibition contained in 37 U.S.C. § 403(c) against payment of BAQ to members without dependents while on field or sea duty of 3 months or more applies to temporary as well as to permanent duty assignments. 59 Comp. Gen. 486 (1980). See also 59 Comp. Gen. 192 (1980); B-201746, June 26, 1981; 60 Comp. Gen. 596 (1981); B-195691, November 16, 1982.

While occupying transient quarters upon transfer

Members without dependents under permanent change-of-station orders authorizing leave en route who occupy transient type quarters before departing the old station or upon arrival at the new station may be paid BAQ not to exceed 30 days of such occupancy whether or not in a leave status. 45 Comp. Gen. 347 (1965).

While traveling between permanent stations

To the extent that members without dependents are not assigned Government quarters while traveling, or during delays en route, they are entitled to BAQ from date of departure from the old station to the date of arrival at the new station overseas, including periods while in a per diem or group travel status for the overseas portion of the travel, the accomodations furnished during such travel not being regarded as the assignment or occupancy of public quarters within the meaning of 37 U.S.C. 403(b). 48 Comp. Gen. 40 (1968).

Transfer between vessels having same home port

A transfer from one vessel to another where both vessels are home-ported in the same area not constituting a permanent change of station within the purview of Executive Order Np. 11157; implementing 37 U.S.C. 403, and the transfer not coming within the exception contemplated by the Executive order, which permits the occupancy of Government quarters without loss of BAQ while a member is in a leave or duty status incident to a change of permanent station, members without dependents who occupy transient quarters incident to a transfer from one vessel to another in the same home port are not entitled to BAQ for the period of occupancy of transient quarters. 48 Comp. Gen. 40 (1968).

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Temporary and Permanent assignments--The prohibition contained in 37 U.S.C. § 403(c) against payment of BAQ to members without dependents while on field or sea duty of 3 months or more applies to temporary as well as to permanent duty assignments. 59 Comp. Gen. 486 (1980). See also 59 Comp. Gen. 192 (1980); B-201746, June 26, 1981; 60 Comp. Gen. 596 (1981); B-195691, November 16, 1982, B-211380, October 12, 1983.

Assigned to Multinational Force of Observers--An Army officer who had no dependents is not entitled to a quarters allowance for the period (which exceeded 3 months) he was assigned to temporary duty in Sinai with the Multinational Force and Observers monitoring the implementation of the Egyptian-Israeli peace treaty. During such duty he apparently was furnished quarters by the Government and his household goods were stored at Government expense. Since duty with the Multinational Force is determined to be "field duty;" he may not receive a quarters allowance because 37 U.S.C. § 403(c) precludes payment of the allowance to a member on field duty in these circumstances. B-209342, June 1, 1983; affirmed B-209342, October 10, 1984.

While on Temporary Duty with Unit Deployed Ashore

A Navy member, detached from his permanent station, with orders to report directly to a patrol squadron deployed (temporary additional duty) ashore overseas, without first reporting to the unit's permanent station in California, is assigned Government quarters at the squadron's deployed site. He is not entitled to basic allowance for quarters, since 37 U.S.C. 403(f) precludes entitlement to basic allowance for quarters when a member performing temporary duty incident to a permanent change of station occupies Government quarters. B-216027, December 26, 1984.

While occupying transient quarters upon transfer

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Navy members above E-6 assigned to a ship

A naval officer or enlisted member above grade E-6 who is "without dependents" is entitled to a basic allowance for quarters while assigned to a ship at its homeport if he elects not to occupy available Government quarters. The member continues to receive the allowance for the first 90 days the ship is deployed. He is also entitled to receive the allowance for 90 days after transfer to a deployed vessel if the homeport of that ship is the same as the homeport of his previous assignment and he was receiving the allowance at the homeport at the time of the transfer. B-211380, October 12, 1983.

After basic training before permanent assignment

An enlisted member without dependents in pay grade E-4 (less than 4 years' service) or below while performing temporary duty between the date he completes basic training and the date he receives orders naming a permanent duty station to which he will report on completion of temporary duty is not in a travel status and is entitled to BAQ when Government quarters are not available to him while serving at the place of performance of his basic duty assignment, which may be regarded as his permanent station for this purpose. 53 Comp. Gen. 740 (1974).

"Partial BAQ" for single members assigned to public quarters

Generally--A member assigned Government single type quarters (barracks), who is therefore ineligible for regular BAQ under 37 U.S.C. 403(b) is entitled to "partial BAQ" under 37 U.S.C. 1009(d). 58 Comp. Gen. 136 (1978). See also 57 Comp. Gen. 194 (1977).

Assignment to family type quarters--A single member without dependents is not entitled to partial BAQ under 37 U.S.C. 1009(d) when assigned to family quarters since partial BAQ is intended to be paid to low-value Government single quarters, not higher value family quarters. 56 Comp. Gen. 894 (1977). See also B-206980, November 4, 1982, to the same effect when a Government-leased apartment is occupied.

E. Members With Dependents

Dependency determinations

Under 37 U.S.C. § 403(h) the Secretary of the service concerned may make dependency and relationship determinations for enlisted members' quarters allowance entitlements and the determinations are final and may not be reviewed by the General Accounting Office. However, that provision does not apply to officers and the Comptroller General renders decisions in officers' cases and also in enlisted members' cases when requested by the service. In the interest of uniformity it seems appropriate to forward doubtful cases to the Comptroller General for decision particularly where an officer is married to an enlisted member. 62 Comp. Gen. 666 (1983).

Common-law marriage

Member who entered into a common-law marriage in Texas, where such marriages may lawfully be contracted, is legally married under Texas law and may claim his spouse as a dependent for increased BAQ purposes. B-186179, June 30,

1976. But a claim for BAQ at the with dependennt rate based on a Texas common-law marriage is too doubtful to permit payment where there is conflicting evidence pursuant to an agreement to cohabitate as man and wife and held each other out to the public as husband and wife. B-191316, September 27, 1978.

Divorce pending appeal

Naval officer's entitlement to BAQ at the with dependent rate for spouse does not automatically terminate upon issuance of decree of divorce where, under governing State law, the finality of the divorce decree is suspended when the judgment is appealed and although on disposition of the appeal the original judgment becomes final, the member is

considered as having a lawful spouse during the pendency of the appeal. Under applicable regulations, member's entitlement to BAQ for spouse continues until appeal is resolved provided, however, that member proves that he actually provided support for spouse during pendency of appeal. B-200198, August 17, 1981.

Living apart

An Army officer lived apart from his wife for 1 year prior to their divorce, without a legal separation, during which time although he made no direct payments to her, he indicates he provided her with various types of indirect monetary support by paying joint obligations, etc. In these circumstances the payments made to him of basic allowance for quarters, and variable housing allowance at the with-dependents rate need not be recouped. B-208650, March 21, 1983.

Family evacuated to safe haven

Government quarters occupied--When the dependents of a member are evacuated under emergency conditions from assigned Government quarters at his permanent station and occupy Government housing facilities at a safe haven area, considered voluntary occupation of adequate quarters as the dependents are not required to occupy the quarters, nor is rent paid for the facilities, the member not having incurred any personal expense is not entitled to payment of BAQ for dependents in order to reimburse a member for the expenditure of personal funds, and the member, not entitled to BAQ, also is not entitled to a family separation allowance. 46 Comp. Gen. 869 (1967).

Same - short duration of evacuation--A member who must continue to maintain and pay rental for private housing in anticipation of the return of his dependents evacuated to Government housing facilities at a temporary safe haven for a relatively short period pending further transportation to a designated place, or return to the place from which evacuated, during which time he occupies single-type quarters at his permanent station, may continue to be credited with BAQ on account of dependents and family separation allowance until his dependents are authorized to return to the member's permanent duty station or arrive at the designated place contemplated by applicable regulations. 47 Comp. Gen. 355 (1968).

Entitlement based on child support

General rule--Divorced service member assigned barracks quarters, but also paying child support for private living quarters for dependent children, is entitled to BAQ at "with dependent" rate since he has not been furnished Gov-

ernment quarters "for himself, and his dependents" under 37 U.S.C. 403. But if member remarries and is reassigned Government family quarters, entitlement to BAQ ceases even though child support obligation remains unchanged; member has then been furnished quarters "for himself, and his dependents," and in fact that some dependents for personal reasons cannot join him in family quarters is no basis for continued BAQ payments. 48 Comp. Gen. 28 (1968). See also 59 Comp. Gen. 681 (1980); and B-200946, December 15, 1980.

Legal custody in third party--entitlement rules where both members provide support--Where two military members are divorced, or legally separated, the children of the marriage are in the legal custody of a third party, and each member is required to pay child support to the third party, only one of the members may receive the increased basic allowance for quarters ("with-dependent" rate) based upon these common dependents. If the members are unable to agree as to which should claim the children as dependents, the parent providing the greater or chief support should receive the increased allowance, unless both members provide the same amount of support, in which case the senior member should receive the increased allowance. B-216022, B-215284, December 3, 1984.

Showing that support is being paid--Member who gave his wife at the time of their divorce a promissory note for $1,500 that was being reduced in the amount of $30 per month was not entitled, in the absence of a definitive court decree requiring child support payments for the son born of the marriage, to BAQ for the child who was in the custody of his mother since the payments were not support payments and there was no showing any part of the monthly payments were used to support the child. 52 Comp. Gen. 454 (1973). Member whose former wife refused his child support payments not entitled to BAQ on behalf of child, even though member put payments in irrevocable trust with child as beneficiary. B-195383, November 6, 1979.

Member has legal custody but not control--Member who is given custody of his minor child at the time of divorce from his wife is not entitled to increased BAQ under 37 U.S.C. 403 on account of the child until he gains control of the child or contributes to the child's support, the purpose of section 403, is to partially reimburse members for the expense of maintaining private quarters for their dependents and not to grant the higher allowance as a bonus merely for the technical status of being married or a parent. 42 Comp. Gen. 642 (1963).

Supported children occupying Government quarters--A Navy officer who, pursuant to a divorce agreement, contributes to the support of his children who live with the member's former wife and her second husband, an Air Force officer--in assigned public quarters is regarded as having his dependent children occupying public quarters to preclude payment of BAQ on behalf of the children. 44 Comp. Gen. 713 (1965). See also 58 comp. Gen. 100 (1978).

Same - while member is in transient status--A navy officer contributing to the support of his children, who are occupying the public quarters assigned to their stepfather, an Air Force officer, is properly denied payment of BAQ on behalf of his children while on sea duty and after assignment of quarters at his new permanent station, but is entitled to payment of a quarters allowance for the period that he was in a leave and transient status between the sea duty and the furnishing of quarters at his new permanent station, an interim period during which he did not occupy public quarters. 45 Comp. Gen. 146 (1965).

Adopted children

The child adopted by a member under an interlocutory decree, followed by the issuance of a final order of adoption, the governing State statute providing that from and after the entry of the interlocutory order of adoption the child for all intents and purposes shall be the child of

the person adopting him, may be regarded as the legitimate child of the member from the date of issuance of the interlocutory decree to determine her entitlement to a basic allowance for quarters under 37 U.S.C. 403. 44 comp. Gen. 417 (1965).

An Army officer claims basic allowance for quarters and variable housing allowance at the with-dependents rates on account of her adopted son during the probationary pre-adoption period (prior to the court's entry of a final adoption order), as the child resided in her household during that time. She is not entitled to the allowances claimed because under the controlling state (Alabama) adoption statutes, a legal adoption had not been effected during that period. B-214017, February 23, 1984.

Illegitimate children

An unmarried member who, although acknowledging the paternity of an illegitimate child and contributing to the support of the child, has not established a home in which his child lives with him as a member of his family, may not be credited with increased BAQ on account of the child, the law of the State of California, the place of birth of the child and the residence of all the parties requiring, in addition to acknowledging an illegitimate child, that a father receive the child into his family and treat the child as his legitimate offspring. 48 Comp. Gen. 311 (1968).

Mother

Former member seeks waiver of a debt which arose as a result of "with-dependents" basic allowance for quarters which he received on account of his mother, who did not qualify as his dependent. Since he was timely informed of her ineligibility as his dependent for the purpose of his entitlement to the allowance, he was on notice of the overpayment and, therefore, is not without fault in the matter. Waiver of his debt is denied. B-212477, September 19, 1983.

Dependent in Confinement

Military member claims basic allowance for quarters at the with-dependent rate on account of her husband, a military member who is not entitled to pay and allowances due to his being in confinement under a 15-year prison sentence. The quarters allowance at the with-dependent rate is not authorized. The member may no longer be considered to have a dependent for quarters allowance purposes since the dependent will be absent for an extended period of time and the member is for all practical purposes absolved of the responsibility of providing quarters for her husband for the duration of his confinement. B-209744, February 1, 1983.

F. Women Members

Frontiero v. Richardson

Air Force member whose husband was a civilian not dependent upon the member for over one half of his support, was entitled to claim her husband as her dependent for purpose of obtaining increased BAQ. Frontiero v. Richardson 411 U.S. 677 (1973).

III. UNIFORM ALLOWANCES

A. Officers

Inclusion in back pay award

Air Force officer released from active duty on July 31, 1961, but who through judgment of the Court of Claims became entitled to "back pay, less appropriate offsets," and to be credited with active duty service through July 31, 1969, did not become entitled to uniform allowances for such eight-year period, since he was not required to wear any military uniforms during that time. 53 Comp. Gen. 813 (1974). Officer retroactively restored to active duty by Board for correction of Military Records is not entitled to uniform allowance upon actual return to active service. B-195129, April 28, 1980.

For Ready Reserve service

A Ready Reserve officer, including a former Regular officer transferred to the Reserves, is entitled to the $50 quadrennial reimbursement uniform allowance provided in 37 U.S.C. 416(a) if he has not become entitled to a uniform

reimbursement or allowance as an officer during the preceding 4 years. 42 Comp. Gen. 550 (1963).

Extended active duty allowance

Relationhsip to initial allowance--Non-Regular officers who have not been paid the initial uniform allowance provided by 37 U.S.C. 415(a)-(c) are not precluded from entitlement to the extended active duty uniform allowance authorized by 37 U.S.C. 416(b), such allowace being "In addition to" the initial uniform allowance authorized. Also, the fact that a nonregular officer had not received the initial uniform allowace does not bar him from qualifying for the extended active duty allowace, 43 Comp. Gen. 729 (1964).

Relationship to quadrennial allowance--Notwithstanding 37 U.S.C. 416(b) provides that the extended active duty uniform allowance is "In addition to" the quadrennial allowance provided by subsection 416(a), a non-Regular Officer may be paid the extended active duty allowance, the phrase "In addition to" not being a sound basis to conclude that the extended active duty allowance may not be paid unless a quadrennial allowance had been received. 43 Comp. Gen. 729 (1964).

On change from Regular to Reserve

An enlisted member of the Regular Marine Corps who when his temporary appointment as a Regular commissioned officer under 34 U.S.C. 350a, at which time he received an initial uniform allowance of $250, is being terminated and he simultaneously is discharged as an enlisted member and accepts a permanent commission in the Marine Corps Reserve is not entitled to the $100 additional active duty allowance provided by 37 U.S.C. 416(b), the member continued on an uninterrupted active duty career that makes him ineligible to receive an extended active duty uniform allowance upon initial entrace on duty as a Reserve officer. 44 Comp. Gen. 327 (1964).

On entering different service

A Marine Corps reserve officer who, within 2 years prior to appointment and active duty in the Corps, had served on active duty for more than 90 days as an officer in the Air Force Reserve, may not be paid an additional uniform allowance under 37 U.S.C. 416(b) on the basis of requiring implementing the authority in 37 U.S.C. 416(b) for payment of the allowance to a Reserve officer who requires a different uniform upon transfer to, or appointment in, another Reserve component. 45 comp. Gen. 116 (1965).

Entrance on duty as non-Regular

The entrance on active duty as a non-Regular officer less than 2 years after release from active duty as a Regular officer or enlisted man, or as an enlisted member of a Reserve component does not deny the officer the extended active duty uniform allowance of $100 that is in addition to the initial uniform allowance, the 2-year restriction in 37 U.S.C. 416-(b) (2) barring payment when a tour of duty commences with 2 years after completing a period of active duty of more than 90 days' duration having reference to active duty ordered in a non-Regular officer status for more than 90 days. 43 Comp. Gen. 265 (1963).

B. Enlisted Members

Change from Reserve to Regular

Air Force Reserve enlisted member who was issued clothing to complete his initial clothing issue requirements upon his recall to extended active duty in 1968 and who did not turn in clothing incident to his discharge from that duty for purpose of enlistment in the Regular Air Force in 1969, was not entitled to an initial clothing monetary allowance at the time of Regular Air Force enlistment under the provisions of Chapter 5, Part Three, of the Department of Defense Pay and Allowance Entitlements Manual. B-184236, February 12, 1976.

Lost clothing allowance to survivors

Where enlisted member is furnished clothing or a monetary allowance in lieu thereof, and his military clothing is lost, damaged, destroyed, abandoned or otherwise rendered unserviceable and such loss was not caused by any fault or negligence on his part, he may maintain a claim for compensation for the loss. However, if the member is deceased, his survivors have no right to compensation for the loss, the right being personal and not extending beyond the member's life. 52 Comp. Gen. 487 (1973).

IV. DISLOCATION ALLOWANCE (DLA)

A. Permanent change of Station

Ordered to change quarters, no PCS

Military members required to involuntarily relocate their households incident to base closings in Japan under Kanto Plain Consolidation Plan, without permanent changes of station, may not be paid DLA under 37 U.S.C. 407(a), nor may they be paid such allowance pursuant to 37 U.S.C. 405a since the relocations were not evacuations incident to unusual or emergency circumstances. 55 Comp. Gen. 932 (1976). See also B-203526, March 4, 1982.

Payments based on alert notice not allowed

A member of the uniformed services who relocates his household incident to an official alert notification, but prior to the issuance of permenent change-of-station orders providing for his transfer to a restricted area overseas, is not entitled to payment of DLA prescribed by 37 U.S.C. 407 incident to the authorized move of dependents predicated on a member's permanent change-of-station orders, section 407 providing no authority for the payment of DLA in unusual or emergency circumstances. 46 Comp. Gen. 133 (1966).

Move off ship when quarters uninhabitable

The home port of vessel was changed and quarters aboard were declared to be uninhabitable due to reconstruction. Naval officer, without dependents, who had been quartered aboard vessel was required to obtain non-Government housing since other Government quarters were unavailable. The officer is not entitled to DLA allowance since for this purpose the permanent station of the officer is his ship, and not the home port, and the allowance is paid incident to a change of permanent station. B-184289, September 16, 1975.

B. Personal Reason for Changing Residence

Delayed move

An Air Force officer who more than 2 years after issuance of permanent change-of-station orders transferring him from a hospital assignment to the area where he had served as a ROTC Staff member and where his dependents continued to reside, moved his dependents to on-base housing as his presence was required on the base, is not precluded by the delayed move from entitlement to dependent travel and DLA no time limitation being imposed on the exercise of the right to dependent travel incident to a permanent change-of-duty station, and the fact the move was delayed for personal reasons pending the sale of the officer's house does not affect his right to move his dependents at Government expense during the period his orders remain in effect and prior to receipt of notice of a further change of station. 45 Comp. Gen. 589 (1966.)

Family move not related to PCS

Navy member who had permanent change of station to a ship at Norfolk, Virginia, in July 1971 (subsequently at Philadelphia, Pennsylvania), and upon reassignment to another ship at Norfolk, Virginia, in February 1972, moved his dependents and relocated his household in November 1973, to a location 36 miles from his former residence and there is no showing that the move was necessary as the direct result of the permanent change of station, is not entitled to dependent's

travel and DLA, nor to transporation of household effects at Government expense. B-183436, July 22, 1975. See also B-195941, October 18, 1979, B-206541, September 21, 1982.

Move before PCS orders issued

Army member who moved his dependents from Fort Benning, Georgia, to Florida in September 1977 in contemplation of his possible retirement in December 1977, but who withdrew his request for retirement and was eventually transferred to Germany in July 1978, may not be paid dislocation allowance in connection with his dependents' relocation in September 1977, since their move was not related to or necessitated by his subsequent transfer to Germany. B-193339, June 28, 1979.

Travel of family for visit

The expense of travel of dependents merely for the purpose of visiting the member, for pleasure trips, or for other purposes not contemplating a change of the dependents' primary residence in connection with a change of the member's permanent station is not an obligation of the Government. However, where Marine Corps member was assigned from California to Okinawa in August 1972 on a 12-month unaccompanied tour of duty; his dependent wife vacated their California residence in March 1973; his wife then traveled to Asia to visit him until June 1973; and his wife then established a residence with her foster parents in Georgia and remained there 12 weeks until his reassignment back to California; sufficient evidence existed that dependent wife had established bona fide residence in Georgia in conjunction with member's PCS assignment. Member was therefore entitled to claim DLA and dependent travel allowance incident to dependent's move from California to Georgia in June 1973 and to further claim DLA and dependent travel allowance incident to dependent's move from Georgia back to California in September 1973, B-182440, November 4, 1975.

C. More Than One PCS In A Year

A member who incident to overseas transfer orders amended to reassign him within the United States moves his dependents during a fiscal year to a selected permanent residence and then to his new duty station, for which move he was paid DLA, may not be paid a second DLA, 37 U.S.C. 407 limiting payment in connection with a permanent change of station to one dislocation allowance in a fiscal year, unless the exigencies of the service require more than one change. 49 Comp. Gen. 231 (1969).

D. Orders Amended Or Revoked

Overseas PCS revoked after move

37 U.S.C. 406a, providing additional travel and transportation allowances when orders amended or revoked, has no application to DLA authorized by 37 U.S.C. 407, and therefore member who relocated dependents to another residence within the United States pursuant to PCS orders assigning him overseas was not entitled to DLA incident to such dependent move, where such orders were revoked. 44 Comp. Gen. 522 (1965).

Revocation after vacating quarters

Where permanent change of station orders assigning member from Kansas to South Carolina were rescinded, member was not entitled to DLA, even though he had vacated private quarters and expended money for a variety of goods and services in preparation for the contemplated transfer. B-179110, June 18, 1974.

Change from overseas move to within U.S.

Where in contemplation of the deactivation of an Air Force Base an officer is selected for an overseas assignment at which he elected to serve unaccompanied by his dependents, but before the overseas orders were issued he was given a humanitarian assignment within the United States under orders issued about the same time the overseas transfer would have been made, the officer is entitled to reimbursement for the advance travel of his dependents and to DLA incident to his permanent duty station transfer within the United States. 42 Comp. Gen. 504 (1963).

E. Effect of Marital Status Disruption

Divorce en route to new station

Where a member en route to a new permanent duty station leaves his dependents at a place where divorce proceedings are begun and, a month later, after the member has gone decree requiring the member to contribute to the support of his minor children, his former wife and children travel to another location, the dependents' travel may be considered as being performed incident to the change of station for payment of DLA provided, that where during travel there is a disruption of the marital status, evidence shows that the member supplied or paid for transportation beyond the place the disruption occurred. 43 Comp. Gen. 47 (1963).

Divorce and early return of dependents from overseas

Where PCS orders are issued for return from overseas of Army member, wife and child, payment of travel expenses for wife and child may be made notwithstanding that prior to effective date of orders wife obtained divorce and custody of child and they no longer qualified as member's dependents. Since regulations at the time did not cover this type of case, authority for advance return of dependents may be used for such travel even though travel orders under that authority were not issued. Member is without dependents for purposes of dislocation allowance, however. B-191100, April 13, 1978.

Custody of children with spouse

Travel incident to authorized visit--A divorced naval officer whose former wife was given legal custody, care, and control of their children under a court order permitting them to visit with him during their summer vacation is considered to be a member without dependents within the meaning of the Joint Travel Regulations and, therefore, the fact that the children accompanied the officer when his permanent duty station was changed during their visit does not entitle him to reimbursement for their transportation or to DLA for the children since the travel of the children was not to establish a residence and neither their visiting status nor their residence was changed. However, since the officer was not assigned public quarters, he is entitled pursuant to 37 U.S.C. 407 to DLA as a member without dependents equal to his quarters allowance for 1 month. 51 Comp. Gen. 716 (1972). See also B-197384, August 12, 1980.

Temporary court order pending divorce--Where at the time of member's permanent change of station, divorce action against member's wife was pending in the court, and the child was in the legal custody of the wife under temporary court order, member is entitled to DLA purusant to 37 U.S.C. 407, as a "member without dependents" as defined by 37 U.S.C. 407(a) and the Joint Travel Regulations, since he would not be entitled to travel expenses of his dependents for the purpose of changing their place of residence and he was not assigned Government quarters. 53 Comp. Gen. 787 (1974). See also B-197144, July 22, 1980 and B-203354, February 8, 1982.

Informal agreement of spouse to modify custody--Payment of travel expenses and DLA to member incident to his dependent child's travel from where he was residing with his mother to the member's duty station is denied because divorce decree granted custody of child to the wife and wife's special power of attorney granting temporary custody of the child to the father without consent of the court is of no effect since parents lacked authroity to modify the custody provision of the final divorce decree. B-186308, July 22, 1976.

F. To First or From Last Permanent Station

Permanent vs. Temporary duty

Whether an assignment to a particular duty station is temporary or permanent is a question of fact and is for determination from a consideration of the assignment orders and the character of the assignment. Where member was ordered to active duty effective July 20, 1970; performed temporary duty at Fort Sam Houston, Texas, for approximately 5 weeks; then reported to his unit at Fort Bliss, Texas, on August 27, 1970; and proceeded to Europe on a unit move on September 2, 1970; the European assignment was on his first permanent change of station, so that payment of DLA was precluded by 37 U.S.C. 407(c). B-176614, January 9, 1973.

Travel to separation station

DLA is not payable to a member ordered from his permanent station to a processing or separation station for discharge and who subsequently reenlists without a break in service and is assigned a new permanent station by orders issued at the point of reenlistment. 36 Comp. Gen. 71(1956); 38 Comp. Gen. 405 (1958); B-135627, May 12, 1959.

Immediate reenlistment

An Army member who, subsequent to discharge and reenlistment overseas, remained at his overseas station sometime before returning to the United States for release but who, before the release was effected, was reassigned to new station in the United States may have the orders directing a release which was never accomplished regarded as a permanent change of station rather than a transfer to a separation point for discharge and a reenlistment whicih would preclude entitlement to DLA. Therefore, upon transfer to the new permanent duty station the member became entitled to DLA allowance. 43 Comp. Gen. 91 (1963).

Change from enlisted to officer status

An enlisted member who, after graduation from Officers Training School - which was the member's temporary duty station during the instruction period - is discharged and appointed as an officer at the old permanent duty station, without a break in service, and immediately reassigned to a new permanent duty station may have the orders, which discharged him from the service to continue as an officer, regarded as a detachment from the old station and assignment to the new station and, therefore, DLA incident to a change of station is payable to the member along with the transportation allowance for the dependent's travel to the new station. 43 Comp. Gen. 133 (1963).

G. Hospital Transfers

Prolonged hospitalization

A "permanent station" meaning a place where a member is assigned for duty, the definition of a permanent station in the Joint Travel regulations may not be broadened to include a hospital in the United States to which a member is transferrred for prolonged hospitalization from either a duty station or other hospital in the United States. However, chapter 9 of JTR's may be amended to authorize the DLA on the same basis dependents and baggage are trasported to a hospital, that is, "as for a permanent change of station," upon the issuance of a certificate of prolonged treatment. 48 Comp. Gen. 603 (1969).

Transfer to TDRL

A Navy officer detached from duty overseas and assigned to a a hospital "for study and treatment if indicated and appearance before a Medical Board and preretirement physical examination," who before moving his dependents maintained them for a short period in the vicinity of the hospital until he was placed on the temporary disability retired list, is entitled to DLA, since the Joint Travel Regulations, providing the allowance incident to a hospital transfer applies to the officer and not the provision which prohibits payment of the allowance in connection with separation release from active duty, placement on the disability retired list, or retirement, since at the time the officer's orders were issued there was only a possibility of retirement or transfer to the temporary disability retired list. 50 Comp. Gen. 579 (1971).

H. Vessel and Home Port Changes

Home port at former shore station

A naval member transferred to a ship that upon commissioning will have the same homeport as his old permanent station is not entitled to DLA authorized by 37 U.S.C. 407(a), the Joint Travel Regulations providing that DLA is not payable for any permanent change of station between stations located within the same corporate limits of the same city. 43 Comp. Gen. 474 (1963).

Vessels having same home port

A Navy member who upon reenlistment and prior to a July 27, 1963 transfer to a new permanent station returns on leave to his home of record, the Philippine Islands, where he married, and who on July 15, 1964 is transferred to another vessel at the same port is entitled to the transportation of

his wife and child, if the child was his dependent on July 27, 1963, and household goods from the Philippines to the home port of the vessels, pursuant to the Joint Travel Regulations incident to his first permanent duty station assignment upon reenlistment; however, DLA authorized by 37 U.S.C. 407, is not payable to the member either incident to the travel of his dependents to his first duty station, or incident to his transfer from one vessel to another with the same homeport, no permanent change of station having been involved in the vessel transfer. 45 Comp. Gen. 477 (1966).

Transfer between Home Port and Shore Station in same city

A Navy member was ordered to transfer from a vessel, whose home port was Mayport, to the Naval Air Station, Jacksonville, Florida. Transportation of dependents was not authorized and Government quarters were not provided at the new duty station. Both Mayport and the Naval Air Station are located within the corporate limits of Jacksonville, and under agency regulations where the transfer is between stations within the same city, no change of permanent station occurs. In the absence of a change of permanent station, regulations prohibit payment of a dislocation allowance, either on a with-dependent or without-dependent theory, even though the dependents were required to vacate Government quarters. B-215390, November 20, 1984.

Change in assignment after move

A Navy enlisted member relieved from duty on board the U.S.S. Black, home port Long Beach, California, and assigned to temporary duty at the Boston Naval Shipyard in connection with fitting out the U.S.S. Worden, home port San Diego, California, and to duty on board the vessel when commissioned, is entitled to payment for the advance travel of his dependents to Fall River, Massachusetts, in an amount not to exceed the monetary allowance for the distance between the two homeports - Long Beach to San Diego - and to a DLA, notwithstanding orders issued by the Worden directing the member to report to the U.S.S. Leahy at Boston (home port, Charleston, South Carolina), the transfer to be effected at no cost to the Government. Further, since the member having reported on board the Worden prior to being transferred, compliance with his initial orders directing a permanent change of station entitles him to transportation for his dependents not to exceed travel from Long beach to San Diego, and to DLA under 37 U.S.C. 406 and 407. 43 Comp. Gen. 810 (1964).

Vessels with different home yards

Navy member was transferred from one vessel to another vessel, both homeported in New York City, but with respective home yards at Boston Naval Shipyard and Charleston, South Carolina. Incident to transfer dependents traveled from

Detroit, Michigan, to East Meadow, New York. There is entitlement to DLA since permanent change of station, while between vessels homeported in the same city, was between vessels having different home yards not similarily located and since dependents performed authorized travel incident to that transfer. 54 Comp. Gen. 869 (1975).

I. *Member without Dependents*

Nonavailability of quarters

Furnishing quarters not economical--A member without dependents who is transferred to a permanent station and furnished a certificate of nonavailability of Government quarters on

the basis that it would be economically advantageous to the United States not to require him to occupy available quarters is entitled to DLA pursuant to the Joint Travel Regulations, implementing 37 U.S.C. 407(a). 52 Comp. Gen. 64 (1972).

Quarters aboard ship not inhabitable--Although a member without dependents who upon reporting to a submarine under permanent change-of-station orders is assigned quarters on board the submarine is not entitled to DLA authorized in 37 U.S.C. 407(a), he is entitled to the allowance if he reports to a nuclear-powered submarine that is undergoing overhaul or repair at its home port or home yard and quarters aboard the submarine are uninhabitable, if the member is not assigned quarters ashore, and lodging accommodations pursuant to 10 U.S.C. 7572(a) are not furnished him. 48 Comp. Gen. 480 (1969). See also 57 Comp. Gen. 178 (1977); and 59 Comp. Gen. 708 (1980).

Two crew nuclear submarines--A dislocation allowance may be paid to members without dependents of both the on-ship and off-ship crews of nuclear submarines, when they initially occupy permanent non-Government quarters at the new home port although the submarine is the permanent station for both crews. This is based on the view that Congress did not intend to preclude payment of the allowance when a member is not able to occupy quarters assigned to him and does incur the expense of moving into non-Government quarters. 59 Comp. Gen. 221 (1980).

Without dependent status

Spouse and children do not move--An amendment of the Joint Travel Regulations permitting treatment of a member with dependents who are authorized to travel with him to his new permanent station but who in fact, do not travel to the new station, as a member without dependents for purposes of receiving dislocation allowance, is not prohibited by 37 U.S.C. § 407. 48 Comp. Gen. 782 (1969) and similar decisions will no longer be followed. 59 Comp. Gen. 376 (1980). See also B-197545, September 4, 1980.

Parent does not move--The payment of DLA to an officer of the Army Nurse Corps as a "member without dependents" who is receiving a basic allowance for quarters as a member with dependents for her mother who will not join her at her new duty station where she was not assigned Government quarters depends on whether or not the mother resided with the officer at the old station. If she did not, the officer is entitled to a dislocation allowance pursuant to the Joint Travel Regulations in an amount equal to the applicable monthly rate of the quarters allowance prescribed for a member of the officer's pay grade without dependents, but if the mother did reside with her at the time of transfer, her

entitlement to transportation for the mother precludes payment of the allowance even though the mother may not have changed her residence. 52 Comp. Gen. 405 (1973).

Children of divorced member--A divorced naval officer whose former wife was given legal custody, care, and control of their children under a court order permitting them to visit him during their summer vacation is considered to be a member without dependents within the meaning of the Joint Travel Regulations and, therefore, the fact that the children accompanied the officer when his permanent duty station was changed during their visit does not entitle him to reimbursement for their transportation or to DLA for the children, since the travel of the children was not to establish a residence and neither their visiting status nor their residence was changed. 51 comp. Gen. 716 (1972). See also B-197384, August 12, 1980.

Dependents do not move on return from unaccompanied assignment--A Marine Corp officer moved his dependents and relocated his household to non-Government quarters in the vicinity of the Marine Corps Base, Camp Pendleton, California, in connection with his permanent change of station assignment to Okinawa, Japan, because he was not authorized to have his dependents accompany him. He received a dislocation allowance at the with-dependents rate incident to that relocation of his dependents. When he completed this assignment he was assigned on a permanent change of station to Camp Pendleton, and he joined his dependents in the residence they occupied when he transferred to Okinawa. In connection with his transfer from Okinawa to Camp Pendleton, where he was not assigned to Government quarters, he is entitled to a dislocation allowance as a member without dependents. B-215096, November 21, 1984.

J. Evacuation of Dependents

A member whose dependents, following evacuation from his overseas duty station to a temporary safe haven in Europe pursuant to 37 U.S.C. 405(a), again moved under orders authorizing further transportation to a place to be designated within the United States, etc., returned instead to his duty station, may not be paid DLA prescribed in 37 U.S.C. 407, the Joint Travel Regulations properly operating to deny the member DLA where they do not locate their household or establish a residence and, therefore, do not incur the relocation costs contemplated by 37 U.S.C. 407. 47 Comp. Gen. 575 (1968).

V. FAMILY SEPARATION ALLOWANCE

A. Terms:

The following abbreviations are used for allowances covered by this section.

FSA-Type I

Under 37 U.S.C. 427(a) a member may qualify for an allowance equal to the monthly BAQ (basic allowance for quarters) if he is not authorized to move his dependents to his duty station outside the continental United States or in Alaska at Government expense.

FSA-Type II

Under 37 U.S.C. 427(b) a member may qualify for an allowance currently $30 per month if:

FSA-R--his dependents are not authorized to accompany him to his permanent duty station at Government expense,

FSA-S--he is on duty aboard a ship away from home port, and

FSA-T--he is on temporary duty away from his permanent station for more than 30 days.

B. Member with Dependent Requirement

Primary family residence requirement

The restriction on the payment of FSA-Type II of $30 per month authorized by 37 U.S.C. 427(b) to cases where the primary dependents of a member of the uniformed services are living in a residence subject to the member's management and control and which he will share with them as a common residence during such time as duty assignments permit having been removed by Public Law 91-529, amending section 427(b). FSA-II is now payable regardless of the residence of the primary dependents if the separation is the result of the member's military orders. To the extent paragraph 3031a of the Department of Defense Military Pay and Allowances Entitlement Manual prescribing a member is not a member with dependents for FSA-II entitlement when "the sole dependent resides in a hospital, school, or institution" provides otherwise it is more restrictive than the law. 51 Comp. Gen. 97 (1971).

Joint custody of child after divorce

Where California judgment of dissolution of marriage awarded Navy member and former wife "joint custody" of their minor child, giving member undivided equal right to custody similar to custody right while married, child may be considered to be in legal custody of the member, who, therefore, is regarded as a "member with dependents" for entitlement to FSA types I and II. B-179976, November 7, 1974.

Divorce decree silent on custody

Under the terms of a member's divorce, the custody of his 18-year-old (age of majority in his state of residence) daughter was not specifically awarded to either his wife or himself; however, she resided with him after the divorce and before he departed for his tour at an overseas station to which he was not permitted to bring dependents. He provided her complete support during the period she resided with him and during a subsequent period while she attended college. Thus, his daughter qualifies as the member's dependent for purposes of family separation allowances, Types I and II. B-190008, November 30, 1977.

Dependents acquired after PCS

A member who is without dependents on the effective date of his permanent change of station is not eligible for FSA

payments, but who acquires a dependent after reporting to his new station and then meets the requirements for FSA authorized under 37 U.S.C. 427(a) is entitled to such FSA *payment from the date the dependent is acquired.* 43 Comp. Gen. 596 (1964).

When authorized transportation does not include all dependents

A member of the uniformed services who is only authorized transportation at Government expense for one of his dependents, but is not authorized transportation for his remaining dependents is regarded as having the movement of his dependents restricted at the violition of the Government and therefore, the member is entitled to payment of FSA under 37 U.S.C. 427(b), clause (1), and 37 U.S.C. 427(a), so long as the movement of the member's remaining dependents to his permanent duty station or place near that station is authorized. 43 Comp. Gen. 332 (1963).

Women members

On the basis of the Supreme Court ruling in Frontiero v. Richardson, 411 U.S. 677, to the effect that the differential treatment accorded male and female members of the uniformed services with regard to dependents, violates the Constitution, and Public Law 93-64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 the sentence causing the differential treatment, the regulations relating to the two types of family separation allowances authorized in 37 U.S.C. 427 should be changed to authorize FSA to female members for civilian husbands under the same conditions as authorized for the civilian wives of male members, and for other dependents in the same manner as provided for male members with other dependents. 53 Comp. Gen. 148 (1973).

C. FSA - Type I and Type II (FSA-R)

Purpose of Type II-R

The statutory purpose of the Basic Allowance for Quarters authorized by 37 U.S.C. 403 is to reimburse a service member for personal expenses incurred in acquiring non-Government housing when rent-free Government quarters "adequate for himself, and his dependents," are not furnished. the Family Separation Allowance, Type II-R, authorized by 37 U.S.C. 427(b)(1) has a separate and distinct purpose, i.e., to provide reimbursement for miscellaneous expenses involved in running a split household when a member is separated from his dependents due to military orders, and it is payable irrespective of the member's eligibility for a quarters allowance. 60 Comp. Gen. 154 (1981).

Separation must be caused by military assignment

Separation due to personal considerations--Family Separation Allowance, Type I, under 37 U.S.C. 427(a) is not authorized to an otherwise eligible member who is legally separated from his spouse since his separation from her results from personal considerations, not military assignment. 56 Comp. Gen. 805 (1977). See also B-205097, March 15, 1982.

Separation due to personal considerations--divorce settlement--An agreement incorporated into a divorce decree provided that there would be joint custody of the children of the marriage but that the children would reside with the member's former wife and visit the member frequently and for long periods. The member asserts that the children actually resided with him before and after the divorce until he was ordered overseas and that they would have continued to reside together but for the military orders. Under these circumstances, the separation between the member and his children resulted from the provisions of the divorce settlement and not from his military assignment. Thus he is not entitled to family separation allowances, Type I. B-213658, June 26, 1984.

Court-ordered separation subsequent to separation by military orders--An Army sergeant serving an unaccompanied tour of duty in Portugal was authorized a family separation allowance, Types 1 and 2 since his separation from his wife and children was due to military orders. While the member was serving that tour of duty, a California court granted to him and his wife an interlocutory decree of divorce that apparently incorporated a separation agreement which gave each joint custody of the children but gave physical custody of the children to the wife. The Army then terminated the member's family separation allowances. This action was correct since, although the member's separation from his wife and children initially was due to military orders, the interlocutory decree of divorce changed the nature of the separation to one for personal reasons which makes him ineligible for the allowances. B-211693, July 15, 1983.

Separation due to military orders--Where a base closure plan requires the transfer, using Government furnished transportation, of dependents to the sponsor's next permanent duty station, while the sponsor remains behind to implement base closure, "endorced" separation exists within the contemplation of 37 U.S.C. § 427(b)(1), and the granting of Family Separation Allowance, Type II (FSA-R), is authorized. 58 Comp. Gen. 183 (1978).

Delay in travel otherwise authorized

Member must request travel approved--In view of the fact that command sponsored dependents of members of the uniformed services, who are dependents permitted at the member's overseas station when approved by the overseas commander, may be given authority to move overseas promptly upon request by the member and, in some circumstances without approval of the overseas commander, transportation is automatically authorized when requested, such command sponsored dependents may not be regarded as dependents not authorized transportation to the overseas station within the meaning of the FSA provisions of 37 U.S.C. 427 (b) (1) until the member has applied for and been refused authorization to bring his dependents to the overseas station, and, therefore, FSA may not be automatically paid to members for command sponsored dependents prior or subsequent to the approval of the overseas commander. 43 Comp. Gen. 547 (1964).

Unreasonable delay in dependent travel--When the delay between the date of the departure of a member from his old station to an overseas station at which his dependents are permitted and the date the dependents join the member is an unreasonable delay caused by the Government or its agents and is not due to personal causes, the dependents may be regarded as not being authorized transportation to the overseas station within the meaning of FSA provisions of 37 U.S.C. 427(b)(1), and for such undue delay regulations to authorize payment of the family separation allowance would not be improper. 43 Comp. Gen. 547 (1964).

Delay in authorization--A member who, incident to an overseas change of permanent station, moved his dependents from the old station in Florida to Nevada pursuant to

orders but who, about 2 months after his arrival at his new duty station in Taiwan, was authorized to have his dependents join him, is authorized FSA type I and type II for the entire period since the basic permanent change of station orders ony authorized dependents' move to another location and not concurrent travel and later when authorized, his dependents were forced to delay their arrival because of Air Force policy and since it appears that there were no available government quarters, the member was required to maintain two households during the period. B-179655, September 27, 1974.

Temporary prohibition of dependent travel--A member whose dependents are temporarily prohibited from moving into a restricted area so that he is entitled to transportation for his dependents elsewhere may, nevertheless, have the movement of his dependents to his permanent station or a place near that station regarded as not authorized at Government expense under 37 U.S.C. 406 within the meaning of 37 U.S.C. 427(a) and 37 U.S.C. 427(b), clause (1), to qualify for FSA. 43 Comp. Gen. 332 (1963).

Travel not permitted due to pregnancy--A member whose wife is not authorized transportation because of pregnancy prior to the time he reports to his new permanent duty station, may be regarded as being precluded from having the movement of his dependents to his permanent station or place near that station authorized at government expense within the meaning of 37 U.S.C. 427(a) and 37 U.S.C. 427(b), clause (1), and therefore, the conditions for entitlement to FSA are satisfied. 43 Comp. Gen. 332 (1963).

Transportation denied due to emergency--A member whose dependents are not eligible for entry into the United States because of immigration laws prior to the time he reports to his new permanent duty station, may only have the movement of his dependent regarded as unauthorized for FSA entitlement if a departmental regulation precludes authorized transportation of the dependent at government expense in such circumstance, but in the absence of such a military restriction, the member would not be eligible for a family allowance payment. 43 Comp. Gen. 332 (1963).

Prior travel of dependents

the "alert" notice that a military unit will commence movement to a restricted overseas area within 90 days is not a permanent change-of-station order entitling a member of the uniformed services to FSA, type II authorized under 37 U.S.C. 427(b)(1). Dependents are free to continue to reside with a member until he is required to move, or to remain at the old station indefinitely, a member relocating his dependents upon receipt of an alert notice does so at his own choice, and absent the enforced separation

contemplated by section 427(b)(1), FSA may not be authorized prior to the effective date of the permanent change of station when dependents are moved. 46 Comp. Gen. 151 (1966).

Early return of dependents

Return for personal reasons--A member whose dependents are returned from overseas for personal reasons may not have such move regarded as due to military requirements, to convert the member's overseaas station into a restricted station to entitle him to FSA. 43 Comp. Gen. 332 (1963). See also B-193532, October 15, 1980.

Returned to U.S. due to misconduct--A member, whose dependents are returned from overseas relating to the involvement of dependent in an incident embarrassing to the United States, prejudicial to the command, or affecting the dependent's safety, may not be regarded as having his overseas station converted to a restricted station by such circumstances for entitlement to FSA payments and, therefore, in order for payment of FSA to be made, there must be a certification by the officer directing the return were not caused by their own misconduct. 43 Comp. Gen. 332 (1963).

Residence at or near permanent duty station

Mileage criterion--Where the dependents of a member reside more than a reasonable daily commuting distance from the member's duty station - 50 miles being considered the maximum one-way distance - the dependents are not regarded as residing at or near the station within the meaning of 37 U.S.C. 427(a), clause (1), or 37 U.S.C. 427(b), clause (1) and (3), so as to preclude the member's entitlement to FSA. 43 Comp. Gen. 332 (1963).

Child's permanent residence--A member, separated from dependent child, not be reason of duty assignment, but because sole custody was in former wife and duty station in England was 20 miles distant from the permanent residence of his dependent child, may not have dependent regarded as living away from his duty station within the meaning of 37 U.S.C. 427, and he was therefore not entitled to FSA. 44 Comp. Gen. 572 (1965).

Visit of family

Short family visit at permanent station--A member who, while entitled to receive FSA under 37 U.S.C. 427(a) or 37 U.S.C. 427(b), clause (1), has his dependents visit him at or near the permanent duty station may continue to receive FSA provided that the facts show that the dependents are merely visiting and have not effected a change of residence, nothing that the three months maximum limitation

for temporary visits under the quarters allowance regulations is prescribed for family separation allowance purposes. 43 Comp. Gen. 332 (1963).

Visits extended beyond 3 months--When visits by dependents to the permanent duty station of a member receiving FSA payments under 37 U.S.C. 427(a), and clause (1) of 37 U.S.C. 427(b) exceed 3 months (unless a shorter period is prescribed by Departmental regulations) due to illness or other emergency arising after the dependents arrive at the duty station the visit may be considered a visit of a "temporary nature" until the end of the 3-month period, and therefore, retroactive collection of FSA payment to the date the visit commenced is not required but payments should be terminated at the end of 3 months. 43 Comp. Gen. 596 (1964).

Planned visit of over 3 months--If at the time dependents of members depart from their residence to visit will be for a period longer than 3 months, the visit is not considered to be of temporary nature for continuation of FSA payments under 37 U.S.C. 427(a) and clause (1) of 37 U.S.C. 427(b) and, therefore, the FSA payments should be stopped on the date the dependents arrive at the member's permanent duty station. 43 Comp. Gen. 596 (1964).

Reinstatement of allowance after visit--When FSA payments to members are stopped because the visit of the member's dependents extends beyond 3 months, and later the dependents return home, the same conditions for payment of the FSA then exist as originally existed, and therefore, FSA payments may be resumed from and including the date of departure of the member's dependents from the permanent duty station. 43 Comp. Gen. 596 (1964).

Some members of family visit--A member who, while being entitled to receive a family separation allowance under 37 U.S.C. 427(a) or 37 U.S.C. 427(b), clause (1), has some of his dependents visit him at or near his permanent duty station would not lose the right to entitlement to FSA on account of the member's dependents from the permanent duty station. 43 Comp. Gen. 596 (1964).

Children remain at family home--The fact that the members of the family of a member who is assigned to a restricted overseas area are separated, his wife and son traveling at personal expense to the restricted area, and remaining there for a period exceeding 3 months regarded as the maximum period for temporary visits, and his two daughters who were attending school remaining in the family household maintained in the United States by the member, does not deprive him of entitlement to payment of FSA under 37 U.S.C. 427(b)(1) on account of the daughters who, not entitled to movernment transportation to the overseas duty

station, continued to reside in the family household for the period his wife and son resided at or near his permanent overseas duty station. 45 Comp. Gen. 205 (1965).

Government quarters available

Lack of facilities at base--Member serving an accompained overseas tour and assigned Government family quarters, who due to lack of U.S. facilities at his duty station chooses to locate his dependents 61 miles from his permanent duty station, is not entitled to FSA, Type I and II, since under 37 U.S.C. 427, those allowances may not be authorized when the separation from the dependents is for personal rather than military reasons. B-182098, October 9, 1975.

Members married each other - single quarters--Female member, whose mother is a dependent, subsequently marries another service member while on permanent duty overseas, is entitled to FSA - Type I for her mother, while member is living off base in a common residence with husband, notwithstanding the availability of Government single quarters, since Government family quarters were not furnished to her and her husband. B-185813, July 13, 1976.

Evacuation from Government housing--When the dependents are evacuated under emergency conditions from assigned government quarters at his permanent station and occupy Government housing facilities at a safe haven area, considered voluntary occupation of adequate quarters as the dependents are not required to occupy the quarters, nor is rent paid for the facilities, the member not having incurred any personal expense is not entitled to payment of the basic allowance for quarters (BAQ) for dependents prescribed by 37 U.S.C. 427(b) in order to reimburse a member for the expenditure of a personal funds, and the member not entitled to BAQ, a condition precedent to the payment of a family separation allowance also is not entitled to this allowance. 46 Comp. Gen. 869 (1967).

Evacuation from private housing--A member who must continue to maintain and pay rental for private housing in anticipation of the return of his dependents evacuated to Government housing facilities at a temporary safe haven for a relatively short period pending further transportation to a designated place, or return to the place from which evacuated, during which time he occupies single-type quarters at his permanent station, may continue to be credited in his pay account with a basic allowance for quarters on account of dependents and FSA-type II until his dependents are authorized to return to the member's permanent duty station or arrive at the designated place contemplated by applicable regulations, in view of the fact that the occupancy of Government quarters by the member and his dependents will

be of short duration and will have resulted from circumstances beyond their control. 47 Comp. Gen. 355 (1968).

Temporary absence of member from permanent station

Allowance commences on departure from old station--Since a member is regarded as in an enforced separation status from his dependents when he departs his permanent duty station for transfer to a restricted station overseas or in Alaska, and since the additional household expenses for which FSA authorized under 37 U.S.C. 427(b)(1) is payable exists from the date of depature, entitlement to FSA commences on the date of the member's departure (detachment) from the old station or the first day of authorized travel time, whichever is later. 43 Comp. Gen. 332 (1963).

Leave in U.S.--Members who are receiving FSA under 37 U.S.C. 427 (a) when they are authorized leave within or outside and are not in excess leave status, may continue to receive FSA payments during the leave period provided that, in cases of leave in excess 60 days, there is a showing that the member continues to maintain quarters at the permanent duty station. 43 Comp. Gen. 332 (1963).

Temporary duty--When a member who is receiving FSA under 37 U.S.C. 427(a) is on temporary duty away from his permanent duty station, including periods of temporary duty in the United States, he may continue to receive FSA provided that in cases of temporary duty in excess of 60 days, payment may be made only upon a showing that the member continues to maintain quarters at the permanent station. 43 Comp. Gen. 332 (1963).

Hospitalization at another place--Members who are receiving FSA authorized under 37 U.S.C. 427(a), when they are hospitalized at or away from their permanent station, including periods of hospitalization in the United States, may continue to receive FSA payments provided that in cases of hospitalization for periods in excess of 60 days there is a showing that the member continues to maintain the commercial quarters at the permanent duty station. 43 Comp. Gen. 332 (1963).

Member in confinement--Members who are receiving FSA payment under 37 U.S.C. 427(a) when they are placed in military confinement or otherwise restricted by competent military authority from performing duty may continue to receive FSA payment during the confinement period provided that, in cases of confinement in excess of 60 days, there is a showing that the member continues to maintain the quarters at the permanent duty station. 43 Comp. Gen. 332 (1963).

Type II - FSA-S FSA-T

30 day requirement

Travel time included--The time for entitlement to FSA authorized under 37 U.S.C. 427(b), clause (3), for members on temporary duty for more than 30 days, is not limited to the period at the temporary duty station, but includes authorized travel time to and from the temporary duty station. 43 Comp. Gen. 332 (1963).

31st day of the month counted--Although the 31st day of a month is not counted in computing the amount of FSA authorized to members under 37 U.S.C. 427(b), it is to be counted in determining the length of time the member is on duty for the continuous period of duty of more than 30 days for eligibility for FSA prescribed in clauses (2) and (3) of 37 U.S.C. 427(b), likewise the 28th of February is to be counted as only 1 day for duty purposes. 43 Comp. Gen. 596 (1964).

Combining TDY and ship duty--A change in the basis of eligibilty for FSA under 37 U.S.C. 427(b), without break in continuity, from clause (2), duty on board a ship away from home port for a continuous period of more than 30 days, to clause (3) temporary duty away from a permanent station for a continuous period of more than 30 days where, a member's dependents do not reside at or near the temporary duty station, has no effect upon the status of a member's enforced separation from his family and FSA continues to be an item properly for inclusion in the computation of the save pay of a Navy or Marine member temporarily appointed a commissioned officer. 46 Comp. Gen. 57 (1966).

Concurrent receipt of BAQ - inadequate family quarters

A member of the uniformed services who is otherwise entitled to FSA under 37 U.S.C. 427(b), clauses (2) or (3), when he is assigned inadequate quarters for the occupancy of himself and dependents at his home port or permanent station without loss of basic allowance for quarters is regarded as meeting the quarters allowance condition for entitlement to FSA authorized even though the member receives the difference between the basic allowance for quarters and the fair rental value of the inadequate quarters. 43 Comp. Gen. 332 (1963).

Duty aboard ship (FSA-S)

Ship in port near home port--Navy members assigned in excess of 30 days to ship overhaul at the Norfolk Naval Shipyard, located 3 miles from home port, Norfolk, Virginia, who had the option to move their families at government expenses to the Norfolk area, but chose not to do so, are

entitled to payment of FSA provided by 37 U.S.C. 427(b)(2) as they have no greater right than those members who had moved their families to the vicinity of Norfolk, since they continued to reside with their dependents. The fact that a member did not move his family to the vicinity of Norfolk in anticipation of extended sea duty gives him no vested right to the allowance since frequent changes, often at short notice, are an incident of military service. 52 Comp. Gen. 912 (1973).

Visits home while aboard ship--Navy members who travel during 48 hours of liberty, 72 hours if a holiday is involved, from the place of ship overhaul to the home port of the ship to visit dependents and return at Government expense pursuant to Public Law 91-210, do not forfeit entitlement to the $30 per month FSA type II, authorized in 37 U.S.C. 427(b). The legislative history of Public Law 91-210, enacted as beneficial legislation to permit members to travel at Government expense from a place of vessel overhaul to home port to visit dependents, evidences no intent to deprive a member of other benefits by reason of a short visit with dependents on the usual type of Navy liberty. 50 Comp. Gen. 334 (1970).

On leave or hospitalization--A member who, while on duty aboard a ship away from the home port for which FSA is authorized under 37 U.S.C. 427(b)(2), is assigned to temporary duty, or is hospitalized ashore, or authorized leave is regarded as in an enforced separation status from his family even though he is not physically performing duties on board the ship and, therefore, entitlement to FSA under 37 U.S.C. 427(b), clause (2), would continue during such periods while the ship remains away from its home port and while on authorized leave not in excess of that for which he is entitled to pay and allowances. 43 Comp. Gen. 332 (1963).

Temporary duty (FSA-T)

Visit of dependents--A member who has his dependents visit him at or near the temporary duty station to which he is assigned for more than 30 days may not have the residence with his dependents regarded as a mere visit to be entitled to payment of FSA authorized under 37 U.S.C. 427(b), clause (3), for temporary duty of more than 30 days since a 31-day minimum period of temporary duty is required for entitlement and the maximum period of temporary duty is generally not in excess of six months. 43 Comp. Gen. 332 (1963).

Some dependents visit--A member of the uniformed services who, while being entitled to receive FSA for temporary duty of more than 30 days under 387 U.S.C. 427(b), clause (3), has one or more of his dependents visit him for an extended period would not be regarded as losing his right to FSA by

reason of the dependents who do not visit him. 43 Comp. Gen. 332 (1963).

Return from TDY on weekends--A member who, while on temporary additional duty away from his permanent station for more than 30 days, returned on weekends to his permanent station where his dependents lived and where he participated in flights as a crew member, may not be regarded as having been on temporary duty away from his permanent station for a continuous period of more than 30 days for FSA payments under 37 U.S.C. 427(b)(3). 43 Comp. Gen. 755 (1964).

VI. OVERSEAS STATION ALLOWANCES

The allowances covered by this section are payable as per diem under 37 U.S.C. 405, however, travel per diem for the member is covered in Chapter 4 while allowances incident to permanent assignment overseas are covered in this section.

A. Housing and Cost-of-Living Allowances - (HOLA and CLOA)

Basic authority and entitlement

Authority for payment--In prescribing a supplemental housing allowance for members stationed outside the United States, 37 U.S.C. 405 makes no provision for separate housing and cost-of-living allowances, but rather authorizes "a per diem, considering all elements of the cost of living." Therefore, the proposed supplemental housing allowance regulation should prescribe different per diem rates at a given station on the basis of different costs incurred by different groups of military personnel, including groups who incur higher or lower than average excess costs. However, until the formula for computing housing allowances can be revisd, and the allowances for each overseas location computed on the revised formula, the computation and payment of the present regular housing and cost-of-living allowances may continue. 47 Comp. Gen. 333 (1967).

Adequacy of allowances--Where a member of a uniformed service stationed overseas incurs expenses for housing in excess of the amount authorized to be paid to him for BAQ and overseas station allowances, his claim for extraordinary expenses to cover the additional cost must be denied. No authority exists for payment of extraordinary expenses and a member may only be paid allowances for housing and living expenses authorized by law and regulations. B-195941, October 18, 1979. See also B-197982, February 26, 1981.

Advance payment prohibited--Joint travel Regulations may not be amended to allow advance payment for station housing and similar allowances paid under 37 U.S.C. 405, as the

advance payment auuthorization in section 303(a) of the Career Compensation Act of 1949 as amended, 37 U.S.C. 404(b)(1), is limited to payments for the member's travel, which does not include station housing allowance. Therefore, in the absence of specific statutory authority for advance payment of such allowances, 31 U.S.C. 529 precludes such advance payments. 56 Comp. Gen. 180 (1976).

Per diem basis--The payment of a higher housing per diem rate to members for the first 2 months of entitlement after entering on an overseas tour of duty and a lower rate for the remainder of the tour for the purpose of accelerating the reimbursement of moving-in expenses would constitute an advance payment of that portion of the per diem allocable to the accelerated reimbursement, and such a payment is not within the contemplation of 37 U.S.C. 405 authorizing a per diem that considers all elements of the cost of living to members stationed outside the United States, regardless of when costs may have to be paid. Therefore, the proposal to establish two housing allowance indexes, one applying for the preponderance of a member's tour which would reflect recurring costs and one applying during the first 2 months of the tour which would reflect the inclusion of the non-recurring expenses may not be legally adopted. 47 Comp. Gen. 362 (1968).

Need for implementing regulations--A member who incident to orders directing attendance at a course of instructions in the Tokyo, Japan, area in 1965, may not be paid per diem, the November 8, 1954 determination by Headquarters, Far East Air Forces that per diem is not payable to its personnel for travel and temporary duty performed within the area involved never having been rescinded. Notwithstanding conditions of travel and temporary duty in the Tokyo area may have changed, the 1954 restriction authorized by 37 U.S.C. 405 does not permit payment of the per diem claimed. 47 Comp. Gen. 131 (1967).

Regulations clearly erroneous--When a regulation is issued based on obvious administrative error, it may be adjusted retroactively to correct the mistake. Therefore, when a station housing allowance was inadvertently deleted from an active duty station, based on information that no personnel were assigned there when in fact that was not the case, the regulation may be retroactively corrected to reinstate the allowance. B-192040, August 7, 1978, see also 56 Comp. Gen. 1015 (1977). Compare B-205237, March 15, 1982.

Entitlement to allowances--Where a housing allowance was authorized by regulation for St. Mawgan, England, member stationed there is unable to secure Government housing was entitled to the allowance, except for any period when he

was entitled to a temporary lodging allowance, B-184460, February 25, 1976.

Dependent spouse--Member of the uniformed services, a resident of the Hawaiian Islands, who enters on active duty and is assigned to the Island of Oahu, but whose dependent wife remains on the Island of Maui, is entitled to station allowances at the with dependent rate. B-196603, February 18,1981.

Dependent status - stepchild--Member was entitled to transportation and cost-of-living allowances on account of his two stepchildren incident to his assignment to Alaska, despite the fact that the natural father was also a member and was vested within a primary entitlement to a quarters allowance credit for the children because of court ordered support payments, since there was no duplicate credit of allowances involved in the matter. 43 Comp. Gen. 690 (1964). See also B-197384, August 12, 1980; B-196727, May 20, 1980.

Dependent status-adopted child--An Army officer stationed in Alaska claims a cost-of-living allowance on account of his adopted son during the 8-month period immediately preceding entry of the final order of adoption. He is not entitled to the allowance because under the relevant state adoption statutes, a legal adoption was not effected during that period. B-209495, April 22, 1983.

Unaccompanied overseas assignment--A service member on an unaccompanied overseas tour of duty may not be paid military overseas houusing and cost-of-living allowances on account of dependents who move to the overseas area, because in those circumstances the dependents overseas residence is purely a matter of personal choice. 37 U.S.C. 405; 53 Comp. Gen. 339 (1973). 60 Comp. Gen. 689 (1981).

Permissive orders for overseas assignment-- Since members arriving at new permanent duty stations overseas under permissive travel orders issued at their request for personal convenience are required to pay their own travel and transportation expenses under such permissive orders, the temporary lodging allowance, which is in substance a continuation of the travel per diem to reimburse the members for more than normal expenses directly attributable to the change of station, are not payable; however, housing and cost-of-living allowances, which are based on average costs normally incurred on permanent duty overseas, are to be distinguished from costs incident to the change of station and such allowances are payable to the members. 43 Comp. Gen. 584 (1964).

Entitlement to HOLA Government quarters available

Quarters leased by NATO--When officers stationed at Headquarters Allied Forces Southern Europe are furnished

quarters leased by NATO for occupancy by United States and foreign personnel and secured with funds contributed in part by the United States, they are not entitled to quarters and housing allowances, the leased quarters being considered "Government quarters" within the contemplation of the Joint Travel Regulations notwithstanding a redefinition of the term "Government quarters" deleted reference to a

foreign Government, and the payment by the officers of a $25 monthly service charge, amounting to 80 cents per day, covering current operating costs for laundering, cleaning, heating, etc., furnishes no basis to authorize a quarters and housing allowance to an officer accupying quarters leased by the NATO, 44 Comp. Gen. 12 (1964).

Quarters administered by Panama Canal Commission--Military members occupying quarters formerly owned by Panama Canal Company (now administered by the Panama Canal Commission) are not entitle to station housing allowances since such quarters are considered Government quarters under Volume 1, Joint Travel Regulations, regardless of whether the member pays rent. Although the Panama Canal Treaty of 1977 transferred the housing owned by Panama Canal Company to Republic of Panama, the United States retained right to use the housing for its employees, and the quarters are still to be considered Government quarters within the meaning of the regulations. However, since members in such housing often pay rent and utilities equal to or greater than a member in comparable private housing who receives the allowances no objection would be posed to an amendment to the regulations authorizing payment of the station housing allowance, since Congress did not intend such a result. B-199718, June 19, 1981.

Unaccompanied tour - assignment to substandard quarters--A service member may, if necessary, be involuntarily assigned to Government quarters classified as inadequate or substandard when reporting to an overseas duty station for a tour of duty he is to perform unaccompanied by his dependents. In such circumstances, he may not secure private housing near his duty station, decline the invlountary assignment to "inadequate" quarters, and thereby gain entitlement to overseas housing and cost-of-living allowances, which are payable under prescibed conditions to service members overseas when they are not furnished with Government quarters. 60 Comp. Gen. 689 (1981).

Assigned quarters not at duty station--Member serving an accompanied overseas tour and assigned Government family quarters, who due to lack of U.S. facilities at his duty station chooses to locate his dependents 61 miles from his permanent duty station, is not entitled to a housing allowance at the without dependent rate, since he may mot be considered a member without dependents and the Joint Travel Regulations preclude payment of housing allowance to member assigned Government quarters for himself and dependents. B-182098, October 9, 1975.

Evidence of nonavailability of public quarters--While record indicated member occupied off-post housing while attached to unit in Yongson, Seoul, Korea, he is not entitled to station housing allowance under 1 Joint Travel

Regulations, par. M4301-3 (b) (3) (change 221, June 1, 1971), for a member without dependents, during a period for which there is no showing that Government quarters were not assigned to him or that off-post residence was approved by the commanding officer. B-187188, October 18, 1976.

Abandonment of assigned quarters--A Marine Corps officer serving an unaccompanied tour of duty in Okinawa chose to bring his family to Okinawa at personal expense, and he moved off base into private family housing. His Government quarters were reassigned to another, but he was offered substitute, substandard quarters for potential emergency use. He is not entitled to a certificate of nonavailability of quarters nor to payment of overseas housing and cost-of-living allowances on his own account based on a theory that he was therby personally forced to reside and take his meals off base since his move was a matter of personnel choice. 60 Comp. Gen. 689 (1981).

Waiver of HOLA received by member assigned quarters--Service member serving overseas as member without dependents who is assigned Government quarters which he occupies for approximately 8 months and then leases civilian quarters while still retaining quarters is not entitled to station housing allowances during such period in accordance with para. M4301-3b(1) and (3), 1 JTR (changes 224 and 229). Since at time he requested such allowances he certified that he was not occupying Government quarters, which fact he should have known was erroneous, it cannot be held that he was without fault in matter so as to waive erroneos payment of housing allowances. B-187490, November 9, 1976.

Entitlement to COLA when subsisted by Government

Entitlement while on leave--Enlisted men without dependents assigned to a permanent duty station outside the CONUS and subsisted at Government expense and, therfore, not entitled to the cost-of-living allowance authorized by 37 U.S.C. 405, for the purpose of defraying the average excess costs experienced by members on permanent duty outside the United States, do not gain entitlement to the allowance while on leave in the United States on the basis a Government mess in not available to them in view of the fact the Joint Travel Regulations prescribed that a member at a permanent overseas duty station without dependents is not entitled to a cost-of-living allownace while absent on leave in the United States of while being subsisted at Government expense at the permanent duty station. 52 Comp. Gen. 273 (1972).

Ship personnel away from ship--Enlisted members without dependents assigned to ships home-ported outside the United States, who are not in a travel status, but are required to be away from their station and where a determination has

been made that subsistence in a Government mess is impractical, are entitled to a fractional cost-of-living allowance under the Joint Travel Regulations for those meals which they must buy away from their station. 54 Comp. Gen. 333 (1974).

Entitlement while on temporary duty

Attending school under no expense orders--An officer who is permitted under "no expense" orders to be absent from his permanent duty assignment outside CONUS to attend a nearby university for 125 days to acquired a degree under 37 U.S.C. 405 and implementing regulations is entitled for the period of the permissive temporary duty to housing and cost-of-living allowances incident to his permanent duty as for a member with dependents residing in nongovernmental housing near his station. 45 Comp. Gen. 245 (1965).

Same - school in U.S.--An officer whose orders transferring him from Hawaii to Virginia and providing for the concurrent travel of his dependents are amended to place the officer on terminal temporary duty "Operation Bootstrap" at the University of Southern California at no expense to the Government, may be paid a station housing allowance and cost-of-living allowance for his dependents who continues to reside in Hawaii incident to his temporary assi ment for the period of the permissive temporary duty, since the officer remained assigned to his overseas station and was expected to return to that station for change-of-station processing after completing his assignment. 51 Comp. Gen. 691 (1972).

At home port of two crew submarines--Members without dependents assigned to two-crew nuclear-powered submarines who are receiving basic allowance for quarters and subsistence while performing temporary additional duty for training and rehabilitation ashore at overseas home port of submarine in excess of 15 days are entitled to the housing and cost-of-living allowances authorized under 37 U.S.C. 4056 and the Joint Travel Regulations notwithstanding the fact the submarine is the permanent station of the members and housing and cost-of living allowances are payable only at permanent station, since Congress did not intend to preclude payment of such allowances to members actually experiencing higher cost for housing and cost of living. 53 Comp. Gen. 535 (1974). See also 57 Comp. Gen. 178 (1977).

Same - While on shore due to injury--Member was on permanent duty on vessel home-ported at Pearl Harbor, Hawaii, when he was injured and ordered to temporary duty for medical treatment at Pearl Harbor. Since those orders for treatment did not effect a permanent change of station and since the member contributed to reside in non-Government quarters he is eligible for station housing and cost-of-living allowances. B-181893, September 16, 1975.

Dependents at other duty station

Member's transfer to CONUS--Coast Guard member's dependents remained in Hawaii, when the member was transferred on permanent change of station orders to Cleveland, Ohio. The member was not entitled to continued payment of station allowances under 37 U.S.C. 405 (1976) in the absence of an emercency preventing dependents from leaving the overseas station since the dependents' residence in the overseas area has no connection with the member's duty assignment. B-196694, December 12, 1979.

Designated place overseas--A member who incident to a permanent change of station to a restricted area overseas to which his dependents are not authorized to accompany him, elects to move his dependents from his old duty station in the U.S. to a designated place in Alaska, Hawaii, Puerto Rico, or any territory or possession of the U.S. - in fact to any place outside the U.S. - may not be paid station allowances temporary lodging, housing, and cost-of-living allowances - as the dependents move overseas would be a personal choice, separate and apart from the member's overseas duty and while residing overseas would not be in a military dependent status. 49 Comp. Gen. 548 (1970). See also B-195570, May 15, 1980.

Consecutive overseas assignments--A Marine Corps member with dependents was transferred from duty in continental United States to restricted duty (dependents prohibted) overseas. His orders stated the intention of the Commandant to reassign him to Hawaii after completion of his restricted duty assignment. Member's dependents moved to Hawaii concurrent with the member's restricted duty assignment and the member now claims station allowances for dependents under 37 U.S.C. 405 (1970). Since such move may be viewed as having a connection with the member's duty assignment, the Joint Travel Regulations may be amended to authorize station allowances in such cases. However, this member's claim may not be paid because current regulations clearly prohibit it. 56 Comp. Gen. 525 (1977).

Station reclassified as restricted area--Where a member lives with dependents in the vicinity of his duty station outside the United States, and the duty station is reclassified as a restricted area so as to require that dependents be relocated to another designated place outside United States, or in Hawaii or Alaska, GAO has no objection to a proposed amendment to the Joint Travel Regulations to provide for station housing and cost-of-living allowances while dependents reside at the new designated place and the member remains at the restricted duty station. B-193787, February 5, 1979.

Member at remote Alaska post--A member who was assigned from CONUS to a remote and isolated post on Alaska and his

dependents were authorized to travel in a military status to another Alaskan location where dependent facilities exist, and to which location the member made periodic visits, does not make the member eligible to receive station allowances, and the principle enunciated in 49 Comp. Gen. 548 is for application, for the choice of an Alaskan location for dependents in lieu of a residence in CONUS does not change the member's "all others" tour of duty to an "accompanied by dependents tour." 53 Comp. Gen. 339 (1973).

Pending effective date of home port change--Members assigned to vessels having two rotating crews, whose dependents arrive overseas between the date of the official announcement of the change in home port of a vessel from the United States to an overseas port and the effective date of change, may not be paid station allowances for dependents under 37 U.S.C. 405, which while authorizing travel and temporary duty and permanent station allowances for members on duty outside the United States, Hawaii, or Alaska, considers dependents only for permanent station allowance purposes. Although the vessel to which assigned is the permanent post of duty of a member, his permanent station for transportation of dependents and household effects is the home yard or port of the vessel. Therefore, absent designation of such a station outside the United States within the contemplation of 37 U.S.C. 405 for entitlement to station allowances until a change of home port becomes effective, the Joint Travel Regulations may not be amended to authorize station allowances to members for dependents arriving overseas prior to the effective date of a home port change. 45 Conp. Gen. 689 (1966).

Dependents visiting in U.S.--When a member remains at his permanent duty station outside the United States while one or more of his dependents returns to the United States for a visit, the cost-of-living allowance adjustment required by the Joint Travel Regulations may be waived if the absence is for 30 days or less. 37 U.S.C. 405, which authorizes the consideration of the cost-of-living element in prescribing the payment of a per diem, indicates no requirement to adjust cost-of-living allowances during absence of a member's dependents for short periods; and the waiver of the adjustment whould be in harmony with the regulations implementing the cost-of-living allowances provided by section 221 of the Overseas Differential and Allowances Act, 5 U.S.C. 5924, for civilian employees of the Government. 50 Comp. Gen. 386 (1970).

B. Interim Housing Allowance (IHA)

The interim housing allowance which is authorized to members of the uniformed services under the Joint Travel Regulations and payable from the date the member procures

non-Government family-type housing until the arrival of the dependents is not regarded as a continuation of the travel per diem, and the fact that the transfer of the member is made under permissible orders which do not entitle the member to travel and transportation expenses does not bar entitlement to the IHA, and otherwise proper payments of such allowance under permissive orders will not be questioned. 43 Comp. Gen. 584 (1964).

C. Temporary Lodging Allowance (TLA)

General restrictions

While enroute to permanent station--Under permanent change-of-station orders, an Army sergeant traveled from Germany to Fort Wainwright, Alaska, which was designated in the orders as his new permanent duty station. In fact, his assignment to Fort Wainwright was merely for the purpose of undergoing processing at the personnel center there and diversion to another Alaskan post for permanent duty. During the personnel processing Fort Richardson, Alaska, was designated as his new permanent duty station. He claims temporary lodging allowances for the 2-day period he resided in temporary quarters at Fort Wainwright. He is not entitled to temporary lodging allowances since that allowance is a permanent station allowance and Fort Wainwright was actually not his permanent duty station. However, he is entitled to per diem allowances for the 2-day period since he was in a travel status en route to his genuine permanent duty station at Fort Richardson. B-207624, October 19, 1982.

Temporary duty station not within limits of permanent station--The Joint Travel Regulations may be amended to authorize temporary lodging allowances to members of the uniformed services when incident to a permanent change of station they perform temporary duty en route within the limits of their new permanent duty station prior to reporting to that station. This allowance may be paid at the time the member reports to the temporary duty station. If the temporary duty station is not within the limits of the permanent station, temporary lodging allowances are not authorized and in the absence of a more specific proposal with respect to this situation the regulations should not be amended to provide this entitlement. B-208740, January 31, 1983.

On day of arrival at permanent station--Reimbursement to a member for hotel expenses incurred on day of arrival at an overseas permanent station may not be authorized by amendment to the Joint Travel Regulations to provide payment of a temporary lodging allowance of mileage, whichever is greater. 47 Comp. Gen. 724 (1968). However while

payment of mileage and TLA may not be made for the same day, this does not preclude payment of travel per diem reduced for quarters and TLA for the day of arrival at the permanent station. B-130608-O.M., June 5, 1975.

FSA and TLA for same period--Upon the termination of the assignment of Government quarters at a permanent station overseas due to the closing of a military installation, a member in receipt of family separation allowance, type 1, under 37 U,S,C, 427(a) may, in addition, for the period prior to departure to his new station be paid a temporary lodging allowance in 10-day increments under 37 U.S.C. 405, the allowances not considered as a duplicate of each other. 47 Comp. Gen. 788 (1968).

Effect of permissive orders--Unlike housing and cost-of-living allowances which are based on average excess costs normally experienced by members on permanent duty outside the United States, the temporary lodging allowance is payable as a substantially higher rate, being based on the applicable per diem rate for the station involved and varying with the number of persons concerned. Thus, in substance, it is a continuation of the travel per diem, and consequently a member not entitled to reimbursement for travel and transportation expenses incident to a permanent change of station under permissive orders, was not entitled to a temporary lodging allowance. However, such a member is not precluded from claiming IHA, HOLA, and COLA, if otherwise authorized. 43 Comp. Gen. 584 (1964).

Permanent change of station requirement

Upon return for long TDY--Temporary lodging allowance may be paid under current regulations on return to permanent station of a member without dependents who must give up his permanent housing while on temporary duty away from his permanent station for extended periods. However, it may be prudent to amend the regulations to specifically provide guidelines for payments of TLA in this situation. TLA may be authorized regardless of whether the member actually loses entitlement to BAQ for the period of temporary duty, by being assigned to field or sea duty provided it is clear that the member relinquished his quarters. 59 Comp. Gen. 486 (1980).

Alert notice--An Air Force member whose dependents traveled from an overseas post to the United States under early return of dependents orders rather than under permanent change of station orders issued later is not entitled to receive dependents' temporary lodging allowance for 10 days prior to their departure. Temporary lodging allowance prior to departure is authorized beginning upon receipt of permanent change of station orders or an "official alert notice." General information that permanent change of station orders would be arriving imminently did not constitute an official alert notice within the meaning of the Joint Travel Regulations. B-204516, April 5, 1982.

Pending effective date of home port change--When the dependents of members of the Navy assigned to vessel duty arrive in the vicinity of an overseas home port of the vessel an occupy temporary lodgings prior to the effective date of the change of the home port of the vessel from the United States to the overseas home port, the conditions for entitlement to the temporary lodging allowance, which is in the nature of a permanent change of station emolument, has not been met until the new home port of the vessel becomes the member's permanent duty station on the effective date of the orders and, therefore, the members are not entitled

to the temporary lodging allowance prior to the effective date of the change in the home port. 43 Comp. Gen. 505 (1964).

Two-crew submarine - prior to reporting aboard--A member who incident to permanent change-of-station orders assigning him to duty on board a ship, occupies hotel or hotel-like accomodations with his family at the home port or is temporarily assigned to the off-ship crew of a two-crew nuclear-powered submarine, is not eligible to receive the temporary lodging allowances prescribed by 37 U.S.C. 405 as a permanent station allowance to partially reimburse a member for the more than normal expenses incurred upon arrival at a permanent station outside the United States. Therefore, as a member is not considered to be at a permanent duty station for the purposes of the temporary lodging allowances until he reports aboard the vessel to which assigned, the Joint Travel Regulations may not be amended to authorize payment of the allowance to a member prior to reporting aboard ship. 48 Comp. Gen. 716 (1969).

Advance return of dependents--The temporary lodging allowance payable to a member of the uniformed services on the basis he incurs more than normal expenses for the use of hotel accommodations and public restaurants for a prescribed period immediately preceding departure from an overseas station on permanent change of station may not be authorized incident to the advance return of a member's dependents under 37 U.S.C. 406 (e) and (h), as the temporary lodging allowance is a permanent station allowance that may not be used to supplement the transportation allowance prescribed by subsections 406 (e) and (h) for the movement of dependents, baggage, and household effects in unusual or emergency circumstances, or when the Secretary concerned determines the movement is in the best interest of the member, his dependents, or the United States without regard to the issuance of change-of-station orders. 50 Comp. Gen. 83 (1970). See also B-204516, April 5, 1982.

Station reclassified to restricted--Where a member of the uniformed services lives with his dependents in the vicinity of his duty station is reclassified from nonrestricted to restricted thereby requiring the dependents to be relocated to a designated place outside the United States or in Hawaii or Alaska, the Joint Travel Regulations may be amended to provide the member a temporary lodging allowances for his dependents at the new designated location. To the extent this conflicts with 50 Comp. Gen. 83, that decision will no longer be followed. 59 Comp. Gen. 353 (1980).

Dependents accompany member on hospitalization--The entitlement of an injured member, when prolonged hospitalization of treatment is anticipated, to the transportation of

dependents and household affects is no basis to authorize payment of a temporary lodging allowance incident to the evacuation of his dependents occasioned by his injured status, unless the movement of the dependents and household effects is in connection with an ordered permanent change of station for the member. 49 Comp. Gen. 299 (1969).

After assignment on unaccompanied tour--A member authorized station allowance for dependents, continuing to reside in the vicinity of his old overseas duty station when he was reassigned to a restricted overseas duty station, may be paid a temporary lodging allowance on account of his dependents who occupied hotel accomodations after vacating permanent living accommodations and shipment of their household effects incident to the member's transfer to the United States, even though he was not at his old overseas station when the transfer orders were received. 43 Comp. Gen. 525 (1964).

Government quarters available

Temporary quarters available but not used--An officer transferred to an overseas duty station who, notwithstanding the availability of Government quarters considered adequate for temporary occupancy, chooses to stay at a hotel until permanent quarters are assigned to him is not entitled to payment of a temporary lodging allowance for the period that he occupies hotel accommodations on the basis that the quarters offered were declared inadequate for permanent occupancy unless voluntarily accepted, and the member having declined to utilize the quarters made available to him, considered adequate for temporary occupancy, is unable to support entitlement to the temporary lodging allowance prescribed by the Joint Travel Regulations for members who when not furnished Government quarters secure temporary lodgings and occupy hotel or hotel-like accommodations. 44 Comp. Gen. 515 (1965).

Visiting officer's quarters--Member who occupied visiting officer's quarters (VOQ) during July 14-August 25, 1970, incident to permanent change of station, is not entitled to temporary lodging allowance (TLA) since at that time the VOQ was considered a Government appropriated fund activity, the occupancy of which under then applicable regulations precluded TLA. Fact that VOQ was changed to a nonappropriated fund activity effective November 1, 1970, in which case partial TLA is authorized, would not provide retroactive entitlement for prior periods since real changes in accounting and operations of VOQ were required and made when change in status of VOQ occurred. B-184846, March 1, 1976.

Commander's determination necessary

Need for occupancy of hotel quarters--Where there was nothing to show the overseas commander had made a determination that temporary lodgings were necessary incident to a member's permanent change of station in Italy, and there was uncertainty as to the effective date of the permanent change of station orders and the proximity of the old duty station to the new duty station, TLA was not payable. 45 Comp. Gen. 510 (1966). See also B-186784, November 24, 1981, B-211573, June 7, 1983.

Decision to discontinue allowance--A member who was paid temporary lodging allowance for 36 days of the initial 60-day period after arrival of his dependents in Taiwan but was denied this allowance for the remaining 24 days of the initial 60-day period by the overseas commander on the basis that the member's actual expenses for the 60-day period did not exceed the amount of the allowance plus his basic allowance for subsistence and basic allowance for quarters for the 36-day period, is entitled to payment for the remaining 24 days since the regulations do not authorize those grounds as a basis for disallowing TLA during the initial 60-day period. B-179655, September 27, 1974.

Failure to keep commander advised--Under regulations directing the overseas commander to advise a member upon arrival of the member's responsibility to aggressively seek permanent quarters and to report his progress in obtaining permanent housing at least every 10 days, member who failed to submit such periodic reports after being advised of his responsibilities was not entitled to TLA beyond the initial 10-day period following his arrival at the overseas station. B-184746, August 16, 1976.

Extension of eligibility

Failure to request extension--Member who continued to reside in a German hotel following the expiration of the period of his TLA entitlement, was not entitled to additional TLA in the absence of determination by overseas commander that additional TLA was necessary, notwithstanding the member's contentions that he could not request an extension due to a unit reorganization. B-185784, February 14, 1977, and November 24, 1981.

Retroactive effect--The authority in the Joint Travel Regulations to extend by special determination the 60-day period of entitlement to a temporary lodging allowance provided for the more than normal expenses that occur incident to an overseas assignment requiring change of residence may not be amended to provide for a time extension after the expiration of 60 days, the rights of the Government and members having vested, any special determination to extend

the period of entitlement operating retroactively would be without effect, and neither would a retroactive determination operate to commence a further and separate period of entitlement. 46 Comp. Gen. 214 (1966).

Commander's duty to determine--Member's claim for additional TLA incident to a permanent change of station to an overseas assignment at RAF St. Mawgan, England, where it is stated that his request for additional TLA was denied by his overseas commander, is not authorized, since under 37 U.S.C. 405 and the Joint Travel Regulations, such overseas commander has sole authority to determine whether member has or will incur undue financial hardship for purposes of this allowance. B-184460, February 25, 1976.

Consideration of actual costs--When a member requests extension of temporary lodging allowance beyond the initial 60-day period after arrival of his dependents in Taiwan and he can show that undue financial hardship will result during only a portion of the requested period of extension, then the overseas commander properly disallowed the member's request for the full period because it is the commander's responsibility to consider the member's income (combined TLA, BAQ, and BAS) and expenses (hotel and public restaurants), during the requested period. B-179655, September 27, 1974.

Same - evidence of hardship--When a member requests extension of temporary lodging allowance beyond the initial 10-day period incident to his departure from his permanent station outside the United States incident to a permanent change of station where it can be shown that undue financial hardship will occur only during a portion of the requested period of extension, payment of the allowance based on the showing of hardship was authorized since it is the commander's responsibility to consider them member's income (combined TLA, BAQ, and BAS) and expenses (hotel and public restaurants) during the requested period and he has the sole authority to disallow requests for periods when the member could not show undue financial hardship. B-179655, September 27, 1974.

Delay in departure due to misconduct--The additional temporary lodging allowance provided by the Joint Travel Regulations, when the departure of a member with dependents from an overseas duty station is delayed beyond the 10-day period of entitlement through no fault of the member or his dependents, should not have been paid to a member whose departure was delayed awaiting court-martial proceedings, since the charges of misconduct against the member established prima facie that he was not without fault for the delay. Therefore, there was no entitlement to the allowance for the period during which charges were pending, and the member would be eligible to receive the allowance only if exonerated from blame. However, having been found

guilty - and it is immaterial if charges were made in a civil action or under the Uniform Code of Military Justice - the erroneous allowance payments would be for recoupment but for the fact that the administrative regulations were not clear. 50 Comp. Gen. 537 (1971).

Delay in departure for personal reasons--Payment of a 10-day temporary lodging allowance for dependents on departure from overseas permanent duty station incident to permanent change of station orders is not authorized where dependents did not leave within 60 days after the effective date of his PCS orders as required by Volume 1, Paragraph M4303-2e(1) of the Joint Travel Regulations. B-186752, February 28, 1977; B-193901, April 24, 1979.

VII. OTHER ALLOWANCES

A. Recruiting Expense Allowance

Added cost of automobile insurance

Although under 37 U.S.C. 428 and the implementing regulations a member whose primary assignment is to perform recruiting duty may be reimbursed for actual and necessary expenses incurred in connection with the performance of those duties, a recruiter is not entitled to reimbursement by the Government for the increased cost of extended insurance coverage incurred in connection with the use of privately owned automobile in the performance of duties, since the cost of automobile insurance, like the cost of fuel, oil, repairs, and depreciation, is one of the expenses of operating an automobile which expense is reimbursed to the member through the separate milage allowance. 54 Comp. Gen. 620 (1975).

Luncheons for groups of school officials

Provisions of 37 U.S.C. 428 and the Joint Travel Regulations authorize reimbursement of out of pocket expenses--including occasional meals--incurred in performance of official duties by recruiting officers from appropriations available to Marine Corps, do not appear to contemplate luncheon expenses incident to preplanned presentation to eleven public school officials who may assist recruiters. While we will not object to payment of subject voucher, similar expenses should not be incurred unless the regulations are revised to authorize them. B-162642, August 9, 1976.

B. Lodging Cost Under 10 U.S.C. 7572

Generally

A Navy officer, without dependents, not entitled to basic allowance for quarters obtained quarters in the private

sector when quarters obtained quarters in the private sector when quarters aboard the ship to which he was assigned became uninhabitable because of repairs. Government quarters at a local Navy base were available although they had been declared "substandard - incapable of being made adequate." The officer is not entitled to reimbursement for obtaining quarters under 10 U.S.C. 7572(b) (1976) since there was no certification that Government quarters were not available. B-196628, December 19, 1979. See also 48 Comp. Gen. 480 (1969); 59 Comp. Gen. 708 (1980).

C. Heat and Light Allowance Under 10 U.S.C. 4593

Generally

Member in Government housing for which he pays rent and utilities while assigned to Panama Canal Government may not be reimbursed for electric costs in excess of his basic allowance for quarters under 10 U.S.C. 4593. Basic allowance for quarters payment includes not only an amount for rent but also an amount for utilities. B-194847, June 19, 1981.

D. Variable Housing Allowance

Confinement at correctional facility

A Marine Corps member received a general court-martial sentence which included confinement at hard labor for 5 years, and forfeiture of pay, but he was entitled to continue receiving basic allowance for quarters at the with-dependents rate. He was subsequently transferred from his duty station at Camp Lejeune, North Carolina, to the Correctional Facility at Camp Pendleton, California, for confinement. He is not entitled to receive a variable housing allowance based on his transfer to the Correctional Facility because he was assigned there for confinement not "for duty" as required by statute. B-214731, September 4, 1984.

Complement to overseas station housing allowance

The variable housing allowance authorized for service members assigned to duty in high housing cost areas within the United States (other than Alaska or Hawaii) is a conus station allowance designed to complement the overseas housing allowance, and is payable to a member incident to his particular duty assignment rather than by virtue of his membership in the uniformed services; hence it may not properly be included in the lump-sum leave settlement of a member entitled to payment for unused accrued leave computed on the basis of his "basic pay and allowances" upon his separation from active duty. 37 U.S.C. 501(b), as amended by Public Law 94-361, July 14, 1976; 37 U.S.C. 403, as amended by Public law 96-343, September 8, 1980. B-201117, February 18, 1981.

Use of temporary lodging

A member of the uniformed services may not occupy temporary lodging facilities, built and maintained with appropriated funds, in excess of 30 days at his permanent duty station incident to a permanent change of station, without a loss of basic allowance for quarters and variable housing allowance since applicable regulations prohibit it. However, the services may amend the regulations to authorize payment for periods in excess of 30 days in certain deserving cases. B-208762, April 14, 1983.

On Account of Adopted Child

An Army officer claims basic allowance for quarters and variable housing allowance at the with-dependents rates on account of her adopted son during the probationary pre-adoption period (prior to the court's entry of a final adoption order), as the child resided in her household during that time. She is not entitled to the allowances claimed because under the controlling state (Alabama) adoption statutes, a legal adoption had not been effected during that period. B-214017, February 23, 1984.

E. Allowances Not Included

In addition to the allowances discussed above, the statutes authorize payment of a variety of other allowances designed to reimburse personnel for expenses incurred in participating in certain activities or in fulfilling the responsibilities of specified positions. Included are special provisions for members participating in international sports (37 U.S.C. 419), and band concert tours (37 U.S.C. 425); allowances for band leaders (37 U.S.C. 207, 424), contract surgeons (37 U.S.C. 421), and certain high ranking officers (37 U.S.C. 414). Another statute (5 U.S.C. 5943) authorizes

a foreign currency depreciation allowance, the purpose of which is to meet losses sustained by members while serving in a foreign country due to the appreciation of foreign currency in its relation to the American dollar. Further, a temporary lodging expense allowance was established by Public Law 97-60, Oct. 14, 1981 (37 U.S.C. 404a) for certain members making a PCS move to a duty station in the United States. No Comptroller General decisions on these allowances were found that were appropriate for inclusion at the time this manual was prepared.

VIII. STATUS OF MEMBER AS AFFECTING ENTITLEMENT

A. National Guard and Reserve Members

Basic allowances for subsistence and quarters (BAS and BAQ)

Active duty for training--A member who away from home to perform active duty training at an installation where Government quarters and messing facilities are not available, in addition to entitlement to the travel and transportation allowances provided by 37 U.S.C. 404(a)(2) and (3), may be credited under the authority of 37 U.S.C. 404(a)(4) with BAQ and per diem without reduction, the restriction in 37 U.S.C. 403 to the payment of a quarters allowance when a member is not entitled to basic pay having no application to a section 404(a)(4) entitlement, and the Joint Travel Regulations not requiring an reduction in per diem while a reservist is entitled to quarters allowance. However, BAS prescribed by 37 U.S.C. 402(b) is not payable to an enlisted man receiving per diem and therefore subsisted at Government expense. 48 Comp. Gen. 301 (1968).

Active duty of less than 20 weeks--The training station to which a Reserve member without dependents is ordered to active duty for less than 20 weeks in a temporary duty status is his permanent station and the member performing his basic assignment at his permanent duty station is entitled to BAQ prescribed by 37 U.S.C. 403 while at the training station and the definition in the Joint Travel Regulations that a home or place from which a member of a Reserve component is ordered to active duty for training is his permanent duty station is not for application. 48 Comp. Gen. 490 (1969).

BAQ dependency certificates--Recertification of dependency certificates for entitlement to BAQ by members of the Army Reserves may be accomplished by the use of computer-generated listing. Further, such recertification may be made for a period exceeding 1 year where annual training cannot be programmed within 12 months of the prior training period. 51 Comp. Gen. 231 (1971), modified. 59 Comp. Gen. 39 (1979).

Reservist receiving disability compensation--When a Reserve member is receiving disability compensation by reason of prior military service is ordered, pursuant to 10 U.S.C. 683(a), to perform training or other duty without pay, he is entitled to the transportation, and quarters and subsistence benefits prescribed by 37 U.S.C. 1002(b) in addition to his disability retirement, the requirement of 10 U.S.C. 684(a) that members elect either the payments incident to earlier military duty, or the pay and allowances authorized by law - "compensation" that includes travel or other expenses, and subsistence and quarters - for current active duty, not being for application. The allowances for travel to and from a training station, and the subsistence and quarters benefits authorized under 37 U.S.C. 1002(b) for reservists ordered to duty without pay at rates fixed by the Secretary concerned, which may or may not be the same rate that is provided by law, not constituting either pay or allowances, and as they are not "compensation" within the meaning of 10 U.S.C. 684(a), the reservist is entitled to both disability retirement and 37 U.S.C. 1002(b) allowances. 44 Comp. Gen. 613 (1965).

Commutation rate for members serving without pay--The commutation rate provided in 37 U.S.C. 1002(b) in lieu of quarters and subsistence to members of the National Guard, or other Reservist who consent to additional training or duty without pay has reference to the cost to the Government of furnishing subsistence and quarters in kind, not to the actual expense a member incurs in providing himself with subsistence and quarters, and the established aggregate daily commutation rate exceeding the maximum commuted rates prescribed by 37 U.S.C. 402 and 403 for members performing training duty in a full pay status, may neither be increased, nor may an increase on a non-Government cost basis, tantamount to payment of an unauthorized per diem at a duty station, be prescribed. 46 Comp. Gen. 319 (1966).

Uniform allowances

Entry as Reserve after release from Regular status--The entrance on active duty as a non-Regular officer less than 2 years after release from active duty as a Regular officer or enlisted man, or as an enlisted member of a Reserve component, does not deny the officer the extended active duty uniform allowance of $100 that is in addition to the initial uniform allowance, the 2-year restriction in 37 U.S.C. 416(b)(2) barring payment when a tour of duty commences within 2 years after completing a period of active duty of more than 90 days' duration having reference to active duty ordered in a non-Regular officer status for more than 90 days. 43 Comp. Gen. 265 (1963).

Family separation allowance (FSA)

Active duty of less than 30 days--Although members of Reserve components who are called to active duty for training for less than 1 year, or to active duty for other than training station regarded as coming within the term "permanent station" in the FSA, Type II, provisions in 37 U.S.C. 427(b)(1) for entitlement to payments when their dependents are precluded from moving to the permanent station at Government expense. Reserve members who are ordered to active duty for training, or to active duty for other than training, for periods which do not exceed 30 days are not regarded as being separated from their dependents for an extended period of time and, therefore, are not entitled to allowances under 37 U.S.C. 427(b)(1). 43 Comp. Gen. 650 (1964).

Duty aboard ship for more than 30 days--Although the term "duty" in 37 U.S.C. 427(b)(2), which authorizes FSA payments for members on duty on board a ship away from the home port of the ship for a continuous period of more than 30 days, is not defined, the definition of "active duty" in 37 U.S.C. 101(18) as including full-time training duty and annual training duty may be used for FSA, Type II, purposes and, therefore, reservists called to active duty or active duty for training on board a ship away from its home port for more than 30 days are entitled to FSA Type II. 43 Comp. Gen. 650 (1964).

30 day TDY during 45 day tour--While a reservist who is ordered to active duty for training for a period of 45 days away from the Reserve unit to which he is attached for drill purposes may not be regarded as having an active duty station other than the station to which he is ordered for training duty to be considered as on temporary duty away from his permanent station for FSA, Type II, authorized under clause (3) of 37 U.S.C. 427(b), he may, because the assignment is in excess of 30 days, have the training station regarded as his permanent station for FSA, Type II, entitlement under clause (1) of section 427(b). 43 Comp. Gen. 650 (1964).

FSA, Type I - duty outside U.S.--The restrictions or limitations on the length of permanent duty assignments for reservists FSA, Type I, need not be applied to the beneficial FSA, Type I, provisions in 37 U.S.C. 427(a), for permanent duty outside the United States or Alaska, and, therefore, reservists who are called to active duty for training or other active duty outside of the United States or in Alaska for periods in excess of 30 days and who do not have any other station that can be regarded as their permanent duty station may be regarded as serving on a permanent duty for entitlement to FSA, Type I, payments under 37 U.S.C. 427(a). 43 Comp. Gen. 650 (1964).

Overseas station allowances

TLA while on training in Europe--Officers of State Army National Guard who performed annual field training in Europe within the authority of 32 U.S.C. 502(a)(2) and 503 during a period Government quarters were not available and living accommodations had to be obtained at their own expense in nearby hotels, are not entitled to the temporary lodging allowances provided under 37 U.S.C. 405, the Joint Travel Regulations contemplating entitlement to the allowance only when members are permanently assigned to duty at a station outside the United States for performance of duty of an indefinite or extended period rather than a period of short duration, such as the duty performed by the officers; however, the Joint Travel Regulations may be amended to authorize payment of a temporary lodging allowance for future short periods of training outside the United States or in Hawaii or Alaska. 45 Comp. Gen. 794 (1966).

COLA while on Reserve duty in Alaska--The cost-of-living allowance authorized by the Joint Travel Regulations for the purpose of defraying the average excess cost experienced by members on permanent duty outside CONUS is not payable to an Air Force Reserve officer ordered from his home in the United States to active duty training in Alaska for a 44-day period, and the fact that a member ordered to active-duty training of short duration is entitled to certain allowances which are paid incident to a permanent duty assignment does not make a short duration assignment for active-duty training permanent in nature. 45 Comp. Gen. 798 (1966).

HOLA and COLA for Alaska reservists--In view of the broad authority contained in 37 U.S.C. 405, Volume 1, Joint Travel Regulations, may be amended to authorize payment of station allowances at with or without dependent rates as appropriate to members of Reserve components who perform active duty for less than 20 weeks outside the United States or in Hawaii or Alaska and who reside permanently in those areas with their families (if any). 55 Comp. Gen. 135 (1975).

B. Husband and Wife Both Members

Basic allowance for quarters (BAQ) - No children involved

Sham marriages--Two service members married each other for the admitted purpose of being allowed to live off base and being paid BAQ under a service policy which authorizes such a procedure to encourage the maintenance of the family unit when Government family-type quarters are not available. In such a case the members should be assigned single-type government quarters, if available, which would discontinue BAQ payments since there is no family unit to maintain. B-195670, December 14, 1979.

Effect of Frontiero v. Richardson, 411 U.S. 677 (1973)--Although the Frontiero decision has no effect on the dependency status of service members married to each other as prescribed by 37 U.S.C. 420, since a member may not be paid an increased allowance on account of a dependent for any period during which the dependent is entitled to basic pay, the differential treatment accorded male and female members in assigning quarters requires amendment of Department of Defense Directive to prescribe entitlement to both male and female members to BAQ at the without dependent rate when adequate public quarters for dependents are not available, notwithstanding the availability of adequate single quarters to reflect that neither husband nor wife occupying Government quarters for any reason who has only the other spouse to consider as a dependent is entitled to BAQ in view of 37 U.S.C. 402; and to provide that when husband and wife are precluded by distance from living together and are not assigned Government quarters, each is entitled to BAQ as prescribed for members without dependents. 53 Comp. Gen. 148 (1973).

One member on excess leave--An Army captain, whose wife is authorized excess leave without pay and allowances for the period between being commissioned and reporting to her new duty station, during which time she is neither furnished nor occupies quarters in kind, may be paid an increased quarters allowance under 37 U.S.C. 403 on behalf of his wife for the period she was in excess leave status. The limitation in 37 U.S.C. 420 that a member may not be paid increased allowances on account of a dependent for any period during which that dependent is entitled to basic pay does not bar BAQ at the with dependent rate, since the wife was not receiving basic pay and her active duty status in itself is not determinative of the husband's entitlement. 47 Comp. Gen. 467 (1968).

One member in prison--Military member claims basic allowance for quarters at the with-dependent rate on account of her husband, a military member who is not entitiled to pay and allowances due to his being in confinement under a 15-year prison sentence. The quarters allowance at the with-dependent rate is not authorized. The member may no longer be considered to have a dependent for quarters allowance purposes since the dependent will be absent for an extended period of time and the member is for all practical purposes absolved of the responsibility of providing quarters for her husband for the duration of his confinement. B-209744, February 1, 1983.

Members occupying inadequate Government quarters--A husband and wife, members of the uniformed services in pay grades E-5 and E-4, respectively, each member in receipt of a basic allowance for quarters while accupying private quarters, when assigned inadequate Government quarters on a

rental basis may continue under 42 U.S.C. 1594j(a) to receive the allowance as members without dependents. However, their combined allowances exceeding the allowance received by the usual military family - one member only in the service - occupying inadequate quarters, the reduction provided by section 1594j(a) when a rental rate exceeds 75 per centum of the quarters allowance may not be applied on the basis of the husband's allowance alone. The manner or from whom the rental charges are collected is immaterial under the landlord and tenant relationship. 48 Comp. Gen. 68 (1968).

Members occupying transient quarters while awaiting adequate family - type housing--Service members married to each other, while awaiting adequate family-type housing, for 17-day period resided in transient housing at their duty station for which they paid nominal service charge. Although members who occupy transient quarters for a nominal service charge are considered to be in assigned rent-free and adequate Government quarters, the members are both entitled to receive BAQ at the "without dependent" rate for 7 days under the authority of Executive Order No. Part IV, Section 403(a), June 22, 1964, as amended. B-198081, February 26, 1981.

Effect of sea duty for one spouse--Husband and wife who are both members of the uniformed services, have no dependents other than each other, and do not live in Government quarters, are both entitled to BAQ at the without dependent rate appropriate for their grades. However, when the husband goes on sea duty, his entitlement to BAQ ceases, and the wife does not thereby become entitled to BAQ at the increased with dependent BAQ rate. B-178979, October 23, 1974. See also 57 Comp. Gen. 194 (1977).

BAQ-Members' children - No children of a prior marriage involved

Child-whose dependent--When two service members marry, neither may claim the other as a "dependent" for military allowance purposes, but if they have a child, that child becomes their joint "dependent" for purposes of establishing entitlement to allowance payments. Although both parents may not claim their child as a dependent for the same allowance payment where dual payments would result, it is permissible for one parent to claim the child as a dependent for the purpose of BAQ and for the other parent to claim the child for other allowances. 60 Comp. Gen. 154 (1981).

Effect of members' separation--A member of the uniformed services who is separated from his or her spouse, who is also a member, and who has legal custody of one or more of their children on whose behalf the spouse contributes no support, is entitled to a basic allowance for quarters at the with-dependent rate, regardless of the spouse's entitlement, provided that the dependents on account of whom the increased allowance is paid do not reside in Government quarters. 62 Comp. Gen. 315 (1983).

Effect of separation agreement--A properly executed separation agreement generally is legally sufficient as a statement of the parties' marital separation and resulting legal obligations, for the purpose of determining entitlement to a basic allowance for quarters, even though the agreement was not issued or sanctioned by a court.

However, a member's entitlement to basic allowance for quarters based on child support obligations created by a separation agreement should be reassessed following court action since the court is not bound by the agreement in awarding custody. 62 Comp. Gen. 315 (1983).

After divorce-in general--Where two Air Force members married to each other with one child are divorced, the male member paying child support and the female member having custody of the child, the child is the dependent of both members under 37 U.S.C. 401; however, since only one member may receive BAQ at the with dependent rate. However, if the member receiving the increased BAQ does not claim the dependent child, the female member who has custody of the child may claim BAQ at the with dependent rate. 60 Comp. Gen. 399 (1981). See also 58 Comp. Gen. 100 (1978); 52 Comp. Gen. 602 (1973); and B-189973, February 8, 1979.

Same-more than 1 child-effect of court order--Where two married Air Force members with common dependents subsequently divorce, only one member may receive basic allowance for quarters based on the children as dependents, unless the class of common dependents is divided by separation agreement or court order. The member paying child support, which is stated to be on behalf of one child but is sufficient to qualify for entitlement under the applicable regulation, is entitled to the basic allowance for quarters at the with dependents rate while the member having custody of the children receives the allowance at the without dependents rate. 62 Comp. Gen. 350 (1983).

BAQ-Children of a prior marriage involved

Members reside in separate quarters-each has child prior to marriage--Both of two uniformed service members, who are married to each other, and had dependent children in their own right prior to their marriage, may be paid an increased basic allowance for quarters on account of their respective dependents, when the spouses do not reside together as a family unit because of their duty assignments. Whether the dependents reside with one, both, or neither of them would not affect their entitlement, provided that each member individually supports his or her dependent and is not assigned to Government family quarters. 62 Comp. Gen. 666 (1983).

Members reside together-each has child of prior marriage--When two uniformed service members who are married to each other and who had dependent children in their own right prior to their marriage, are assigned to the same or adjacent bases, are not assigned Government quarters, and live together as a family unit, only one member may receive a quarters allowance at the increased "with-dependents" rate. Only one set of family quarters is

required and all the dependent children belong to the same class of dependents upon which the increased allowance is based whether the children live with the members or not. To the extent that 60 Comp. Gen. 399 (1981) may be understood to contradict this holding, it is hereby modified. 62 Comp. Gen. 666 (1983).

Child of prior marriage determined to be a "dependent" after member's remarriage--When a uniformed service member's child meets the qualifications for becoming the member's dependent following the member's marriage to another member who is not the child's natural parent and the members have other dependent children, the child joins the class of dependent children upon which the member-parent's increased basic allowance for quarters entitlement is determined. 62 Comp. Gen. 666 (1983).

Status of child of current marriage-members reside together--Female service member married to and residing with male member who receives BAQ at the with dependent rate on account of children of a previous marriage is not entitled to BAQ at the with dependent rate for a child of the present marriage since, although this child is not claimed as a dependent by the other member, the child must be considered a dependent of the spouse who is receiving BAQ at the with dependent rate by virtue of other dependents and may not provide a basis for allowing both spouses to receive BAQ at the with dependent rate. 54 Comp. Gen. 665 (1975).

Same-members reside separately--A military member married to a military member occupies Government quarters with their dependent child. Upon a permanent change of station of the male member, the female member remains in Government quarters with the dependent child. Male member is not provided Government quarters at new station and claims BAQ at the with-dependent rate since he is paying child support to a former non-military spouse not residing in Government quarters with dependent children. The male member is entitled to BAQ at the with-dependent rate since his BAQ entitlement is determined independent of his military spouse where they do not reside in the same household. 59 Comp. Gen. 681 (1980).

"Partial BAQ" under 37 U.S.C. 1009(d)

Generally--A member of a uniformed service married to another member, who has no dependents other than his or her spouse, is entitled to "partial BAQ" under 37 U.S.C. 1009(d) when assigned to single-type Government quarters. However, such a member assigned to family quarters is not entitled to partial BAQ. 56 Comp. Gen. 894 (1977).

Effect of sea duty for one spouse--A member assigned to sea duty who occupies Government family-type quarters assigned to his spouse when the vessel is in port is assigned to quarters on the vessel and is considered a member without dependents by virtue of 37 U.S.C. 420 (1970). Therefore he is not entitled to partial BAQ authorized by 37 U.S.C. 1009(d). 57 Comp. Gen. 194 (1977).

Family separation allowance (FSA)

Member with no dependents other than member spouse--A member with no dependents, as his wife, his only dependent, is also a member of the service on active duty is not entitled to the family separation allowance (FSA-II) provided by 37 U.S.C. 427(b) because, notwithstanding the elimination from the section pursuant to Public Law 91-533 of the qualifying language for entitlement to FSA-II of the phrase "who is entitled to a basic allowance for quarters," the prohibition in 37 U.S.C. 420 against increasing a member's allowance on account of a dependent entitled to basic pay under 37 U.S.C. 204 precludes payment of the FSA-II. 51 Comp. Gen. 116 (1971).

Same-1 member returns to CONUS for discharge--Where spouses without dependents are both members of the uniformed services and are assigned to the same overseas permanent duty station immediately before one member chooses to return to the United States for separation from active duty, the continued separation between the member and the released spouse is not an enforced separation, but a matter of personal choice. Therefore, a Family Separation Allowance, under 37 U.S.C. § 427, may not be paid. B-199233, December 27, 1983.

Member with child and member spouse-unaccompanied overseas tour--Marine Corps member separated from her child and husband while serving an unaccompanied tour of duty overseas may properly be regarded as a "member with dependents" under 37 U.S.C. 427(b)(1) and is entitled to a Family Separation Allowance, Type II-R, notwithstanding that her husband is also a Marine and is drawing a Basic Allowance for Quarters at the "with dependent" rate on behalf of the child, since their child is their joint dependent and since payment of the two allowances--each for a separate purpose--would not improperly result in dual payments of the same allowance for the same dependent. 60 Comp. Gen. 154 (1981).

Same-PCS with dependent travel authorized--Where spouses with a dependent child are both members of the uniformed services, and one member is given a permanent change of station with dependent travel authorized, the Military Pay and Allowances Entitlements Manual may not be interpreted or amended to authorize payment of the Family Separation Allowance to either member. Whether the child travels to the reassigned member's new station or remains at the old station is a matter of personal choice and not a forced separation as when a member is assigned to a restricted station. B-199233, December 27, 1983.

Same-when dependent travel could have been authorized--An Army member claims entitlement to Family Separation Allowances, type I and type II, on the basis that he was separated from his minor child due to orders assigning him to his new permanent duty station in Germany to which his dependent was not authorized concurrent transportation. The member seeks to establish dependency as of the date he arrived at his new duty station when apparently the child previously had been considered the dependent of his wife, also a member of the Army. The member's orders show that a dependent's concurrent travel may well have been authorized had the member clarified the dependency and pursued travel authorization and, as a matter of fact, a few months later the dependent traveled with the member's wife to Germany upon her assignment there. In these circumstances, the separation between the member and his dependent may not be considered as enforced so as to authorize payment of the Family Separation Allowances. B-201887, April 21, 1981.

Dislocation allowance (DLA)

Both spouses transferred--Where female and male service members are married and reside in the same household and incident to a change of permanent station for each member the household is moved and the members continue to reside in the same household only one dislocation allowance may be paid for such movement, and since the male member already has received such allowance the female member's claim must be denied. However, upon repayment of DLA previously received by male (junior) member, DLA may be paid to the female (Senior) member. 54 Com. Gen. 665 (1975).

Same - separate quarters at old station--Husband and wife, both Navy members, are each entitled to a dislocation allowance (DLA) (without dependents rate) upon permanent changes of station where at the old station the husband was assigned to quarters aboard a ship homeported at Pearl Harbor and the wife occupied quarters on land near Pearl Harbor, her duty station, and both were transferred to Long Beach, California, where they occupied non-Government quarters together. Although the husband stayed with his wife in her quarters when he was not required on board ship at the old duty station, the move involved transfer from a

station where the members were assigned separate quarters and thus was not a move of a single household to preclude payment of two DLA's. B-191742, August 1, 1978.

One spouse separated--A member under permanent change-of-station orders traveled concurrently with his wife, who was traveling under separation order. He is not entitled to dependent transportation allowance on account of his wife as his dependent since she was paid travel and transportation expenses to her home of record in connection with her separation from active service in the Air Force. However, he may be paid a dislocation allowance at the with-dependent rate on account of his wife since she is considered his dependent on the effective date of his transfer. 63 Comp. Gen. 55 (1983).

Child dependent--An Army member's claim for travel expenses and a dislocation allowance for his wife's and child's travel to his new permanent duty station may not be allowed. Although such travel was mistakenly provided for in the member's orders, on the effective date of his orders (the date he was required to begin travel to his new duty station) his wife was on active duty in the Army and she was claiming their child as a dependent. Since a member may not claim a spouse, who is also a member entitled to basic pay, as a dependent, the member had no dependents for transportation or dislocation allowance purposes. B-202313, October 9, 1981.

After divorce - custody of child--Two members were husband and wife and had a child by that marriage but are divorced at the time of entitlement to a dislocation allowance incident to a transfer. The female member has custody of the child although the male member pays child support. Regardless of basic allowance for quarters entitlements the female member is entitled to dislocation allowance at the "with dependent" rate since under regulations applicable to that allowance she does have a dependent. B-183176, November 18, 1975.

C. Members in Missing-In-Action or Prisoner-Of-War Status

Continuation of allowances

When a member enters a status covered by the Missing Persons Act, permanent items of pay and allowances, except temporary allowances, may continue to be credited to his account provided no change occurs in conditions of entitlement, section 2 of the act authorizing the same basic, special and incentive pay, basic allowances for subsistence and quarters, and station per diem allowances, not to exceed 90 days, for a period of absence that a member was entitled to at the beginning of his absence, and the family separation allowance authorized by 37 U.S.C.427(a), falling

within the purview of section 2 of the Missing Persons Act may be allowed, but not the cash clothing allowance provided for enlisted personnel under 37 U.S.C. 418, an item that is not enumerated in the act. 44 Comp. Gen. 657 (1965).

Basic allowances for subsistence and quarters (BAS and BAQ)

Enlisted members, whether with or without dependents, who, prior to being carried in a missing status (37 U.S.C. 551-558), were quartered and subsisted by the United States Government under the concept of "changed conditions", may

be credited with quarters and subsistence allowances from the beginning of a missing status, subject to 31 U.S.C. 71a. 52 Comp. Gen. 23 (1972).

Family separation allowance (FSA)

Continuation of existing allowance--Family separation allowance, Type I, authorized by 37 U.S.C. 427(a), may be continued during a missing status provided circumstances arising after the missing status starts do not terminate the right to the allowance. 44 Comp. Gen. 657 (1965).

Initiation of Type II allowance for TDY--A member on temporary duty assignment who is missing prior to completing the 30-day qualifying period prescribed by 37 U.S.C. 427(b)(3) for entitlement to payment of a monthly family separation allowance, Type II, may nevertheless have the allowance credited to his pay account for the period he is officially determined to be in a missing status on the basis that the family separation allowance is an additional quarters allowance - an allowance authorized for continuation in section 2 of the Missing Persons Act - and that the qualifying period for entitlement to a family separation allowance was completed after the member entered into a missing status, and while the temporary duty status of the member appears to have been terminated by his missing status, the separation from his family is nonetheless an enforced separation resulting from military requirement. 45 Comp. Gen. 633 (1966).

Dislocation allowance (DLA)

Family move under missing persons act--Entitlement to payment of the dislocation allowance authorized by 37 U.S.C. 407, predicated on orders directing a permanent change of station for members, the determination that a member is in a missing status is not a proper basis to authorize the payment of DLA under section 554, which only authorizes the travel and transportation of the dependents and household and personal effects of a member who is in a missing status. 47 Comp. Gen. 556 (1968).

Determination of death--The transportation of a housetrailer at Government expense for the dependents of a member in a missing status, as defined in 37 U.S.C. 551(2), may not be provided in the absence of specific authority (37 U.S.C. 554, in authorizing the transportation of the dependents and the household and personal effects of members in a missing status, does not expressly provide for the transportation of a housetrailer or a mobile home and the words "personal effects" as used in the section may not be construed as including a housetrailer), and 37 U.S.C. 409, in providing for a trailer allowance in lieu of the transportation of baggage and household goods, and the payment of DLA, restricts entitlement to the member, or in

case of his death to his dependents, and makes no provision for payment in the event the member is in a missing status. 50 Comp. Gen. 317 (1970).

Overseas station allowances

The payment of a temporary lodging allowance incident to the evacuation of dependents of a member of the uniformed services missing in action may not be authorized, as the allowance accrues only in connection with a permanent change of station. Under the Missing Persons Act, which designates the items of pay and allowances that may be continued while a member is in a missing status, although a housing and cost-of-living station allowance may be paid, a temporary lodging allowance incident to the evacuation of dependents may not, because a member in a missing status cannot meet the permanent change-of-station requirement. 48 Comp. Gen. 299 (1969).

CHAPTER 4

MEMBERS' TRAVEL

I. BASIC ENTITLEMENT RULES

A. Orders Requirement

Necessity

The right of military personnel to reimbursement of travel expenses and the extent of such reimbursement is dependent upon the performance of official travel directed by competent orders. B-175211, March 31, 1972; B-182803, October 24, 1975.

Travel status

Member at permanant station without travel orders--Service members not in a travel status, and acting on their own volition, incurred personal expenses for meals and lodgings incident to their military duties at their permanent duty station during a snowstorm and seek reimbursement. The entitlement of members of the armed services to be so reimbursed for expenses incident to their military service is contained in title 37, United States Code. In the absence of specific authorization, there is no legal basis upon which this Office may authorize reimbursement. B-194499, October 31, 1979.

Same-emergency orders to vacate quarters--Because of imminent danger of a natural gas explosion, a military installation commander responsible for protection of personnel and facilities, ordered two Army officers and their families to vacate Government family housing. Claims for reimbursement of the reasonable costs of motel lodgings necessarily incurred as a result of that order may be paid from the installation's operation and maintenance funds, since those costs were directly related to the commander's orders and the proper administration of the installation. B-213293, December 7, 1983.

TDY canceled after travel under orders begins--A service member was ordered on TDY via Fly-It-Yourself rental aircraft. Several hours after departure, he was forced to return to the starting point due to inclement weather without reaching the TDY station. Although 1 JTR states a requirement that to be in a travel status the travel must be pursuant to orders which require a landing be made away from starting point, the member in this case is considered in a travel status since the travel orders provide for such a landing point and the travel was properly begun. A travel status existed, even though the outward bound portion of the journey was not completed. B-203356, February 9, 1982.

Competency

Verbal orders--A verbal order given in advance of travel and subsequently confirmed in writing giving the date of the verbal order and approved by competent authority will meet the requirements for written orders. Written orders confirming verbal orders, together with evidence showing that an emergency prevented the issuance of written orders may be accepted only if the written confirmatory orders, fully substantiated, are issued within a reasonable time thereafter. 43 Comp. Gen. 50, 281 (1963); B-180646, September 3, 1974; 52 Comp. Gen. 236 (1972). 59 Comp. Gen. 397, 401-402 (1980); B-208346, November 9, 1982; B-203623, March 23, 1982.

Verbal orders--delayed written confirmation--Verbal travel orders were issued to an Army reservist for active duty training in a marksmanship program. Written orders, published 1 year after performance of travel, purporting to confirm verbal orders, cannot support claims for reimbursement of travel expenses, in the absence of an adequate explanation for the 1-year delay in publication. A mere statement provided 3 years later that the delay was the result of intercommand technical difficulties does not satisfy the explanation requirement. B-215683, December 27, 1984.

Travel required by duty assignment--Member of the Marine Corps traveled from his home in Springfield, Virginia, to Quantico, Virginia, in order to perform temporary duty. Member travelled without written temporary duty travel orders issued in advance. Although 37 U.S.C. 404 requires travel to be authorized by written orders the fact that the travel was required by the member's duty assignment and that his travel was subsequently approved in writing by competent authority as being advantageous to the Government in sufficient to authorize his travel and entitle him to reimbursement under 37 U.S.C. 404.59 Comp. Gen. 397 (1980).

Invalid amendment of orders by verbal orders--Where original written orders are amended is a verbal order without any date of the verbal orders or showing that an emergency prevented the issuance of written orders such verbal order is not sufficent to meet the Regulations and is therefore unauthorized. B-191681, November 21, 1978.

Alert notice--An alert notice does not conform to the requirements of a competent change-of-station order. 46 Comp. Gen. 133 (1966).

De facto officer traveled without orders--An applicant for a commission in the Public Health Service (PHS), began performing the duties of a commissioned officer on July 1, 1977, prior to his being found fully qualified , and appointed as an officer effective July 12, 1977, by official personnel order. While he may be paid pay as a de facto officer for the period July 1-11, 1977, he is not entitled to allowances for travel performed without orders. B-192116, November 24, 1978.

Modification of orders after travel performed

In general--It is a well established rule that legal rights and liabilities with regard to travel allowances vest as and when travel is performed under orders and that such orders may not be revoked or modified retroactively so as to increase or decrease the rights which have accrued or become fixed, after the travel has already been performed. An exception to this rule has been recognized when an error is apparent on the face of the original orders, or all facts and circumstances surrounding the issuance of such orders clearly demonstrate that some provision which was previously determined and definitely intended had been omitted through error of inadvertence in preparing the orders.

23 Comp. Gen. 713 (1944); 24 Comp. Gen. 439 (1944); 37 Comp. Gen. 627 (1958); 37 Comp. Gen. 683 (1958); 44 Comp. Gen. 405 (1965); 48 Comp. Gen. 119 (1968); 51 Comp. Gen. 736 (1972); 55 Comp. Gen. 1241 (1976); B-199464, August 29, 1980; B-203623, March 23, 1982; 63 Comp. Gen. 4 (1983).

Determination of "inadvertence" after orders executed--Former commissioned officer of Public Health Service who requested separation from the service in abrogation of his agreement to serve a specified period after being trained at Government expense and who was advised that he would be divested of travel and transportation allowance benefits to home on separation, may not have separation orders amended retroactively to authorize reimbursement for these expenses, on the basis of a subsequent administrative determination that his separation had been "inadvertent." B-186036, January 26, 1977.

Error at time orders prepared clearly demonstrated--The separation orders of a Public Health Service officer, released from active duty upon the completion of his obligated term of service, must be amended retroactively to authorize payment for travel and transportation allowances, where it is clearly demonstrated that the withholding of these entitlements under the original orders was the result of an erroneous assumption made when those orders were prepared that the members had breached an agreement to remain on active duty. B-190458, January 26, 1978. See also 44 Comp. Gen. 405 (1965); 33 Comp. Gen. 98 (1953); B-207624, October 19, 1982.

Erroneous Orders Superseded By Valid Orders--Army reservist performed travel for period of active duty training and received travel allowance based on timely written orders determined later by the Inspector General to be invalid. However, the Inspector General also determined that the member performed the duties in good faith and should be paid. Corrected written orders, later published by direction of the Inspector General, to reflect the true intention to authorize travel, retroactively, are proper basis for payment. B-215683, December 27, 1984.

Fraudulent claims

Part of claim fraudulent - invitational orders--The decision in 57 Comp. Gen. 664 (1978), holding that where a civilian employee submits a travel voucher wherein part of the claim is believed to be fraudulent, only the expenses for days for which fraudulent information was submitted should be denied, is applicable to military members and non-Government employees traveling pursuant to invitational travel orders as well. 59 Comp. Gen. 99 (1979). See also 60 Comp. Gen. 357 (1981); 61 Comp. Gen. 399 (1982); and B-211220, September 27, 1983.

B. Official Business Requirement

General rule

The entitlement of a member of the uniformed services to travel at Government expense is for determination on the basis of whether the travel is performed on public business, that is--that the travel relates to the activities or functions of the member's service - or is performed solely for personal reasons. If before completing a temporary assignment, a member's assignment is changed by competent orders, as defined in the Joint Travel Regulations, because of the bona fide needs of the service, the fact that the change might also be beneficial to, or in accordance with the needs of the member, would not defeat his entitlement to the travel authorized incident to the change in assignment. 49 Comp. Gen. 663 (1970).

Return to designated post of member on appellate leave--In the event a court-martialed service member who has been involuntarily placed on appellate leave under the Uniform Code of Military Justice is returned to a designated post for the purpose of participating in further judicial proceedings ordered in his case, or for other purposes of an official nature, his return travel may be regarded as having been performed under orders on official business while away from his designated post, so that his personal transportation at Government expense may be authorized. B-211797, December 23, 1983, 63 Comp. Gen. ___.

Travel expenses for personal business

The travel allowances authorized for members of the uniformed services are for purposes of reimbursing them for the expenses incurred in complying with the travel requirements imposed on them by the needs of the service over which they have no control. Expenses of travel for personal business and not performed on public business are not authorized as reimbursable expenses. B-191681, November 21, 1978.

Travel on leave--failure to take Government transportation--A service member on emergency leave who was not advised that he was authorized to travel on Government transportation in connection with his leave obtained transportation at his own expense. Travel allowances are not payable for the costs of the travel performed or necessitated solely by reason of leave, since such travel is considered as performed for personal reasons, rather than on public business, and although an Army regulation authorizes military air transportation in kind, there is no entitlement to commercial air transportation. B-215269, September 25, 1984.

Circuitous route for personal convenience

Expenses of circuitous travel performed by a member of the uniformed services for his personal convenience may be reimbursed only in an amount not to exceed the amount for the cost of travel between the member's duty stations via the most direct route. 54 Comp. Gen. 850 (1975). See also B-191681, November 21, 1978; and B-198341, April 28, 1981.

Education activities

Orders issued at member's request--An Army officer who performed travel and temporary duty incident to orders issued at the officer's personal request that he be temporarily assigned to the Armed Forces Institute of Pathology at Washington, D.C. and later to St. Louis to take the American Board of Pathology examination, was not on public business so as to be in a travel status during such period within the contemplation of the travel and transportation allowance provisions of paragraph 3050 of the Joint Travel

Regulations and is not entitled to payment of travel and transportation allowances. 33 Comp. Gen. 196 (1953). See also 57 Comp. Gen. 201 (1978).

Orders canceled after registration fee paid--Member was advised of cancellation of temporary duty orders to attend pediatrics course in Hollywood Beach, Florida, prior to his travel there but after having paid registration fee. He may not be reimbursed for travel costs incurred in attending said course during administrative absence under permissive orders nor may he be reimbursed for registration fee absent showing fee would have been forfeited had he not attended course. B-186250, November 4, 1976.

School transfer during leave of absence--Officer, detailed to Judge Advocated General's Corps upon permanent change-of-station orders with excess leave granted without pay and allowances for purposes of attending law school, may not be reimbursed for travel and transportation expenses incurred incident to reassignment at officer's request for purpose of changing law schools since regulations provide that orders permitting member to travel, as distinguished from directing member to travel, do not entitle him to expenses of travel, nor can expenses incurred durin;g periods of travel under orders which do not invlove public business be paid by Government. B-172848, July 27,1971.

Sports activities

Specific legislative authorization required--Although Defence appropriation acts specifically provide funds for travel of military personnel who attend regional, national, and international marksmanship competitions, and 10 U.S.C. 717, authorizes, by implication, expenditures for travel and transportation expenses of members who participate in international amateur sports competition or in Pan-American and Olympic Games, such acts do not indicate that public funds may be expended for any travel not incident to the performance of public business except as specifically authorized by law; hence, an Army regulation which purports to authorize payment of travel expenses of members participating in an Army sports programs is invalid, and credit in the accounts of disbursing officers for payment of travel expenses and per diem under such regulation must be withheld. 38 Comp. Gen. 873 (1959).

Team members not "command supervisors"--Air Force members who in connection with sports programs attend coaches' and officials' training schools under temporary duty orders designating them as command supervisors are not entitled to per diem and transportation payments, even though Air Force Regulation authorizing sports programs, provides travel and per diem expenses for a command supervisor who is in charge of a sports team, the members having been assigned to teams for training and not to assume command, and the mere designation the travel orders of the members as command supervisor, absent performance of that duty, does not entitle them to travel at Government expense; therfore, the temporary duty of the trainees not constituting public business as contemplated in the Joint Travel Regulations, appropriated funds may not be used to pay the travel and per diem expenses of the members. 42 Comp. Gen. 233 (1962).

Award ceremonies

The Secretaries concerned may issue regulations authorizing the payment of travel and transportation expenses of civilian employees of the Department of Defense and military

members who travel on temporary duty to receive non-Federally sponsored honor awards provided such awards are determined in each case to be reasonably related to the duties of the employee or member and the functions and activities of the agency to which the recipient is attached. Travel to received awards in which such determination cannot clearly be made is not travel on public (official) business and no authority exists for such travel at Government expense. 55 Comp. Gen. 1332 (1976).

Travel delays

See also "Travel Time Allowable" under Per Diem, infra, this chapter.

Air force member who traveled on temporary duty and did not use normal government transport, but rather Areo Club aircraft which incurred mechanical difficulties, may not be reimbursed for travel to and from San Francisco, his permanent duty station, while waiting for the aircraft to be repaired, since the trip was not a necessary expense pursuant to public business but an expense as a result of a personal choice. 55 Comp. Gen. 1247 (1976).

Return home during TDY for personal reasons

Limited reimbursement authorized--An amendment to the Joint Travel Regulations to provide that members of the uniformed services who voluntarily return from temporary duty stations to their permanent stations or places of abode over weekends, holidays, etc., may be reimbursed for the travel not to exceed the per diem which would have accrued had they remained at the temporary duty station is proper under section 303(a) of the Career Compensation Act of 1949, which not only authorizes payment of travel allowances to members away from their designated posts of duty under orders but permits the Secretaries concerned to establish or to adjust those allowances by regulations. 39 Comp. Gen. 322 (1959).

Where member commutes between home and TDY station--Marine Corps member on temporary duty assignment who commuted 120 miles daily between his permanent residence and temporary duty station, is entitled to be paid mileage allowance for such travel, but not to exceed amount he would have received had he remained at temporary duty station, where commuting travel was not approved as advantageous to Government but was instead merely permitted for reasons of member's personal confidence. B-186677, September 29, 1976. See also B-206503, November 30, 1982.

Emergency leave--An enlisted member of the uniformed services who upon arrival at a temporary duty station learns of the death of his father-in-law and is orally informed that his temporary duty prders will be cancelled, that he may

depart on leave, at the end of which period he should return to his permanent duty station, is not entitled to reimbursement for the travel expenses incurred, even though subsequently he is returned to the temporary duty station, or that formal orders were issued to support the oral directions. The travel expense did not relate to the activities or functions of the member's service and, therefore, were not incurred on public business, and having been induced by the personal needs of the member, reimbursement of the travel expenses may not be authorized. 49 Comp. Gen. 663 (1970). However, 37 U.S.C. 411e as added by Public Law 97-60, October 14, 1981, now provides specific statutory authority for travel at Government expense in certain circumstances when a member returns home from a TDY station due to a family emergency.

Return to assist dependents in PCS move

PCS with TDY--A member of the uniformed service is detached from his permanent duty station upon being assigned to temporary duty and the new permanent duty station is not designated until the end of temporary duty assignment. Member may be authorized travel at Government expense from the temporary duty station to the old duty station for the purpose of arranging for relocation of dependents and personal effects resulting from the permanent change of station and then travel to the new permanent duty station. The date of the detachment from the old permanent duty station does not affect this entitlement. 60 Comp. Gen. 564 (1981). See also 57 Comp. Gen. 198(1977).

Change of ship's home port--When the home port of a ship or other mobile unit to which a Navy member is being transferred is in the process of being changed the member may accompany his dependents or otherwise travel to the newly designated home port prior to reporting to the ship or other mobile unit if that travel is authorized by amendment to the Joint Travel Regulations provided the travel is necessary to assist in the transportation of the member's dependents or property. 60 Comp. Gen. 561(1981).

Return from unaccompanied tour--Dependents of a military member are located at a designated place away from his duty station because of the member's isolated duty, unusually arduous duty, or unaccompanied overseas tour. Travel by the member to the designated place upon assignment to the permanent duty station to which he is not authorized to take his dependents and upon his next permanent change of station at Government expense may be authorized by amendment to the Joint Travel Regulations, but the authorization of travel to the designated place must be based on the member's need to assist in arranging for transportation of dependents, household or personal effects, or privately owned conveyance. 60 Comp. Gen. 562(1981). See also B-210205, August 24, 1983; and 62 Comp. Gen. 651 (1983).

Recall from leave to permanent duty station

Interruption within 24 hours of departure--Although the payment of travel expenses incurred by a member of the uniformed services returning to his permanent station at the conclusion of a period of authorized leave for the resumption of his regular duties is a personal obligation, where the authorized leave of absence of 5 days or more is interrupted within 24 hours after the member's departure and he is required to return to his duty station for the performance of duty under circumstances not contemplated when the leave of absence was granted, the element of "public business" is present in the required travel, and the Joint Travel Regulations may be amended to authorize payment of travel from a leave point to the permanent duty station and return when the authorized leave of a member is interrupted by circumstances arising after his departure on leave. 46 Comp. Gen. 210 (1966).

Interruption after 24 hours of departure--Current regulations which limit a service member's entitlement to return travel and transportation expenses upon recall from authorized leave of 5 days or more due to urgent unforeseen circumstances only if recall is within 24 hours of departure from the duty station, may be amended to authorize entitlement for recalls after 24 hours. Such amendment should set forth definite criteria to be followed if authorization of expenses is to be allowed after 24 hours, i.e., to allow reimbursable travel in certain limited situations when the purpose of the member's trip on leave has been defeated or a substantial portion of the leave period has been eliminated by the recall. B-201716, August 12, 1981.

Emergency war operations--When the leave of absence granted members of the uniformed services is canceled due to emergency conditions brought about by actual contingency operations or emergency war operations, the members may be returned to their permanent duty station at Government expense by the most expeditious means available, regardless of the days of leave authorized or the number of days the members had been in a leave status, and the Joint Travel Regulations amended accordingly. The need to recall members to duty cannot be contemplated at the time the leave is authorized, and as an element of public business is present in the emergency return of members to their permanent duty station, payment to the members of the cost of ordered return travel is justified. 49 Comp. Gen. 804 (1970).

TDY with leave interrupted--A Navy enlisted member stationed in California who while on leave in Baltimore, Md., which was authorized under orders providing for subsequent temporary duty to attend school in Rhode Island, is

directed to return to his permanent duty station upon completion of his leave is entitled to travel allowances equivalent to the round-trip distance between his permanent duty station and leave point, not to exceed the round-trip distance between his permanent and temporary duty stations, even though ordinarily such allowances are not payable for leave travel performed for personal reasons and not public business, since the member performed the circuitous travel to his leave point under competent orders, travel he would not have undertaken had he not been ordered to perform the temporary duty. 51 Comp. Gen. 548 (1972).

Leave with TDY in United States--An Air Force enlisted member on permanent duty in Germany, whose travel orders direct travel by Government air, but who by amemdment to those orders is authorized to take leave in the United States following his temporary duty assignment there, is responsible for the commercial transportation costs incurred in getting from his temporary duty station to his leave address and to the Air Force base from which he departs by Government aircraft to return to Germany. B-210197, June 6, 1983.

Location of ship changed while on liberty

Reimbursement authorized--Prior to taking leave while assigned to a ship at San Diego, California, member was informed that upon return from leave the ship would be at Pearl Harbor, Hawaii. After leave in San Antonio, Texas, he traveled to Travis AFB, California, and being unable to secure onward Government transportation, he went by taxi to the San Francisco airport and from there via commercial air to Honolulu, Hawaii, and by taxi to Pearl Harbor. Under Joint Travel Regulations then in effect, member may be reimbursed for travel at personal expense from Travis AFB to Pearl Harbor. B-184374, September 18, 1975.

When Government transportation unavailable--Member returning from leave to ship formerly at San Diego, California, but then at Pearl Harbor, Hawaii, was unable to secure Government transportation and traveled by first class commercial air on earliest flight available. He may be reimbursed for such travel not in excess of cost for tourist class travel in absence of indication that such travel was not available within a reasonable time. B-184374, September 18, 1975.

Leave in connection with consecutive overseas tours

Second tour at same station--Proposed revision of Volume 1 of the Joint Travel Regulations granting leave travel entitlements authorized under 37 U.S.C. 411b, to members reassigned to second tours of duty at same overseas station is contrary to clear language of statutory provision which

provides from this entitlement in connection with a "change of permanent station to another station to another duty station. 55 Comp. Gen. 284 (1975). However, 37 U.S.C. 411b was amended by Public Law 97-60, October 14, 1981, to specifically authorize leave travel for a member ordered to a consecutive tour of duty at the same overseas duty station.

Delayed leave--There is no objection to a proposed revision of Volume 1 of the Joint Travel Regulations to grant leave entitlements under 37 U.S.C. 411b, where because of the

critical nature of the member's job he is not authorized leave travel between permanent station assignments provided such travel takes place within a reasonable time following the change of station, and entitlements do not exceed those provided if travel had occurred between assignments. 55 Comp. Gen. 284 (1975).

Return from leave to duty abroad

Where Army member was issued transportation request upon showing he was without funds to purchase necessary transportation for return to his overseas duty station at end of period of leave, member was not entitled to reimbursement of cost of commercial transportation used in connection with emergency leave, regulations expressly prohibiting such reimbursement for travel by commercial means, and reimbursement also being prohibited in connection with ordinary leave since it is not on public business. B-180810, October 9, 1974. See also B-205455, September 23, 1982; and 37 U.S.C. 411d as added by Public Law 97-60, October 14, 1981, which specifically authorizes reimbursement for emergency leave travel in certain circumstances for members stationed abroad.

Presence of dependents in vicinity of restricted overseas station

Transportation expenses are authorized for members of the uniformed services in connection with authorized leave between unrestricted and restricted tours of duty overseas. They may receive such allowances where their dependent wives were transported at Government expense to a designated place in the U.S., subsequently left the designated place and joined the member in the vicinity of the restricted overseas duty station at personal expense and were there when the member was notified of permanent change of station to a consecutive overseas duty station at the designated location to which they returned and to which the members traveled to assist in disestablishing that residence. B-195643, April 24, 1980.

Convalescent leave

Ill or injured while entitled to hostile fire pay--A member of the uniformed services who travels from his convalescent leave site to a medical treatment facility other than the one that granted the convalescent leave incident to an illness or injury incurred while receiving hostile fire pay may be authorized return transportation at Government expense pursuant to 37 U.S.C. 411a. To restrict a member's return to the facility from which departed is not required in view of the apparent beneficial intent of the 1967 act to relieve a member of the travel expenses incurred incident to convalescent leave, and the governing regulations may be amended accordingly. 49 Comp. Gen. 427 (1970).

Not entitled to hostile fire pay--A member of the uniformed services is granted convalescent or sick leave while recuperating from surgery and although released from the hospital is restricted as to the distance he may travel while on leave. Member is not entitled to per diem or reimbursement for expenses incurred while on sick leave. B-194234, October 23, 1979.

Hospitalization while on leave

Where a service member traveled on authorized ordinary leave and was subsequently hospitalized in a military hospital at his leave site at the end of his leave, he is not entitled to reimbursement, under 37 U.S.C. 404, for return travel to his duty station. The fact that his regular leave was extended by hospitalization does not alter his entitlement. His hospitalization due to illness merely entitled him to a respite from military duty and was solely for his accommodation. B-185459, April 22, 1976. See also B-185576, July 20, 1976.

Leave due to family emergency during TDY assignment

An enlisted member of the uniformed services who upon arrival at a temporary duty station learns of the death of his father-in-law and is orally informed that his temporary duty orders will be canceled, that he may depart on leave, at the end of which period he should return to his permanent duty station, is not entitled to reimbursement for the travel expenses incurred, even though subsequently he is returned to the temporary duty station, or that formal orders were issued to support the oral directions. The travel expense did not relate to the activities or functions of the member's service and, therefore, were not incurred on public business, and having been induced by the personal needs of the member, reimbursement of the travel expenses may not be authorized. 49 Comp. Gen. 663 (1970). However, 37 U.S.C. 411e as added by Public Law 97-60, October 14, 1981, now authorizes return leave travel from a TDY station at public expense in certain family emergencies.

Emergency leave granted after arrival at ordinary leave point

Where the member departed from his last duty station in a leave status pursuant to permissive rest and recuperation leave orders after receipt of permanent change of station (PCS) orders, but after arrival at his leave point and prior to the effective date of the PCS orders was granted emergency leave and directed to proceed directly to his new duty station, the member is not entitled to reimbursement of the cost of transportation from his last duty station to his leave point or to per diem allowance for such travel. 54 Comp. Gen. 641 (1975).

Junior enlisted travel - effective date of entitlement

Although the Department of Defense Appropriation Act, 1979, appropriated funds which could be used for extension of travel and transportation entitlements to junior enlisted service members, the regulations authorizing the entitlements were issued under the existing authority of 37 U.S.C. chapter 7 (1967) and 10 U.S.C. § 2634 (1976). Therefore, the effective date of the junior enlisted travel entitlements is the effective date of the regulations, which may not be amended retroactively, and not the earlier effective date of the Appropriation Act. B-193879, October 18, 1979.

Lost records--burden of proof on claimant

An Army Reserve officer claims payment for travel expenses incurred during a period of active duty for training in 1976. The claim first received in the General Accounting Office on August 26, 1981, is disallowed since in the intervening period between the performance of duty and request for payment, all Government records which would justify payment or refute nonpayment were lost or destroyed. The burden of proof absent such Government records is on the claimant and he has not furnished appropriate financial records documenting his entitlement to payment. B-213498, May 14, 1984.

II. PER DIEM ALLOWANCE

A. Requirement That Member Be Away From Permanent Station

General rule

No per diem if TDY station within metropolitan area of permanent station--A Naval officer who was detached from assigned duties and directed to proceed to a new station within the same metropolitan area as official residence (home) for temporary duty in connection with separation processing, and who upon the completion of the processing was to proceed home for release from active duty, is not entitled to payment of per diem incident to the performance of the temporary duty. 33 Comp. Gen. 55 (1953).

Where city limits encompass wide area--Members of the uniformed services while performing temporary duty as escorts for deceased members within the corporate limits of their permanent duty station may not be paid per diem, even though the distance traveled to the funeral site is over 55 miles. The allowances prescribed in 10 U.S.C. 1482 for escort duty may only be considered in conjunction with 37 U.S.C. 404 and section 408, regarding entitlement generally for travel performed on public business under competent orders. Under section 404, per diem for temporary duty is payable only when a member is away from his designated duty

station, and for travel within the limits of his permanent duty station, a member under section 408 may only be paid transportation costs. Therefore, the Joint Travel Regulations may not be amended to provide per diem for escort duty at a permanent duty station. 49 Comp. Gen. 453 (1970).

Permanent station is ship and home port changed during TDY--A chief petty officer who incident to a permanent duty station change from Memphis, Tennessee, to Patrol Squadron Eight at Brunswick, Maine, is ordered to report on April 29, 1971, for 19 weeks of instruction on temporary duty with Squadron Thirty at Patuxent River, Maryland, is entitled to per diem for the entire period of the temporary duty, notwithstanding the unit to which assigned at his new permanent duty station was located at Patuxent River until June 30, 1971, since paragraph of the Joint Travel Regulations prohibiting the payment of per diem within the limits of a permanent duty station has no application as the officer was not a member of Squadron Eight until he reported to Brunswick and, therefore, his travel status and per diem entitlement were not affected because his temporary duty station was for part of the time the old permanent station of the squadron. 51 Comp. Gen. 215 (1971).

Travel away from permanent station less than 10 hours

A Navy officer who was unable to fulfill his temporary duty assignment because he was recalled to his permanent station for emergency duties a few hours after arrival at the temporary duty station and incurred an advance payment for the rental of a hotel room in addition to taxi fare and trips for handling baggage at the air terminal may be reimbursed even though the payment of per diem is precluded by the Joint Travel Regulations because the officer's absence from his permanent duty station was less than 10 hours since the officer under proper orders rented the hotel room due to the unavailability of Government quarters, and the reimbursable hotel charge is considered an administrative expense that is chargeable to the appropriation for Operation and Maintenance Navy. 51 Comp. Gen. 12 (1971).

A member of the Army whose regular duties involve performing flights as an aircrew member which are more than 6 but less than 10 hours is not entitled to partial per diem allowance for meals which he cannot take at his permanent station, since he is not incurring any additional expense for meals taken away from his station. B-211424, October 31, 1983.

No permanent station designated

PCS changed to TDY - further travel not directed--A Marine Corps officer, whose orders directing him to proceed overseas on a permanent change of station were amended to provide that the travel was "for temporary additional duty for training" rather than a permanent change of station - with no indication that a return to his old duty station was required or that a further assignment to a new permanent duty station was contemplated - is not performing "temporary duty" away from his permanent station to per diem for such duty. 32 Comp. Gen. 330 (1953).

Initial TDY school assignment - no permanent station designated--In an action to recover per diem allowances allegedly due plaintiffs while in attendance at the United States Naval School for indoctrination and Naval Justice courses, on the ground that plaintiffs were then in "travel

status" within the meaning of applicable provisions of the Joint Travel Regulations, it is held that plaintiffs, having gone immediately to Officers Candidate School from their homes upon enlistment, were not, under the terms of their orders, "away from their permanent duty station" and therefore were not in such "travel status" as would warrant payment of per diem allowances; it is further held that plaintiffs were not on "temporary duty" within the meaning of applicable regulations because they had no permanent duty station other than Officers Candidate School which was their first duty station. Califano v. United States, 145 Ct. Cl. 245 (1959). See also B-202822, May 21, 1981; and B-202319, May 4, 1981.

Newly enlisted airman in training--Travel per diem authorized for service members under 37 U.S.C. § 404 is payable to a member only "when away from his designated post of duty," so that per diem is not payable to a newly enlisted airman undergoing preliminary training under orders that do not designate the first permanent duty station to which he is to proceed upon the completion of his training assignment, since the training station where he is then located is the only "designated post" that he has. B-211545, November 1, 1983.

Initial TDY assignment - permanent station designated--The holding in the case of Califano v. United States, that a travel status does not exist for a member of the uniformed services in the absence of a designated post of duty away from which travel is performed and that orders which direct a member to proceed from his home to a station for four months' indoctrination and further assignment upon completion did not place the member in a travel status for entitlement to per diem, will be followed; however, the decision will not be construed as prohibiting per diem where a member is ordered to active duty from home, assignment to temporary duty, and the orders designate a duty station to which travel is required upon completion of temporary duty. 38 Comp. Gen. 849 (1959).

Rule in all cases where no permanent station designated--The holding in Califano v. United States, is not limited to cases involving newly inducted or enlisted members, but is for application in any case where a member is ordered from his home and is assigned to a station for temporary duty under orders which contemplate a further assignment to duty upon completion of the temporary duty, and the orders do not designate a specific permanent duty station to which the member is to travel and report for duty upon completion of temporary duty. 39 Comp. Gen. 507 (1960).

Several consecutive TDY assignments with no permanent station--A member of the uniformed services who is ordered to active duty from his home, assigned to a station for tem-

porary duty upon completion of which he is to report to another location for temporary duty and further assignment may not have the place at which the second or subsequent periods of temporary duty are performed considered as other than the member's only post of duty to place the member in a travel status for per diem purposes. 39 Comp. Gen. 511 (1960).

Permanent assignment canceled while on TDY--A Navy officer whose orders to temporary duty under instruction and subsequent assignment to a designated vessel were canceled before he was required to report to the vessel because of

an extended period of hospitalization is regarded as having a designated post of duty aboard the vessel upon completion of the temporary duty, even though cancellation of the unexecuted orders relieved him of the requirement to report to the vessel, so that the principle in Califano v. United States, precluding per diem in the absence of a designated post of duty away from which travel can be performed is not for application and, therefore, when the member was found to be fit for duty and reported for temporary duty pending receipt of permanent orders he is considered in a status for entitlement to per diem. 43 Comp. Gen. 203 (1963).

TDY station changed to permanent station

General rule--The restriction against payment of temporary duty allowances in the United States after date the member of the uniformed services receives permanent change of station orders which designate the temporary duty station as the new permanent station contained in the Joint Travel Regulations is applicable to temporary duty stations outside the United States which are designated as the new permanent duty station during the period of temporary duty. 38 Comp. Gen. 697 (1959).

Member advised TDY assignment will become permanent prior to his departure--Member who was issued oral orders (subsequently confirmed in writing) designating Bandung, Indonesia, as new permanent duty station and 1 day later received written orders for 15-day temporary duty at Bandung, is not entitled to per diem in connection with his duty at Bandung since totality of circumstances indicates that Bandung was member's permanent duty assignment and member had knowledge of such assignment prior to his departure for Bandung. B-185851, April 28, 1976. See also B-202319, May 4, 1981.

Conflicting TDY and PCS orders issued simultaneously--Where two orders were issued on same day by same headquarters, one designating Davis-Monthan Air Force Base as member's new permanent duty station and the other directing member to perform several weeks temporary duty at that base, member was not entitled to either per diem or return travel to his old permanent station, in absence of appropriate evidence to substantiate member's statement that he had no knowledge of permanent change of station order until after his return to old permanent station followiong purported temporary duty assignment. B-176653, December 13, 1972.

When per diem entitlement ceases--Where member on temporary duty assignment at Aberdeen Proving Ground on September 15 received order making that installation his permanent duty station, member was entitled to per diem through September 15 even though permanent change of station order was dated, issued, and made effective on September 10. B-175183, May 8, 1973.

Return to former permanent station on TDY

Per diem not authorized--A Navy enlisted member who, subsequent to assignment for temporary duty for hospital treatment, is transferred to his original permanent duty station for temporary duty pending action on his medical survey may not have the temporary duty assignment for medical treatment regarded as a conclusive detachment from the permanent duty station but rather as a contingent detachment dependent upon further developments and, therefore, during the period of hospitalization and upon reassignment the original station remained the member's permanent duty post until placement on the temporary disability retired list and per diem for the period of temporary duty at the permanent station is not authorized. 43 Comp. Gen. 185 (1963).

Circumstances in which per diem may be paid--Colonel ordered on permanent change of station (PCS) due to excess colonels at old station and then immediately ordered back to old station in temporary duty status is authorized per diem notwithstanding general rule against receipt of per diem when performing temporary duty at old duty station in connection with permanent change of station, since temporary duty orders were confirmed by new station, member vacated family quarters at old station and moved family to new station shortly after orders were issued, and there was valid reason for PCS. B-180632, July 27, 1976.

TDY prior to reporting at new permanent station

No per diem entitlement--Naval officer who was ordered to report for permanent duty at one Washington, D.C., installation and to perform prior "temporary duty" at another Washington installation may not be considered to have been traveling away from his designated post of duty within the meaning of section 303(a) of the Career Compensation Act of 1949 so as to be entitled to per diem for the "temporary duty" or duty period, even though at the time he was performing such "temporary duty" amendatory orders were issued which directed him to proceed to another permanent duty station. 34 Comp. Gen. 427 (1955).

TDY and new permanent stations in same county and within commuting distance--An officer who when released from his duty station at a university is assigned to the Pentagon in Arlington, Virginia, with temporary duty en route at the Center for Naval Analyses, also located in Arlington 2 miles from the Pentagon, and who establishes a residence within commuting distance to both points, is not entitled to per diem since the boundaries of Arlington County are considered to be comparable to the corporate limits of a city within the contemplation of the Joint Travel Regulations (JTR) and, therefore, the officer is not in a

"travel status" within the meaning of JTR while performing temporary duty at his permanent duty station. 52 Comp. Gen. 751 (1973).

TDY after detachment from old permanent station

No per diem even though intervening TDY away from permanent station--Where member of uniformed services is ordered to make permanent change of station from Fort Myer, Virginia, to South Vietnam with temporary duty en route at Rosslyn, Virginia, travel status and entitlement to per diem does not exist since the temporary duty was performed within the limits of his old permanent station (Fort Myer and Rosslyn both being located in Arlington County, Virginia), notwithstanding fact member performed temporary duty in Florida prior to duty at Rosslyn, since Joint Travel Regulations provide that a travel status commences with his departure from his permanent station and terminates on return to that station or upon reporting to a new permanent station. B-181346, January 17, 1975.

No per diem even though permanent quarters vacated--Air Force officer whose permanent duty station was located within San Antonio, Texas, and who received permanent change of station orders reassigning her from that military installation in San Antonio to a distant post, with provisions for a 40-day temporary duty assignment en route at another military installation in San Antonio, is not entitled to per diem allowances in conjunction with such 40-day assignment, notwithstanding she occupied transient quarters, because that assignment did not involve or require any departure from the limits of the member's permanent duty station. B-184861, August 3, 1976.

Commuting between permanent quarters and TDY station

No per diem even though transient quarters unavailable--Daily travel by a Naval officer from the place where he was ordered to active duty to his temporary duty station and return is travel within the immediate vicinity of his duty station and precludes payment of per diem, notwithstanding the place from which he was ordered to duty was not his permanent address, and that Government quarters and messing facilities were not furnished. 35 Comp. Gen. 548 (1956).

No per diem even though TDY station outside limits of permanent station--Member with permanent change of station from Jacksonville, North Carolina, area to overseas location with temporary duty and commuted daily to Cherry Point, is not entitled to per diem during period under Volume 1 Joint Travel Regulations in effect, as per diem was prohibited whether the temporary duty location is within or without the area of the permanent duty station. However, member may be paid for transportation between his

residence and the temporary duty station in accord with this provision. 54 Comp. Gen. 803 (1975). See also B-206503, November 30, 1982.

No partial per diem for meals--An Army officer whose travel orders directed him to commute daily from his residence to certain temporary duty stations near his permanent station is not entitled to partial per diem for one meal he purchased each day at the temporary duty stations. The fact that he may have had to stop at his permanent station each day en route to the temporary duty stations did not change the fact that the travel was commuting for which per diem is not authorized. B-201887, March 10, 1982.

Mileage allowance authorized--An officer occupying quarters on post at Quantico who is ordered to perform temporary duty at Marine Corps Headquarters, Washington, D.C., and to travel daily by privately owned car between the two points, a distance of 70 miles, is subject to paragraph of the Joint Travel Regulations which precludes the payment of per diem to a member traveling daily from his residence to a temporary duty station on the basis the member incurs no change in living conditions or additional subsistence expenses. However, the officer is entitled to the rate per mile prescribed for the required travel. 49 Comp. Gen. 709 (1970).

Mileage allowance - travel approved but outside limits of permanent station--The travel of a Marine officer who was verbally directed to travel by privately owned vehicle from his permanent duty station at Quantico to Marine Headquarters in Arlington, as well as to various locations in Washington, D.C., incident to temporary duty - travel subsequently approved for reimbursement - is interstation travel within the purview of 37 U.S.C. 404 and reimbursable at the rate prescribed by the Joint Travel Regulations rather than at the higher rate provided pursuant to 37 U.S.C. 408, for travel within the limits of a member's station. Although 37 U.S.C. 404 requires travel to be authorized by written orders, confirmation of the verbal orders by competent authority shortly after the performance of the travel as being advantageous to the Government may be accepted for the purpose of reimbursing the officer. 52 Comp. Gen. 236 (1972). But see also 59 Comp. Gen. 397 (1980); and B-206503, November 30, 1982.

Mileage allowance - travel not approved but permitted for member's convenience--Marine Corps member on temporary duty assignment who commuted 120 miles daily between his permanent residence and temporary duty station, is entitled to be paid mileage allowance for such travel, but not to exceed amount of per diem he would have received had he remained at temporary duty station, where commuting travel

was not approved as advantageous to Government but was instead merely permitted for reasons of member's personal convenience. B-186677, September 29, 1976. See also B-206503, November 30, 1982.

Basic duty assignment over wide geographic area

General rule--Members of the uniformed services who are required to perform a basic duty assignment over a widespread area may have such area within which a substantial amount of duty will be performed administratively established as a designated post of duty so that travel and temporary duty performed at places removed from such area will entitle the members to travel allowances; however, if it is not feasible to make such a designation, the entire area of activity of the basic duty assignment must be regarded as the member's duty station and travel allowances would not be proper. 38 Comp. Gen. 656 (1959).

Specific location within area as permanent station--Military and civilian personnel who are ordered to report to a place for duty, in connection with a considerable amount of travel in the field after indoctrination and training at that place, and who subsequently are issued orders directing temporary duty away from and return to that place may be regarded as having a specific location for a permanent duty station away from which travel and temporary duty, such personnel may be regarded as in a travel status for per diem and travel expense purposes. 39 Comp. Gen. 753 (1960).

Area with definite boundaries - half of State--A member of the uniformed services who is assigned to a permanent duty station (Westover Air Force Base) to perform investigations in a definite area encompassing a part of a State (western half of Massachusetts) and all the cities therein and who, while traveling in the area and receiving a subsistence allowance, has to procure meals is not required to have all the travel in the entire area regarded as in the "immediate vicinity" of his duty station so as to be precluded under the Joint Travel Regulations from obtaining reimbursement for meals; however, travel to a city (Springfield) which is 18 miles away from the Base and takes 38 minutes of actual travel time where a noon meal is procured is not travel away from the duty station under 37 U.S.C. 404 and the Joint Travel Regulations and reimbursement for the meal is not authorized, but allowance for meals at other places outside the immediate vicinity of the Base is proper, less a prorated reduction from the member's subsistence allowance for such meals. 42 Comp. Gen. 666 (1963).

Basic assignment covers corps operational area--Air Force member was assigned duty as forward air controller with Republic of Korea Capitol Division, in the operational area

of corps operating out of Cam Ranh Bay, Vietnam. Member performed such duty between October 12, 1969, and March 6, 1970, mainly at Tigertown, Vietnam, 18 miles from headquarters posts at Cam Ranh Bay. Member was not entitled to per diem for duty at Tigertown, since that place was within sphere of his basic duty assignment, the corps operational area. B-176109, October 31,1972.

Basic assignment covers entire theater of operations--Air Force member was assigned from Cam Ranh Bay,Vietnam, to Korat, Thailand, on January 11, 1971, under orders designating such duty as "permanent change of station without permanent change of assignment." Thereafter, until June 9, 1971, member performed duty throughout Southeast Asia under variety of orders one of which transferred him to Quang Tri, Vietnam, on "permanent change of station." On June 9, 1971, member traveled to United States on emergency leave orders issued at Korat and directing return to Korat within 30 days. However, orders then issued at Cam Ranh Bay permanently reassigned him from Cam Ranh Bay to air base in California. Member was entitled to per diem for period January 11-June 9, 1971, notwithstanding language in orders, since in fact Cam Ranh Bay was his permanent station and he was performing temporary duty away from that station. B-177855, April 23, 1974.

B. Limitation on Length of TDY

Six month rule

A duty assignment of members of the uniformed services for a period in excess of 6 months may not reasonably be considered as temporary duty for payment of per diem. The assignment of members of the uniformed services to Antarctica incident to Operation "Deepfreeze II" for an 18-month period is far in excess of the duration which reasonably may be considered temporary for payment of per diem. 36 Comp. Gen. 757 (1957). See also 63 Comp. Gen. 4 (1983).

Six month assignment - orders amended to call duty TDY

After members of the uniformed services have actually reported to a new station for duty under instruction for a period of 6 months pursuant to permanent change of station orders, the amendment of the orders to refer to the duty as temporary is ineffective to authorize the payment of per diem. 36 Comp. Gen. 569 (1957). See also 63 Comp. Gen. 4 (1983).

Multiple TDY's at same station

The assignment of a member of the uniformed services to a school of instruction for 6 weeks and, upon the successful completion of the course, the further assignment to another training course at the same station for an additional

15 weeks constitutes a permanent rather than temporary change of station for 21 consecutive weeks to preclude the receipt of per diem, and the contingency that the member may fail to meet the scholastic requirements for successful completion of the first course may not defeat the administrative intent to continue the member under instruction for both training periods. 37 Comp. Gen. 637 (1958).

Extension of TDY beyond 6 months authorized

Although a time limitation of 6 months for temporary duty assignments for members of the uniformed services appears reasonable under ordinary circumstances, if the services promulgate uniform regulations applicable to all services, with appropriate administrative criteria for approval, in exceptional cases, of temporary duty assignments which are not of short duration, payment of per diem in such cases for periods of duty in excess of 6 months could be authorized. 38 Comp. Gen. 853 (1959).

Failure to obtain approval of TDY extension

Army member who after a period of 171 days of duty as a "Referral Recruiter," which is considered to be temporary duty, received several temporary duty orders continuing the duty at same location for 5 additional months, in absence of approval for temporary duty in excess of 180 days, in accord with the Joint Travel Regulations, and Army Regulations, is limited to per diem allowances not in excess of 180 days at that location. 54 Comp. Gen. 368 (1974).

PCS vs. TDY - time limit on per diem

Temporary or permanent duty is a question of fact to be determined from the orders and, where necessary, from the character of the assignment--considering duration, nature of duty enjoined, etc. Thus, Army officer ordered as a member of a unit on temporary duty to another station for a period of 5 months (later extended to 8 months) while quarters at permanent station were being renovated was entitled to the per diem prescribed for unit temporary duty, not to exceed 180 days without headquarters prior approval and excluding periods of group travel, leave and field duty. B-185987, November 3, 1976.

C. Travel Time Allowable

General rule

No per diem allowance is payable for any day of leave, proceed time, or delay en route when such day is classified as leave. B-178329, April 18, 1974.

Advance travel necessary to take advantage of excursion air fare

Payment of an extra day's per diem is authorized to a member of the uniformed services who may be considered to be in a travel status for the extra time required to take advantage of a reduced excursion air fare since the increased traveltime did not interfere with the performance of his official duties because he traveled on a nonworkday, it was not solely for personal convenience, and the cost of the extra per diem was more than offset by the savings to the Government through use of the excursion fare. B-194381, August 2, 1979.

Extra traveltime required to qualify for reduced fare

For purposes of qualifying for per diem a member of the uniformed services may be considered to be in a travel status for the extra time required to take advantage of a reduced air fare if it can be shown that the increased traveltime will not interfere with the performance of official business, is not for personal convenience, and the cost of the extra per diem when added to the cost of the reduced fare does not exceed what the Government would have been required to pay had the reduced fare not been used. 58 Comp. Gen. 710 (1979).

Intentional rest layovers

Transoceaanic flights--Navy member returning from Teheran, Iran, to Washington, D.C., on temporary duty, who departs from Teheran at 5:35 a.m. and completes 7 hours of travel to Rome, Italy, on trip requiring at least 24 hours' total travel if he is to continue on same plane or flight, may be allowed recredit of leaave and paid per diem for period of rest stopover since officer's action in utilizing stop for rest appears reasonable under circumstances. 55 Comp. Gen. 513 (1975). Compare B-202477, December 23, 1981.

Overnight layovers within United States--Member directed to proceed from Vienna, Virginia, to Vallejo, California, for 2 days' temporary additional duty, who upon completion of such duty at 5:30 p.m. on second day elected to spend night in San Francisco and return to Virginia the following morning on 8:45 a.m. flight, was entitled to per diem for overnight layover, such layover being reasonable under circumstances, since member had worked full day and there was no showing he was required to be at permanent station next morning. B-177897, March 21, 1973.

Unnecessary advance travel prior to TDY--Where Navy member was ordered to travel from Washington, D.C., to Camden, New Jersey, and return, for purposes of inspecting shipbuilder's model, and it appeared that time (including

travel) necessary for completing assignment did not exceed hours between 6:00 a.m. and midnight of one working day, member was not entitled to additional per diem due to his travel to Camden, New Jersey, and overnight layover on day preceding scheduled inspection. 33 Comp. Gen. 379 (1954).

Travel over 4 or more time zones--Paragraph M4204-3c, Volume 1 of the Joint Travel Regulations (1 JTR), provides in part that when a service member performs temporary duty travel by air over a direct route, his departure may be scheduled to allow arrival at a temporary duty station 24 hours prior to the beginning of a work status if the permanent and temporary duty stations are separated by four or more time zones. This provision applies to a rest stop at a temporary duty station prior to the beginning of a work status, and is therefore not applicable to the situation where the stop en route was not made at a temporary duty station prior to the beginning of a work status. 3-202477, December 23, 1981.

Need for approval of rest stop--As to travel during a service member's normal hours of rest, 1 JTR para. M4204-3d provides for a rest stop en route which has been authorized or approved by the order-issuing official. No basis exists upon which to authorize payment of the costs of a scheduled rest stop until that stopover has been authorized or approved by the order-issuing official. B-202477, December 23, 1981.

Travel by Government auto--Marine Corps members who traveled by Government van on temporary duty may be paid per diem for entire period of travel, where the circumstances of the travel do not show that it was performed in an unreasonable or imprudent manner. They departed permanent duty station at 5:30 a.m., traveled 370 miles, and stopped travel at 3 p.m. Their departure at 5:30 a.m. was not unreasonable merely because it placed them on travel status during morning mealtime. In addition, they did not act unreasonably in traveling 600 miles in 2 days rather than 1 day on their return travel. Proposal that they should have performed the travel in 1 day, involving about 11 hours' driving time, would have imposed an unreasonable travel requirement. B-202733, February 23, 1982.

The Comptroller General has no legal objection to an amendment of the Joint Travel Regulations, if considered desirable by the service Secretaries, which would generally allow 1 day of traveltime for per diem purposes for each 300 miles of temporary duty travel performed by Government automobile, since that amendment would not be inconsistent with the governing provisions of the statutory law authorizing travel allowances for service members on temporary duty assignments, 37 U.S.C. 404, nor with the requirement that Federal personnel perform official travel in an expeditious manner. B-202733, February 23, 1982.

Unintended delays

General rule use of POV--When travel by private vehicle incident to temporary additional duty is authorized on the basis of a factual determination that it will be more advantageous to the Government, the member is regarded as performing temporary duty for the actual time necessary to perform the travel, and no leave is chargeable for this period. Per diem is payable for the entire time of travel. If the travel by privately owned conveyance is not authorized as more advantageous to the Government, however, travel by that mode is considered to be for the convenience of the member. He is then considered to be in performance of duty only for the constructive travel time by common carrier, and he is chargeable with leave for the remainder of the actual time used in travel. Per diem is necessarily limited to the constructive travel time. B-171996, May 13, 1971.

Weather delays - no advance approval of POV travel--Member who traveled on temporary duty assignment from Fort Sheridan, Illinois, to Fort Benjamin Harrison, Indiana, by privately owned vehicle (POV) without securing advance approval that travel by POV was more advantageous to the Government, and who was delayed en route by bad weather conditions, was not entitled to per diem for period of delay, since regulations provide that without such advance approval per diem for travel is limited to that for constructive travel over usually traveled route by air or surface common carrier. B-175580, September 5, 1972.

Mechanical difficulties - Aero Club aircraft--Air Force member who traveled on temporary duty using Aero Club aircraft which incurred mechanical difficulties causing a layover of 4 days may not be reimbursed per diem for the layover time since per diem in this circumstance may not exceed the amount which would have been payable had the member used such commercial transportation as would have been available. 55 Comp. Gen. 1247 (1976).

Delays in obtaining port call and Government transportation--Member under permanent change of station orders performed temporary duty en route for 2 weeks as directed in orders. Thereafter, he was required to wait 14 weeks for port call for overseas transportation, during which time he performed assigned duties at TDY station. There was additional 2 days' delay pending departure from port of embarkation. Rule that per diem may only be paid for period of temporary duty stated in orders was not applicable to limit per diem entitlement to 2 weeks, since under Joint Travel Regulations per diem is also payable during periods of necessary delay awaiting further transportation, and thus member was entitled to per diem for entire period. B-173960-O.M., November 11, 1971, citing 33 Comp. Gen. 98 (1953). See also B-180936, January 6, 1975.

Delay en route due to family emergency--Member and dependent wife were traveling under permanent change of station orders from Homestead, Florida, to Incirlik, Turkey, when wife became ill on aircraft. Member and wife departed aircraft at Rome, Italy, where wife was hospitalized for 2 days. Such 2-day period is properly charged as leave to member, and he is not enntitled to per diem or to reimbursement under 10 U.S.C. 1040 as wife's attendant, since no orders were ever issued authorizing him to act as non-medical attendant. B-174852, March 14, 1972.

Extended delays en route - avoidable or for personal convenience

Sightseeing stopover--While member on change of permanent station travel arrived Yokota AB, Japan, on April 22 but was booked on April 29 flight to Osan AB, Korea (his new duty station), since transportation was available from Yokota prior to April 29 it would appear that the delay until that date was avoidable, charge to leave for delays was proper and per diem is not payable for such delay. However, since member traveled on April 21 and 22 leave should not be charged for April 22 and per diem and baggage handling charges are payable for those days. B-181509, February 5, 1975.

Use of ship when air transport available--An Army officer returning to his new permanent duty station in Hawaii from a temporary duty assignment in the United States who is erroneously furnished transportation by commercial vessel to accompany his dependents authorized this mode of transportation to travel to the new station prior to issuance of the temporary duty orders, is indebted for the cost of the commercial vessel transportation, less the cost of transportation by military air. He is also properly charged with leave and denied per diem for the excess travel time. 49 Comp. Gen. 744 (1970).

Circuitous route--Member who is given erroneous port call information while performing circuitous travel to new duty station is not entitled to additional payments based upon such erroneous information under 37 U.S.C. 404 and implementing Joint Travel Regulations. When authorized travel is performed on change of permanent station from old to new duty station by other than direct route, members of uniformed services generally are entitled to reimbursement for travel and transportation costs actually incurred, not to exceed those that necessarily would have been incurred for travel by direct or official route. B-180936, January 6, 1975.

D. Amount of Per Diem Government Quarters and Mess Available

See also Special Categories and Circumstances, infra, this chapter.

In general

Initial training-Government provides quarters and meals--When orders are issued designating the first permanent duty station of a newly enlisted airman who is at a training station taking a preliminary course of instruction, the airman may then be regarded as being "away from his designated post of duty" and in travel status. However, if Government quarters and dining halls are available to him at the training station, so that he has no actual need to incur additional living expenses while in that travel status, he remains ineligible for per diem under the Joint Travel Regulations. This is consistent with the underlying statutory purpose of per diem, which is solely "to meet the actual and necessary" additional expenses of living during periods of travel. B-211545, November 1, 1983.

Survival training - member provides own food and shelter--A Naval officer ordered to temporary duty to participate in survival training which requires personnel to forage for subsistence and to improvise their own shelter is considered to have been furnished rations and quarters, and therefore per diem may not be paid for the period of temporary training duty. 35 Comp. Gen. 555 (1956).

Space travel - quarters and food provided by Government contractor--Member assigned to plant of Government contractor to participate in space flight experiments under TDY orders stating that Government quarters and messing facilities were not available, but who was furnished experimental diet in lieu of subsistence and quartered aboard space vehicle at no personal expense, was not entitled to increase per diem on basis that Government quarters and mess were unavailable. 44 Comp. Gen. 326 (1964).

Direct Government contracts for commercial lodgings or meals--The holding in 60 Comp. Gen. 181 (1981) regarding the limitation on use of appropriated funds to pay per diem or actual expenses where an agency contracts with a commercial concern for lodgings or meals applies to members of the uniformed services as well as to civilian employees of the Government. However, because 60 Comp. Gen. 181 was addressed specifically to the per diem entitlement of civilian employees under 5 U.S.C. 5702, the Comptroller General will not object to per diem or subsistence expense payments already made to military members that exceed the applicable statutory or regulatory maximums as the result of an agency's having contracted for lodgings or meals. 62 Comp. Gen. 308 (1983).

Air travel - quarters and food provided by commercial airline--The per diem payable to a member of the uniformed services who is furnished quarters by a commercial airline

for a scheduled overnight delay in transit while traveling under a Government transportation request need not be reduced, the accommodations furnished neither constituting Government quarters, nor constituting quarters furnished by a Government contractor incident to the performance of temporary duty, as the delay was not occasioned by the performance of temporary duty, but caused by the mode of transportation utilized. 46 Comp. Gen. 795 (1967).

Private rental of Government quarters--A member of the uniformed services who, while in a travel status at isolated posts, is required to occupy Government quarters which are assigned or occupied by other military or civilian personnel is regarded as occupying Government furnished quarters so that a reduction in per diem is required. Military personnel or civilian personnel who are required to provide lodging in their Government furnished quarters at isolated posts to other military or civilian personnel who are in a travel status may not charge for such accommodations. 36 Comp. Gen. 459 (1956).

Use of Government VIP quarters--A member who, while on temporary duty, voluntarily moves into Government VIP bachelor officer quarters for which there is a service charge may not, under current regulations, receive increased per diem equal to such service charge. This limitation is applicable even though moving into the Government quarters may result in a savings of per diem to the Government over that which would have been payable had the member occupied commercial quarters. B-183755, July 23, 1976.

Government quarters and mess unavailable due to travel schedule--Member who traveled to Los Angeles in afternoon after completing TDY assignment at China Lake, Calif., and utilized commercial facilities prior to return flight to permanent station next day, in absence of specific authority in orders, was not entitled to increased per diem while in Los Angeles, since he could have remained at TDY station, where Government quarters and mess were available, and could have utilized common carrier (bus) next morning to go to airport in Los Angeles for same return flight. B-177493, May 14, 1973.

Determination of availability

Factors for consideration--A member of the uniformed services at a temporary duty or delay point where a Government mess is determined not to be available because of the distance between lodgings and the mess location, or because of the incompatibility of mess hours with duty hours, may be paid per diem at a rate authorized when a Government mess is not available on the basis that a member in a travel status is not required to use inadequate facilities, unless a military necessity, and distance is a factor in determining the impracticability of utilizing a Government facility. 52 Comp. Gen. 75 (1972).

Member's erroneous belief that available quarters inadequate--Member on TDY assignment who was informed that a double occupancy of Government quarters would be required, and who then secured commercial quarters based on his erroneous belief he was entitled to single quarters and that government quarters available were therefore inadequate, wsa properly denied certificate of nonavailability of Government quarters and was properly paid per diem at reduced rate. B-174495, March 7, 1972.

Quarters and mess available despite contrary statement in orders--Member whose TDY orders stated: "Government quarters and messing facilities will not be available (at TDY station)" was properly paid per diem at reduced rate and denied statement of nonavailability by TDY station commander, where such facilities were actually available. since installation commander or other responsible officer at TDY station has duty to assign available and suitable Government quarters, we have accepted determination by such officer unless, clearly, it is not in accord with actual circumstances. B-178537, July 13, 1973.

Certificate of nonavailability revoked after TDY completed--Where order issued by TDY station commander authorized member to mess separately for the reason: "mess unavailable," and this authorization was revoked following period of TDY, member was nevertheless entitled to increased per diem computed on basis that Government

messing facilities were not available, since member messing separately in reliance on original determination and since member's post of duty at TDY station was 40 miles distant from main area of station. B-177586-O.M., May 1, 1973.

Failure to make messing facilities available--Officers of the uniformed services on temporary duty overseas in connection with operation Longthrust VIII who were issued certificates of nonavailability of a Government mess for per diem subsistence payment purposes but such certificates were subsequently administratively invalidated because of an established policy requiring officers on temporary duty to be subsisted at enlisted field messes may have the nonavailability certificates regarded as a contemporaneous determination of the factual situation then existing regarding the nonavilability of a Government mess (since the enlisted mess was not actually made available to them), and, therefore, per diem payments made to the officers need not be recovered. 44 Comp. Gen. 740 (1965).

Where use of Government facilities may adversely affect mission--Three enlisted military members were on temporary duty as part of team with civilian employees at station where Government quarters and mess were available for enlisted personnel but not for officer-level civilians. Entire team moved to commercial quarters. While civilians are entitled to full per diem, military members are not so entitled since mess and quarters were available unless under the circumstances TDY order-issuing authority certifies that use of Government quarters would have adversely affected mission. B-185376, August 19, 1976.

E. Amount of Per Diem - Shared Lodging

A military member traveling on temporary duty shared a lodging accommodation with another person (his wife) who was not entitled to lodging at Government expense. In the absence of regulations providing otherwise, if he would have used the same accommodation at the single occupancy rate had he not been accompanied, he may be reimbursed on the basis of such single occupancy rate rather than at one-half of the double occupancy rate. If the hotel makes no distinction in rates between single and double occupancy, then the member may be reimbursed on the basis of the full room cost. B-194339, February 7, 1980.

F. Use of Recreation Vehicle for Lodging

Member who uses personal recreation vehicle for lodging while on temporary duty may not be reimbursed portion of the monthly purchase payment on his recreation vehicle for time in temporary duty status. Reimbursement of lodging expenses is to compensate a member for additional expenses

he incurs while away from his permanent station. In the case of a member who chooses to reside in a personal recreation vehicle while on temporary duty average lodging costs may include only such as parking space rental, utility connections and shower fees in the computation of his per diem. See 1 JTR, paras. M4205-5 and M4007-4. B-196968, July 1, 1980.

G. Lodging with Friends or Relatives

A claim by a member of the military for reimbursement of expenses incurred during temporary duty for lodging with a friend must be denied, even though the member paid his friend rent for the lodging, since Joint Travel Regulations par. M4205-1 provides that under such circumstances there may be no reimbursement for the cost of lodgings. 60 Comp. Gen. 57 (1980). But compare B-199683, February 24, 1982, concerning the rental of separate quarters owned by friends or relatives.

H. Loss of Personal Property on Temporary Duty

A Coast Guard officer on temporary duty placed liquor intended for his personal use aboard a Coast Guard aircraft on which he was to fly from the State of Washington to Alaska. The liquor was lost before the officer reached Alaska. Whether the member may be reimbursed for his loss is for determination by the Coast Guard under the Military Personnel and Civilian Employees' Claims Act of 1964 which provides that claims may be allowed only if possession of the property under the circumstances was reasonable, useful, or proper, and if the loss was not caused by the officer's negligence. Settlement is final and conclusive if statutory conditions are met. B-195295, November 14, 1979.

I. Actual Expenses

Unusual circumstances

The Per Diem, Travel and Transportation Allowance Committee (for uniformed service personnel) and the General Services Administration (for civilian employees) may issuue regulations permitting reimbursement to travelers on an actual expense basis based on unusual circumstances when due to the infrequency of travel to a given location consideration was not given to designating that locality as within a high cost geographical area. Authorization or approval of actual expense reimbursement should be predicated upon advice from the Committee or the administration, as appropriate, that the locality was not considered for inclusion in the list due to lack of information with respect thereto and will be applicable only to the specific travel under consideration. 59 Comp. Gen. 560 (1980).

Reimbursement for meals taken between permanent station and airport

A member of the Navy, authorized actual expenses while in a travel status, may be reimbursed for meals taken at normal meal times en route to and from the airport servicing his permanent duty station, where the airport is a considerable distance from his station and he is scheduled to travel on non-meal flights. B-215736, December 3, 1984.

Area not designated high cost

Where travel is to an area that is not designated as a high cost geographical area but where the choice of accommodations are limited or the costs of accommodations are inflated because of conventions, sports events, natural disasters, or other causes which reduce the number of units available, such events may be considered as unusual circumstances of the travel assignment which would permit payment of expenses to an employee or member on an actual expense basis depending upon the circumstances of each case and the necessity and nature of the travel. 59 Comp. Gen. 560 (1980).

Designation of high rate area retroactively

General designation of high rate geographical area may not be made retroactively even though the existence of normal high costs sufficient to warrant such a designation was unknown to the Per Diem, Travel and Transportation Allowance Committee prior to the performance of travel in any individual case and such facts are thereafter made known. 32 Comp. Gen. 315 (1953). 59 Comp. Gen. 560 (1980).

III. TRANSPORTATION EXPENSES

A. Government Conveyance Directed

Government conveyance available but not used

Under the Joint Travel Regulations which provide that where travel is directed to be performed by Government conveyance and such conveyance is available, but travel is performed by another mode of transportation, payment of the monetary allowance in lieu of transportation is prohibited, a serviceman whose orders required travel by Government air transportation which was available for a portion of the trip, is entitled to reimbursement for cost of travel by commercial air only for that part of the trip where Government air transportation was not available. 31 Comp. Gen. 572 (1952). See also B-199731, May 8, 1981; and B-202477, December 23, 1981.

An Air Force enlisted member's temporary duty travel orders directed travel by Government air and referred to a "dedicated airlift" which would be available for his use in returning directly to his permanent duty station. Since the orders did not clearly state that the dedicated airlift was the only flight for him to use, he need not reimburse the Government for the cost of his travel for a portion of the trip for which he used a different Government flight to return to his permanent duty station. B-210197, June 6, 1983.

Transportation officer erroneously authorizes commercial transport

An Army officer returning to his new permanent duty station in Hawaii from a temporary duty assignment in the United States who is erroneously furnished transportation by commercial vessel to accompany his dependents authorized this mode of transportation to travel to the new station prior to issuance of the temporary duty orders, is indebted for the cost of the commercial vessel transportation, less

the cost of transportation by military air. The member is also properly charged with leave for the difference in time between air and surface transportation. The transportation officer, limited under the member's orders to authorizing transportation by commercial air if military aircraft was not available, exceeded his authority and did not exercise sound traffic judgment in furnishing transportation by commercial vessel, and the member returning to his station under temporary duty orders, his travel is not within the scope of the Joint Travel Regulations provision authorizing commercial vessel travel concurrently with dependents under permanent change of station orders. 49 Comp. Gen. 744 (1970).

B. Government Conveyance Not Directed

Travel by commercial airline

Marine Corps member and his dependent who perform at personal expense circuitous transoceanic travel by commercial airline authorized by permanent change-of-station orders is entitled to reimbursement at Military Airlift Command rates for direct travel between duty stations despite having used commercial airline's reduced military fare contrary to Department of Defense (DOD) instruction providing that such fares may not be used by active duty members whose travel will be paid by DOD. B-198660, August 19, 1980.

C. Use of Government Transportation Requests (TR's)

Commercial transportation authorized - TR available

For travel within the United States, when TR's are available to the traveler at the time and place required and the traveler procures transportation on common carriers at his own expense in amounts of $100 (plus tax) or less under an individual travel order, he may elect to receive reimbursement for the actual cost of transportation for the mode of transportation authorized and actually used. For amounts over $100, the member may elect the same procedure, but his reimbursement may not exceed the cost to the Government for authorized transportation had a TR been used. B-163758, July 24, 1972.

When TR not available

Where Army member received TDY orders Friday evening in Tulsa, Oklahoma, directing he report to Durham, North Carolina, following Monday morning, and authorizing travel by public carrier, member was entitled to reimbursement as though TR was not available even though he made no effort to apply for one, since it was unlikely he could have obtained TR under the circumstances. B-170423, February 18, 1972.

D. Use of Privately Owned Vehicles (POV's)

When prohibited

Express prohibition in orders--Member directed to travel from Detroit, Michigan, to Great Lakes, Illinois, for medical observation was not entitled to mileage allowance, where travel by rail was directed and orders stated, "POV will not accompany EM," but member nevertheless performed travel by private auto. B-146525, August 30, 1961. See also B-182918, March 6, 1975.

Group travel - commercial transportation directed--Under orders which directed a unit to move from Fort Campell, Kentucky, to Fort Indiantown Gap Military Reservation, Pennsylvania, for TDY of approximately 90 days, and which specifically directed travel by commercial air except for certain designated members authorized travel by POV, unit member not so designated but who chose to travel by POV was not entitled to any mileage allowance. B-173064, June 30, 1971.

When POV authorized

As advantageous to Government--Where points between which travel is performed are adequately served by common carrier and no duty is directed en route requiring the use of a POV, there is no proper basis for a determination that use of POV is more advantageous to the Government. When member is authorized travel by POV, but the use of such transportation is not approved as advantageous to the Government and instead is authorized for member's personal convenience, mileage allowance must be computed at reduced rate and leave charged for delays en route. B-171996, May 13, 1971; B-175580, September 5, 1972.

Permitted for member's convenience--Marine Corps member on temporary duty assignment who commuted 120 miles daily between his permanent residence and temporary duty station, is entitled to be paid mileage allowance for such travel, but not to exceed amount of per diem, etc., he would have received hadhe remained at temporary duty station, where commuting travel was not approved as advantageous to Government but was instead merely permitted for reasons of member's personal convenience. B-186677, September 29, 1976. See also B-206503, November 30, 1982.

Reimbursable POV expenses

Mileage allowance in lieu of actual expenses--It is the established rule that mileage allowances authorized by statute in lieu of transportation costs or expenses, unless otherwise qualified, are intended as a commutation for all transportation expenses, including such items as road and

bridge tolls, ferry fares and the like, and consequently, that actual expenses for any such items are not properly payable in addition to the mileage allowance. 34 Comp. Gen. 531 (1955).

Insurance and other expenses--Since the cost of automobile insurance, like the cost of fuel, oil, repairs, and depreciation, is one of the expenses of operating an automobile, which expense is reimbursed to the member through the mileage allowance, the cost of additional insurance is in fact reimbursed in the mileage rate paid and may not be reimbursed as an out-of-pocket expense. 54 Comp. Gen. 620 (1975).

When actual expense reimbursable--No legal objection exists to authorizing the amendment to the Joint Travel Regulations to provide for reimbursement to members of the uniformed services on temporary duty for the actual expenses incurred for operating POV's when it is determined that the use of such vehicles is advantageousto the Government and reimbursement is limited to the cost of gasoline, oil, parking fees, tolls, and similar costs. B-185733, September 1, 1976.

E. Travel To and From Carrier Terminals

Mileage allowance authorized

A round-trip mileage allowance for members of the uniformed services at 7 cents per mile in lieu of reimbursement for use of taxicabs for each one-way trip between residence or duty station and common carrier terminal by privately owned automobile, not to exceed usual taxicab fare, including allowable tip, for a one-way trip from home to terminal or terminal to home may be authorized under the provisions of section 303(a) of the Career Compensation Act of 1949, which provides 7 cents per mile for travel away from the designated post of duty; therefore, the Joint Travel Regulations may be amended accordingly. 39 Comp. Gen. 131 (1959).

Not local travel - lower mileage allowance rate

Since one way trips by members of the uniformed services between residence or duty station and carrier terminal incident to the beginning or ending of travel away from a permanent duty station are to be distinguished from travel on official business within the limits of a duty station, which is reimbursable under section 2(m) of the act of September 1, 1954, the reimbursement authority for commutation of such one-way trip expenses on a round-trip mileage basis under section 303(a) of the Career Compensation Act of 1949, is subject to the 7 cents a mile maximum fixed by

section 303(a) of the Career Compensation Act of 1949. 39 Comp. Gen. 464 (1959). See also B-206503, November 30, 1982.

Flight canceled - mileage and parking fees allowed

An officer of the uniformed services who used his privately owned automobile to reach his airport departure point under orders authorizing travel to attend a conference, but who is prevented from departing due to adverse weather conditions and he returned home after an absence of 4 hours, is entitled to a travel allowance under the Joint Travel Regulations, which authorizes mileage for one round trip from home to airport, plus parking fees, not to exceed the cost of two taxicab fares between those points. 52 Comp. Gen. 452 (1973).

Use of taxicabs and other public carriers

Member on temporary duty assignment was required by circumstances of adverse weather conditions to travel by taxicab from St. John's to Gander, Newfoundland, Canada, to meet connection flight at Gander International Airport. Payment of full taxi fare may be made under the Joint Travel Regulations, which authorize reimbursement for taxicab, bus, streetcar, subway, or other public carrier fares between carrier terminals when necessitated by change in mode of transportation or when free transfer is not provided. B-178022-O.M., August 20, 1973.

Travel to air terminal that is not a local terminal

An officer of a uniformed service used his car to perform two round trips between his residence, Fallbrook, California, near Camp Pendleton and the Dan Diego, California air terminal, in the course of performing temporary duty travel. His claim for mileage for the two round trips between his residence and the airport may not be paid under item 1 of subparagraph M4401-2 of the Joint Travel Regulations, since the San Diego terminal is not a local terminal with respect to his residence. However, he may be reimbursed for one round trip. B-191624, July 5, 1978. See also B-206503, November 30, 1982; and B-198330, May 5, 1981.

F. Travel at TDY Station

In general

Transportation expenses incurred by members of the uniformed services in the conduct of official business at temporary duty stations may be reimbursed in the same manner

as for reimbursement of such expenses at permanent duty stations to the extent that payment is not currently provided as incident to the temporary duty orders. 35 Comp. Gen. 680 (1956).

Taxicab between quarters and place of duty

The use of taxicabs by members of the uniformed services for travel between their lodging and the place of temporary duty when the lodging is so remote from the temporary duty station that it is not reasonably accessible by public conveyance and when the travel requires an excessive expenditure of personal funds is considered travel on official business to entitle the members to reimbursement for the actual expenses, provided that the expenses are administratively approved. 42 Comp. Gen. 612 (1963).

POV or public carrier to duty station and restaurants

To provide the same entitlements for local transportation costs to members of the uniformed services as are authorized for civilian employees by the Standardized Government Travel Regulations, member at a temporary duty station for travel between place of lodging and place of business may be reimbursed the cost of bus or streetcar fare, taxicab fare when authorized or approved as advantageous to the Government, mileage for the use of a privately owned automobile, and the expense of travel to the nearest available eating place, considered necessary transportation not incidental to subsistence and, accordingly, the Joint Travel Regulations may be amended to provide the same reimbursement right as authorizing the civilian regulations including expense of daily travel to procure meals, bus or streetcar travel, taxicabs, and mileage, however, 37 U.S.C. 404 governs within and without station travel for the entire trip. 45 Comp. Gen. 30 (1965).

Exact amounts and dates of taxi fares not recorded

Service member while serving on temporary duty was authorized use of taxi service in and around tempoary duty station by memorandum endorsement to orders, but cannot furnish evidence of exact dates and amounts for the taxi fares. Since the number of trips claimed was far less than the maximum which could be allowed he may be reimbursed for such fares on the basis of best estimate of taxi trips utilized during the period. B-180243-O.M. May 22, 1974.

Interstation travel

Member of the Marine Corps travelled by privately owned vehicle from his home in Springfield, Virginia, to Quantico, Virginia, in order to perform temporary duty. Member's travel is interstation travel and therefore payment of his travel allowance is governed by 37 U.S.C. 404

and the implementing regulations. However, Comptroller General has no objection to proposed amendment to regulations that would result in separate cities or installations in close proximity being classified as within a "local commuting area" for purposes of payment of a mileage allowance at the higher rate authorized by 37 U.S.C. 408. 59 Comp. Gen. 397 (1980). See also B-206503, November 30, 1982.

Local travel

The Joint Travel Regulations may be amended to expand the definition of the term "area" in paragraph M4500-2 to reflect the view that the area intended to be covered under 37 U.S.C. 408 for reimbursement for travel in the vicinity of a duty station is the normal commuting area of the station concerned. However, in implementing the proposed amendment an arbitrary mileage radius should not be established in setting up the local commuting areas of permanent and temporary duty stations. 59 Comp. Gen. 397 (1980). See also B-206503, November 30, 1982.

G. Special Conveyances

Hire for extended travel

May be authorized--A Coast Guard member who is required to perform official travel to a place not served by common carriers under circumstances not permitting transportation by Government vehicle, and who is authorized by proper orders to hire a special conveyance (taxicab, U-Drive car, airplane, etc.) to perform such travel, may be reimbursed under provisions of the Joint Travel Regulations. 33 Comp. Gen. 563 (1954).

Taxicabs--Army member whose TDY orders authorized travel by "rail" but who elected to travel to TDY station by taxicab, was not entitled to reimbursement of taxi fare, since hire of special conveyance was not authorized in orders and since travel performed did not come within provision of Joint Travel Regulations which authorizes reimbursement for taxicab fares incident to travel to and from "carrier terminals." However, member was entitled to mileage allowance authorized. 33 Comp. Gen. 390 (1954).

Rented commercial aircraft--Air Force officer claims reimbursement for using rented commercial aircraft under blanket temporary duty travel order which stated that written justification must be filed for each use of such special conveyance and such conveyance would be authorized only if order issuing/approving official specifically endorsed order for each trip, which endorsements and justifications were not made. Regardless of possible application of DOD Instruction which prohibits use of leased commercial aircraft without proper authorization, under Joint

Travel Regulations member is not entitled to reimbursement since he did not have required approval for use of rented aircraft. Thus member is entitled only to mileage allowance for travel at personal expense. B-185853, September 21, 1976.

Aero Club aircraft

Constitutes Government conveyance--Use by Air Force officer on official travel of aircraft which was loaned by Department of the Air Force to the Air Force Academy Aero Club which was given full operational control of aircraft, nevertheless, constitutes use of a Government conveyance within the meaning of the Joint Travel Regulations which authorizes payment of monetary allowance in lieu of transportation for use of commercial or privately owned transportation and precludes such allowance for use of Government conveyances; however, amounts paid by the officer for gas and other necessary expenses are for reimbursement if supported by receipts. 38 Comp. Gen. 366 (1958).

Flying fees--The hourly flying fee charged an Air Force officer by the Air Force Academy Aero Club for the use on official travel of aircraft loaned to the Club may be considered a reimbursable travel expense item under the Joint Travel Regulations, which provide that, in unusual circumstances, where expenses of operation of Government convevances are incurred the traveler mav be reimbursed. 40 Comp. Gen. 587 (1961).

Airport fees--"tie-down" fees-- Charges paid for the protection and safeguard of Air Force Academy Aero Club aircraft left overnight at commercial airports when Government facilities are not available may be considered as in the nature of storage expenses which are reimbursable under the Joint Travel Regulations when a Government conveyance is used for official travel. 40 Comp. Gen. 587 (1961).

Aircraft destroyed - insurance--Military member may be reimbursed, as part of essential expenses, insurance deductible charged for destruction of Aero Club Aircraft used by member on official duty. Total cost, however, is limited to cost to Government of commercial transportation otherwise available for use. B-181364-O.M., February 13, 1975.

Mechanical breakdown - return to permanent station--Air Force member who traveled on temporary duty using Aero Club aircraft which incurred mechanical difficulties may not be reimbursed for travel to and from San Francisco, his permanent duty station, while waiting for the aircraft to be repaired, since the trip was not a necessary expense pursuant to public business but an expense as a result of a personal choice. 55 Comp. Gen. 1247 (1976).

No precedence over normal Government conveyance--The use of Aero Club-owned or Government-loaned aircraft is considered a Government conveyance when used as a mode of official travel but under current regulations such use will not take precedence over normal Government conveyance irrespective of whether use of the aircraft may be considered advantageous to the Government. 55 Comp. Gen. 1247 (1976).

Reimbursement - constructive travel limit--The determination of the constructive transportation cost ceiling on Air Force travel vouchers involving Aero Club aircraft or private aircraft by including the commercial fares for the operator (pilot) plus corresponding fares for any passengers accompanying the operator who are also in an official travel status does not appear to be improper. 55 Comp. Gen. 1247 (1976).

Transoceanic ferries

Although there is no authority in current regulations under which full fare (including that part attributable to transportation of the automobile) for Hovercraft crossing of the English Channel may be paid incident to temporary duty travel of military personnel, it does not appear that payment of such full fare would be objectionable under appropriate regulations if travel by automobile, including transoceanic ferry service is specifically authorized as advantageous to the Government since the transportation of the automobile may be considered as incident to authorized travel of the member in appropriate circumstances. 55 Comp. Gen. 1072 (1976).

Privately owned sailboat

A service member authorized reimbursement of the cost of transoceanic transportation used when performing travel upon PCS who traveled by privately owned sailboat may be reimbursed only necessary expenses directly connected with the operation of the vessel (fuel, oil and docking fees), provided they do not exceed the amount which would have been paid by the sponsoring service for available Government transportation. B-197402, September 16, 1980.

H. Circuitous Routes

In general

Navy member on permanent change of station from Antarctica to Bainbridge, Maryland, instead of normal route (Christchurch to Auckland, New Zealand, by foreign carrier, and by Category "Z" American air to Travis Air Force Base, California), traveled circuitously for personal reasons using foreign air for overseas travel except from Lima, Peru, to Miami, Florida. Since American'ir was available via the

direct route from Auckland to Travis, reimbursement not to exceed Government cost from Christchurch to Travis may be paid for cost of travel from Christchurch to Auckland and from Lima to Miami but not for costs of other foreign travel. 54 Comp. Gen. 850 (1975). See also B-191681, November 21, 1978; and B-198341, April 28, 1981.

Use of foreign carrier

Former Navy member who upon release from active duty returned to U.S. by circuitous route via foreign carrier is denied claim for additional travel allowances since computation of reimbursement must be based on cost of most direct, usually traveled route. Furthermore, the Joint Travel Regulations prohibit reimbursement of foreign carrier travel unless domestic transportation is impractical, unavailable, or would interfere with official business. Claimant's ignorance of prohibition provides no basis for relief; however, he does appear entitled to additional mileage payment for distance between point of debarkation in U.S. and home of record. B-178847, August 28, 1973.

Delivery of automobile--port selected for personal convenience

A provision of the Uniformed Services Pay Act of 1981 authorized a new travel allowance for service members transferred overseas to reimburse them for the expenses of taking their automobiles to and from ports of shipment. The Congress did not intend that this provision be interpreted to allow reimbursement for trips taken over unnecessarily circuitous routes to and from ports selected for personal convenience, for example, to accomodate travel to a desired leave location. Hence, a transferred Navy petty officer who was ordered to proceed from California to Charleston, South Carolina, to board a military flight to a new duty station in Panama, and who could have delivered his automobile to the port in Charleston for overseas shipment, may not be allowed additional travel allowances predicated on his election to take leave en route in Massachusetts and to deliver his automobile instead to a port in New Jersey. B-215123, December 4, 1984.

I. Use of Foreign Air Carrier Prohibited

General rule

An Army member who travels with dependents to an overseas location on a foreign airline (one not holding a certificate under 49 U.S.C. 1371) is not entitled to reimbursement for such travel since reimbursement for travel on a foreign airline is prohibited by 49 U.S.C. 1517 and pars. M2150 and M7000-8, 1 Joint Travel Regulations, when United States certificated carriers are available. B-193419, March 29, 1979. See also B-198872, February 20, 1981; and B-203625, February 22, 1982; B-206723, October 21, 1982.

Justification certificate

A service member may execute a justification certificate regarding "unavailability" of United States-flag air carriers, and paragraph M2150-3(1), 1 JTR, defines United States-flag air carrier passenger service "unavailable" if a traveler, en route, has to wait 6 hours or more to transfer to a United States-flag air carrier to proceed to destination. However, it does not apply to a service member waiting to begin travel but not "en route" from origin airport to destination and does not apply if only military reduced rate seats are unavailable when other seats are available. Service member executing such a justification certificate as the basis for United States-flag air carrier "unavailability" when it does not apply may not be reimbursed for travel performed on a foreign-flag air carrier. B-195302, October 17, 1979.

Basis for justification

Joint Travel Regulations' provisions implementing 49 U.S.C. § 1517, commonly called the Fly America Act, may not be changed to permit the greater use of foreign air carriers on the basis of their lower transportation costs. However, the provisions should be changed to be consistent with the 1980 amendment to the Act, which permits greater use of foreign air carriers to avoid undue delay. B-207637, November 10, 1982.

J. Use of Travel Agency

Inadvertent use

A member of the uniformed services, to take advantage of a low cost charter flight, purchased transportation for official travel with personal funds from a travel agency. Since traveler was not aware of the regulation which precludes use of travel agencies he may be reimbursed an amount not exceeding the cost of the transportation if it had been purchased directly from the carrier. 58 Comp. Gen. 710 (1979).

Member with notice of prohibition

A Navy Reserve officer who frequently traveled by air for mobilization training claims reimbursement for discount rate air fare tickets he purchased from a travel agency for travel within the United States. The use of a travel agency in such a case is prohibited by regulations because generally purchases directly from air carriers are more efficient and economical. Reimbursement is allowed only if the purchase was inadvertent and the claimant neither knew nor should have known of the prohibition. However, this officer was aware of the prohibition so he may not be reimbursed for such tickets. B-204297, December 22, 1981.

IV. MISCELLANEOUS REIMBURSABLE EXPENSES

A. Quarters Rented But Not Used

Travel delays

Rent for reserved hotel rooms which could not be used by a group of military and civilian personnel traveling on official business overseas incident to a research project because the Government airplane on which they were traveling was delayed due to mechanical difficulties and weather, and because the notice of cancellation of the reservations arrived too late to permit the hotel to rent all of the reserved rooms, may considered as a necessary expense incident to the authorized project flight and the claim paid. 41 Comp. Gen. 780 (1962).

Recall to permanent station

Where a Navy officer was unable to fulfill his temporary duty assignment because he was recalled to his permanent station for emergency duties a few hours after arrival at the temporary duty station the advance payment for the rental of a hotel room may be reimbursed in addition to taxi fare and tips for handling baggage at the air terminal since the officer under proper orders rented the hotel room due to the unavailability of Government quarters, and the reimbursable hotel charge is considered an administrative expense that is chargeable to the appropriation for Operation and Maintenance, Navy. 51 Comp. Gen. 12 (1971).

TDY at different places - double rental required

An officer involuntarily assigned to bachelor officers quarters at his temporary duty station, Clark Air Base (AB) in the Philippines, which he is directed to maintain while deployed to Taiwan because of adverse weather conditions, and where he is paid for the period August 8 through October 1, 1972, the maximum locality per diem rate of $13 is entitled to reimbursement of the $2 per day service charge he paid during his absence from the AB notwithstanding paragraphs of the Joint Travel Regulations against increasing a maximum locality rate. The service charge is not a rental fee but is intended to defray operating expenses, and as the service was not agreed to by the officer, or required to be furnished during his absence, the reimbursement will not constitute additional per diem. 52 Comp. Gen. 917 (1973).

TDY at different places - double rental for personal convenience

Navy member sent on 6-month temporary duty assignment to Misawa, Japan, and other places, who maintained unoccupied Government living quarters at Misawa as a matter of personal convenience and for storing personal belongings during short periods when performing additional duty in the Philippines and Korea, and while on leave at Kyoto and Tokyo, Japan, is not entitled to reimbursement for room charges incurred during such periods either as per diem or as a necessary miscellaneous expense incidental to official travel. B-188415, July 6, 1977.

B. Baggage Handling

General rule

The tips given exclusively for handling Government property at hotels may be reimbursed to members of the uniformed services, and the Joint Travel Regulations amended accordingly, the rule that a tip is an incidentalexpense item

included in a member's per diem applying only to personal baggage. However, reimbursement may not be authorized for tips or fees incurred in handling a member's personal baggage as well as Government property at hotels except to the extent a separate charge or additional cost is experienced for handling the Government property. 48 Comp. Gen. 84 (1968).

Failure to itemize reimbursable amounts

Where member claimed reimbursement for expenses incurred for "unloading, movement, checking, loading, and transport of baggage," but statement submitted did not disclose which items were reimbursable expenses under requirements and limitations of regulations, no amount could be paid on claim. 40 Comp. Gen. 140 (1960).

Excess baggage

Member incurs excess baggage costs while traveling on commercial airline. Under 1 Joint Travel Regulations, para. M4404, such costs may be reimbursed member if authorized before travel or approved after travel by appropriate Army officials. Since excess baggage costs were neither authorized nor approved, member may not be reimbursed. B-195585, February 21, 1980.

Baggage lost or stolen

A Coast Guard officer on temporary duty placed liquor intended for his personal use aboard a Coast Guard aircraft on which he was to fly from the State of Washington to Alaska. The liquor was lost before the officer reached Alaska. Whether the member may be reimbursed for his loss is for determination by the Coast Guard under the Military Personnel and Civilian Employees' Claims Act of 1964 which provides that claims may be allowed only if possession of the property under the circumstances was reasonable, useful, or proper, and if the loss was not caused by the officer's negligence. Settlement is final and conclusive if statutory conditions are met. B-195295, November 14, 1979.

C. Airport Taxes

The airport fees military and civilian personnel are required to pay when departing from airports incident to the official travel of themselves and their immediate families and dependents are reimbursable, if the charges are reasonable, as transportation expenses on the basis of a Supreme Court ruling that a user fee imposed on departing passengers does not involve an unconstitutional burden on interstate commerce, and that if the funds received by local authorities do not exceed airport costs, it is immaterial whether they are expressly earmarked forairport use. However, as fees imposed on arriving passengers are held to be

an unreasonable interference with interstate commerce, they may not be reimbursed, but if found valid upon appeal, reimbursement is authorized on the same basis as departure fees. 52 Comp. Gen. 73 (1972).

D. Traveler's Checks

Reimbursement to members of the uniformed services for the cost of purchasing traveler's checks, whether the related travel is performed within or without the United States may be authorized without regard to the value of the checks purchased in view of the broad authority for reimbursement in connection with the travel of members and their dependents, and the Joint Travel Regulations amended accordingly, thus bringing reimbursement for the cost of traveler's checks for travel within the United States in line with the long recognition that the cost of traverler's checks incident to travel outside the United States is a valid expense. 51 Comp Gen. 606 (1972).

E. Passports

No Travel Performed

Air Force member who obtained passport in preparation for overseas TDY assignment, but who was separated from active duty without having undertaken TDY assignment, was not entitled to reimbursement for passport fees, since there is no authority for reimbursement of such fees incurred in preparation for travel if no travel is performed. B-168038, November 25, 1969, citing 45 Comp. Gen. 34 (1965).

Extra travel to obtain passport

A member may not be reimbursed for travel expenses incurred due to extra travel to obtain passports for a permanent change of station where no travel orders are issued authorizing such extra travel. Also, the charge to leave for the time the member spent obtaining the passports is a matter within the discretion of the service and will not be disturbed. B-195586, July 15, 1980.

F. Ice for Cooling Water

The term "other similar incidental expenses" as used in the Joint Travel Regulations, providing that per diem allowance is designed to cover room rentals, meals, tips, laundry, and "other similar incidental expenses," includes the cost of ice for cooling drinking water so that the cost of ice deemed necessary to cool water in order to make it potable for members of the uniformed services who are receiving per diem while on detached duty is not an expense for which the Government is liable. 31 Comp. Gen. 501 (1952).

G. Dependents' Expenses - Award Ceremonies

There is no authority for the Secretaries concerned to issue regulations authorizing the payment of travel and transportation expenses of dependents of civilian employees or military members to accompany such employees or members who are receiving honor awards, nor is there authority for the payment of travel and transportation expenses of such dependents to receive awards themselves. 55 Comp. Gen. 1332 (1976).

H. Telephone Charges, Athletic Equipment, Banquets, Entertainment, Alcoholic Beverages, Etc.

Members on temporary duty to attend courses offered by certain universities may not be reimbursed for telephone installation and service charges (when for personal convenience), gym outfits (unless gym classes are part of curriculum), or expenses for alcoholic beverages. There is no basis to authorize TDY allowances for dependents in connecton with "Graduation (Wives) Week." Also, "Cape Cod Weekend" expenses, "Can Group" dinner expense, and pro-rata share for entertainment cannot be considered "extraordinary costs of banquets attended in connection with official business as a part of a conference or meeting." Moreover, such expenses may not be considered in determining level of per diem, since purpose of per diem is to offset necessary subsistence costs of travel. B-174464, February 28, 1972.

I. Costs of Babysitting and Gasoline

Member on permenent change of station from California to New Mexico who performs relocation at personal expense is not entitled to reimbursement for baby sitting and for gasoline for return trip to California to get dependents, in absence of authority for such reimbursement, such expenses being in nature of miscellaneous costs for which a dislocation allowance was paid to member. B-184023, July 29, 1975.

J. Trip Cancellation Insurance

A member of the uniformed services purchased trip cancellation insurance when he purchased charter flight accommodations. It is the policy of the Government to insure its own risks of loss. Trip cancellation insurance is not a reimbursable travel expense unless it can be shown that the insurance is an inseparable part of a travel package which provides special or reduced fares at a savings to the Government. 58 Comp. Gen. 710 (1979).

K. Laundry Expenses

An Army member's claim may not be allowed for commercial laundry expenses incurred while he was on temporary duty in Cairo, Egypt, and was entitled to per diem at the full rate authorized when Government furnished quarters are used. While under applicable regulations reimbursement of certain necessary incidental expenses in addition to per diem is permitted if approved as being necessary to the successful performance of the related duty and as in the interest of the Government, in this case such authorization was not given. In any event laundry expenses are generally considered as subsistence expenses covered by the per diem allowance the member received. B-205354, June 2, 1982.

L. Animal Quarantine Fee

Animal quarantine fee incurred for family at service member's temporary duty station while en route to new duty station incident to transfer may not be reimbursed because it is not an allowable transportation or transportation-related expense. Further, the fact that the member was allowed accompanied travel with temporary duty en route does not permit payment of a fee incurred because the family pet was traveling with the family. B-205577, May 18, 1982.

M. Telephones - Change of Permanent Quarters

Reconnection charges

Claim that reimbursement of telephone reconnection charges should be paid under same authority as other utility charges incurred incident to a required relocation of Air Force member, not constituting a permanent change of station, may be paid, since it is doubtful that Congress intended to preclude payment in such cases when enacting 31 U.S.C. 679, which precludes the payment of any expense in connection with telephone service installed in a private residence. 56 Comp. Gen. 767 (1977).

Relocation of telephone for temporary period--A member of the Air Force who was ordered to vacate his quarters in a Government dormitory for 3 months during renovation was authorized reimbursement for allowing his private telephone service to continue as a less costly alternative to paying reconnection charges at his temporary quarters. During that period although he could not use his telephone he was able to charge toll calls to his account. Use of appropriate funds for reimbursement for the service charges that accrued during renovation is prohibited under 31 U.S.C. § 1348. Relocation of a telephone for this temporary period is not analogous to the situation in which telephone relocation charges were authorized because that case involved a permanent move caused by Government necessity

and not a temporary move. Absent authority to pay for relocation of telephone service there is no authority to pay for basic service charges. B-213660, May 3, 1984.

Government-procured service

Because of necessity to ensure telephone service in the Air Deputy's residence upon his occupancy of quarters in Norway, telephone service is secured by the U.S. Government under long-term lease. For 2 months, between incumbents the residence was vacant but the telephone charges continued to accrue. Although 31 U.S.C. § 679 prohibits using

appropriated funds for telephone service in a private residence, the statute is not to be applied here where neither the outgoing nor incoming Air Deputy occupied the premises during the period covered by the charges. 60 Comp Gen. 490 (1981). Compare 59 Comp. Gen. 723 (1980).

V. SPECIAL CATEGORIES AND CIRCUMSTANCES

A. Reserve, and National Guard, and Retired Members On Active Duty

Reservists on active duty - length of active duty period

Per diem allowed if tour of duty less than 20 weeks--Members of Reserve components who are called to active duty or active duty for training, as distinguished from annual active duty for training under orders which required a return home upon completion of duty, are entitled to per diem if called to duty from their homes for tours of less than 20 weeks duration, 37 U.S.C. 404(a)(4) permitting the payment of per diem to reservists ordered from their homes for short periods of less than 20 weeks of duty, irrespective of the type of duty performed, if they are not furnished quarters and mess at a training duty station. 48 Comp. Gen. 517 (1969).

Per diem not allowable if tour of duty more than 20 weeks--When members of Reserve components are ordered to active duty or active duty for training for 20 weeks or more, the rules and regulations relating to temporary duty travel do not apply and the entitlement of reservists to per diem is for determination pursuant to 37 U.S.C. 404(a)(1) and not section 404(a)(4), which provides for the equalization of reservists' benefits with that of Regular members. 48 Comp. Gen. 517 (1969). See also B-207840, January 10, 1983.

Tour of duty extended beyond 20 week period--Where due to unforeseen circumstances, it is impossible for a reservist to complete ordered duty within a scheduled 20-week period, per diem payments may be continued for short additional periods and regulations amended accordingly. 49 Comp. Gen. 621.(1970). Compare B-203525, March 15, 1982 (extension not due to unforeseen circumstances).

Two tours of duty exceeding 20 weeks, at same location, with 1-day break in service--A naval reservist who travels from and to his home under orders providing for a 63-day recruiting assignment at a temporary duty station and then under subsequent orders after a 1-day break in service returns to the temporary duty station for a 150-day similar assignment is considered to have had one continuous period of service for determining entitlement to a temporary duty allowance - per diem and monetary allowance in lieu of transportation - and under 37 U.S.C. 404(a) permitting

payment of travel and transportation allowances to reservists ordered from home for short periods of active duty - less than 20 weeks - where mess and quarters are not provided, the member may not be paidon the basis that two periods of duty were authorized by the separate orders. 48 Comp. Gen. 655 (1969).

Two tours of duty exceeding 20 weeks, at different locations, with break in service--The fact that orders directing an officer of the Army National Guard to report for 3 phases of continuous rotary wing aviation training to be held at 2 different locations for a period in excess of 20 weeks were revoked to substitute two separate orders of 18 weeks each for training at different locations, with a service break in-between, does not operate to deny the officer entitlement to per diem for the entire period of training. Public Law 90-168, which is implemented by the Joint Travel Regulations to provide per diem for members of Reserve components ordered to active duty from home while at a permanent duty station for less than 20 weeks, where Government quarters or mess, or both, are not available, contains no indication in its legislative history that it is not applicable to separate periods of training. 49 Comp. Gen. 320 (1969).

Tour of duty exceeds 20 weeks solely due to holiday schedule--A chief warrant officer, a member of the Rhode Island National Guard, who under permanent change of station orders attended full-time training duty in a Warrant Officer Auto Repair Course at an Army OrdnanceCenter and School for a period in excess of 20 weeks, although the usual period of instruction is less than 20 weeks, because no instruction was provided during the Christmas holiday period, and other military personnel who were students, - some membrs of the Army, the National Guard and United States Army Reserve - similarly situated are entitled to a per diem allowance, notwithstanding the receipt of permanent change of station orders, as both the officer and students were in fact in a temporary duty status since the actual course of instruction was less than 20 weeks' duration and the active duty status during the holiday period was merely incidental to the course of instruction and did not serve to extend the period of the instruction. 53 Comp. Gen. 218 (1973).

Availability of Government quarters and mess

General rules if quarters and mess availabale--Reserve member on active duty for training for 35 days at a service school where Government quarters and messing facilities are available is not entitled to per diem. Prohibition against payment of per diem to Reserve members during annual training where Government quarters and messing facilities are available is also applicable to periods of active duty for training. Army Regulations provision which permits member

to use other than Government facilities is not applicable to a reservist attending military service school. B-203925, September 2, 1981.

"Residual" per diem if quarters and mess available--To equalize the entitlement of members of the National Guard with members of Regular components, regulations may be amended to provide so-called "residual" per diem for reservists ordered to duty for periods of less than 20 weeks when quarters and mess are available, not only to attend service schools, but in all cases similar to those where Regular members performing like duty in a temporary duty status are entitled to per diem, subject to the exception in the legislative reports with respect to section 3 of Public Law 90-168 (37 U.S.C. 404(a)), that no member of a Reserve component should receive any per diem for performance of 2 weeks of annual active duty for training at a military installation where quarters and mess are available. 49 Comp. Gen. 621 (1970).

Per diem if quarters and mess unavailable--Denial of per diem under 37 U.S.C. 404 (a)(4) to a member of a Reserve component is required only while he is on annual active duty for training when Government quarters and Government mess are available and, therefore, per diem may be paid to a member of a Reserve component while on annual active duty for training or active duty at a duty station where Government quarters or Government mess, or both, are not available even though the duty is performed at the same place and under the same conditions as apply to the reservist's inactive duty traininq. 48 Comp. Gen. 517 (1969).

Per diem allowable if member lodged in nonappropriated fund facility--Member of Reserve component ordered to annual active duty for training stayed at Navy Lodge, a nonappropriated fund temporary lodging facility, at $9 daily charge. In view of 37 U.S.C. 404(a)(4) and Joint Travel Regulation, which provide that members of Reserve components ordered to annual active duty for training are not entitled to per diem if Government quarters and mess are available, does not preclude per diem where members of Reserves incur lodging expenses at nonappropriated fund activities which were defined as Government quarters for purposes of 1 JTR without consideration that such expenses would be incurred. 55 Comp. Gen. 130 (1975).

Per diem not reduced due to receipt of quarters allowance--A member of the Coast Guard Reserve when away from home to perform active duty training at an installation where Government quarters and messing facilities are not available, in addition to entitlement to the travel and transportation allowances provided by 37 U.S.C. 404(a) (2) and (3), may be credited under the authority of 37 U.S.C. 404(a)(4) with a basic allowance for quarters and per diem

without reduction, the restriction in 37 U.S.C. 403(b) to the payment of a quarters allowance when a member is not entitled to basic pay having no application to a section 404(a)(4)entitlement, and the Joint Travel Reoulations not requiring a reduction in per diem while a reservist is entitled to quarters allowance. However, the basic allowance for subsistence prescribed by 37 U.S.C. 402(b) is not payable to an enlisted man receiving per diem and therefore subsisted at Government expense. 48 Comp. Gen. 301 (1968).

Reservist's home located at or near duty station

Mileage allowance prohibited for commuting expenses--A member of a Reserve component who commutes daily from his home to his training duty station is not "away from home" within the meaning of 37 U.S.C. 404(a) (4) to entitle him to reimbursement for the expense of commuting and, therefore, although the reservist because his activeduty station is his permanent duty station would be entitled to reimbursement under the Joint Travel Regulations for travel expenses incurred in conducting official business within his permanent duty station and adjacent areas, the regulation may not be amended to authorize reimbursement to reservists for the expense of commuting daily between home and duty station located within the corporate limits of the same city or town. 48 Comp. Gen. 517 (1969).

Per diem prohibited where member commutes--Army reservist whose home was in Richmond, Virginia, was directed to report to Fort Lee, Virginia, 26 miles distant, for active duty for training of 3 months. Government quarters and messing facilities were not available and travel by public transportation was impracticable, so that member commuted by private automobile. He was not entitled to per diem or mileage allowance, since he commuted daily from home and since Fort Lee was his permanent duty station. B-175929, October 4, 1972.

TDY performed by reservist near place from which called to active duty--Reservists ordered to active duty training at permanent duty stations away from their homes or places from which ordered to active duty for periods of either less or more than 20 weeks who subsequently are required to perform temporary duty assignments away from the permanent stations in areas where their homes or places from which they are ordered to active duty are located, are entitled to per diem under the applicable provisions of the Joint Travel Regulations since the members having departed their permanent duty stations are in travel status, and the fact additional expenses are not incurred at the temporary duty location does not preclude payment of per diem, as "per diem" is a commutation of expenses and is payable without regard to whether the expenses it is designed to reimburse are actually incurred. 53 Comp. Gen. 484 (1974).

Inactive duty training immediately before or after active duty period

A Reserve member who performs inactive duty training at headquarters before and after an active duty training period is not precluded from entitlement to the travel and transportation allowances authorized in 37 U.S.C. 404(a) because of the prohibition in the Joint Travel Regulations against payment of travel or transportation allowances for inactive duty training at the headquarters of a Reserve component, absent a requirement for performance of travel immediately preceding or upon detachment from active duty. For consideration, however, is the availability of the reservist for inactive duty training, 37 U.S.C. 204(b), providing that the active duty status of a reservist ordered to duty for more than 30 days is expanded to include travel time. 48 Comp. Gen. 78 (1968).

Reimbursement for miscellaneous expenses if reservist entitled to per diem

Members of the Reserve components away from home on active duty for less than 20 weeks, and entitled to a per diem at their permanent station, may be reimbursed such miscellaneous expenses as are authorized for Regular members of the uniformed services under the Joint Travel Regulations in connection with travel or temporary duty and the regulations amended accordingly in view of the parity intended to be accomplished by the addition of clause (4) to 37 U.S.C. 404(a) by the act of December 1, 1967. However, the entitlement to travel between place of lodging or messing and duty as prescribed in Joint Travel Regulations may not be authorized since under clause (4) members at their permanent station performing annual training duty are not entitled to per diem when Government quarters and mess are available. 51 Comp. Gen. 559 (1972).

Reservists serving on active duty without pay

Per diem not authorized--The authority provided by 37 U.S.C. 1002(b) to pay members of the National Guard, or of a Reserve component of a uniformed service performing training or other duty pay, travel and transportation allowances to and from the training or duty and to furnish them subsistence and quarters in kind, or commutation thereof, at a rate fixed by the Secretary of the military department concerned may not be exercised to amend the Joint Travel Regulations to prescribe entitlement to the payment of per diem allowances at rates provided for those members who are not furnished quarters and/or mess while performing duty without pay at locations other than at their primary duty stations, the Secretaries' discretionary authority extending only to furnishing subsistence and quarters in kind, or commutation thereof, and "commutation"

meaning a fixed sum in lieu of rations and quarters in kind, a per diem payment - a temporary allowance payable on a daily basis and varying in accordance with the expenses incurred - may not be authorized. 44 Comp. Gen. 615 (1965).

Reimbursement on actual expense basis not authorized--The commutation rate provided in 37 U.S.C. 1002(b) in lieu of quarters and subsistence to members of the National Guard, or of a Reserve component of the uniformed services who consent to additional training or duty without pay has reference to the cost to the Government of furnishing subsistence and quarters in kind, and not to the actual expense a member incurs in providing himself with subsistence and quarters, and the established aggregate daily commutation rate exceeding the maximum commuted rates prescribed by 37 U.S.C. 402 and 403 for members performing training duty in a full pay status, the rate may not be increased. Nor may an increase on a non-Government cost basis tantamount to payment of an unauthorized per diem at a duty station, be prescribed. 46 Comp. Gen. 319 (1966).

Reservists hospitalized for injury or disease incurred in line of duty

Members of the Army and Air Force Reserve, and National Guard qualifying for the disability benefits prescribed by 10 U.S.C. 3722 and 8722, and 32 U.S.C. 319, having been authorized necessary transportation incident to hospitalization, rehospitalization and return home when discharged from the hospital, the Joint Travel Regulations may be amended to authorize travel allowances consistent with the general authority for travel and transportation allowances provided in 37 U.S.C. 404. 43 Comp. Gen. 561 (1964).

Retired personnel ordered to active duty

The payment of the travel and transportation allowances prescribed in 37 U.S.C. 404(a) to retired members of the uniformed services ordered to short periods of duty at a station where mess and quarters are not prescribed is not precluded by the lack of specific reference to retirees in the legislative history of Public Law 90-168, dated December 1, 1967, adding clause 4 to section 404(a) to provide travel and transportation allowances for Reserve components, the 1967 act having been designed to authorize the same entitlements to "all military personnel" when the circumstances are essentially the same. In amending the Joint Travel Regulations to provide for payment to retired members, the fact that the per diem authorized by the act is a permanent station allowance that is payable only during periods of duty at a permanent station is for consideration. 48 Comp. Gen. 553 (1969).

Travel for medical examination

Reserve or retired member who does not pass physical examination given incident to being ordered to active duty for more than 30 days is entitled to pay and allowances for period required for examination and travel time to and from examination, provided orders place member in active duty status. Reserve or retired member who passes physical examination incident to such orders is entitled to pay and allowances for travel time to his first duty station when later ordered to active duty for more than 30 days B-181762, July 18, 1975.

Reservist on indefinite active duty voluntarily relieved from and immediately recalled to active duty

An Army Reserve officer on indefinite active duty assigned to the Selective Service System who is voluntarily relieved from active duty in the Army and immediately thereafter is voluntarily recalled to active duty in the same grade in the Army Reserve and assigned to the Army National Guard without any break in service is not entitled to travel allowances. B-193799, July 13, 1979.

Reservist travel on ordinary leave

Reserve officer who returned from his duty station at Carlisle, Pennsylvania, to his residence in Milan, Italy, while on ordinary leave during a period of Active Duty Training may not be reimbursed for travel expenses because he was not in a "travel status" pursuant to orders, but was traveling on leave for personal reasons. Thus, upon his return to his duty station in Carlisle and subsequent temporary assignment to Fort Bliss he was entitledto travel allowances for himself only from Carlisle to Fort Bliss, not from Italy. B-191291, June 30, 1978.

B. Cadets and Midshipmen of the Service Academies and ROTC Members

Cadets and mishipmen

Travel of dependent spouse acquired upon commissioning--A graduate of the United States Military Academy who, upon receipt of a commission as an officer, is assigned to a new permanent duty station, with temporary duty en route, and who acquires a dependent before the date he is required to commence travel to report to the temporary duty station, is entitled to reimbursement for travel of the dependent to the new station not to exceed travel from farthest point under the officer's orders to the new station; however, if the dependent is acquired after the date of required travel to the temporary station, reimbursement may not exceed entitlement from the temporary to the permanent station

irrespective of the place where the dependent is acquired. 38 Comp. Gen. 790 (1959).

Cadets whose parents are members of uniformed services--United States Military Academy cadets, who are sons of members of the uniformed services, are entitled to transportation allowances in their own right and, therefore, such cadets may not be regarded as dependents for travel purposes incident to a permanent change of station of the member to entitle the member to reimbursement for the cadet's travel when the permanent change of station is made after the son entered the academy. 39 Comp. Gen. 786 (1960).

Temporary duty allowances--Since the commuted value of rations which cadets and midshipmen at the service academies are entitled to receive without deduction when the ration itself is not furnished is more analogous to the allowance officers are entitled to receive than to the payment for subsistence in kind received by enlisted personnel, the provisions in section 3(e) of Executive Order No. 10119 precluding enlisted personnel from receiving a ration allowance when they are in a travel status are not applicable to cadets and midshipmen; therefore, when cadets and midshipmen are in a travel status receiving per diem they may also receive the commuted value of the ration when rations are not furnished or when required to pay for meals at officers' closed mess or officers' field ration mess. 43 Comp. Gen. 94 (1963).

Rejected candidates for admission--A candidate for admission to the United States Air Force Academy who had in January, 1973, medically qualified for pilot training but when he reported to the Academy in July was not admitted because he was found medically disqualified for a condition that had existed from birth but which had been overlooked during his initial physical examination may be reimbursed the cost of traveling from his home to the Academy and return, since the candidate's rejection was due to no fault on his part and, therefore, he should be granted reimbursement on the basis the Government owes him the same consideration that is extended to rejected applicants for enlistment in the Regular services or Reserve components. 53 Comp. Gen. 236 (1973).

Cadets suspended but later reinstated--Cadets are required to sign agreement they will complete full 4-year course at academy, and their posts of duty remain the same during that time. If they decide to travel home during period of leave such travel would be at personal expense. However, cadets suspended for misconduct, and who either go home in leave-without-pay status or are sent to military post to serve in enlisted status, and who then obtain temporary restraining order directing their reinstatement, are entitled to travel allowances for travel performed to home or

military post and return to academy. B-177201, December 6, 1972.

Reserve Officers' Training Corps (ROTC)

ROTC members do not have same per diem entitlements as cadets and midshipmen--The Joint Travel Regulations may not be revised to authorize per diem allowances for members of, and applicants for, Senior Reserve Officers' Training Corps to same extent as prescribed for cadets and midshipmen appointed under 10 U.S.C. 2107, in the absence of specific statutory authority for such allowance in 10 U.S.C. 2109 for members not appointed under 10 U.S.C. 2107. 53 Comp. Gen. 957 (1974).

ROTC members not authorized per diem as enlisted Reserve members--Members of, and applicants for, Senior Reserve Officers' Training Corps may not be authorized per diem under the Joint Travel Regulations by virtue of enlisted status in Reserve component, since requirement that such members enlist in Reserve component is for purpose of securing involuntary active military service as enlisted member if student fails to complete course of instruction or refuses to accept appointment as commissioned officer with its obligated service and these members do not attend drills or perform duty other than that prescribed in 10 U.S.C. 2109, which specifically provides travel allowances incident thereto. 53 Comp. Gen. 957 (1974).

ROTC members performing recruiting duties--A cadet in a Reserve Officers' Training Corps (ROTC) at the University of Detroit who under invitational orders performed recruiting duties at two Detroit high schools - a matter of 2 hours and 3 hours duty on separate days - and returned each time to the University is not entitled to a per diem allowance, having used Government transportation and not having incurred any additional subsistence expenses. ROTC cadets have no military status nor are they Government employees, and unless utilized as consultants or experts, they are considered persons serving without pay and such a person under 5 U.S.C. 5703(c) may be allowed transportation expense and per diem only while en route and at his place of service or employment away from his home or regular place of business. However, since the cadet at the University of Detroit incurred no additional subsistence expenses incident to his recruiting duties he is not considered to have been in a travel status within the meaning of 5 U.S.C. 5703(c). 53 Comp. Gen. 145 (1973).

ROTC members participating in rifle and pistol team matches--Since the participation of members of the Reserve Officers' Training Corps (ROTC) in rifle and pistol team competition matches is neither military training nor part of the ROTC curriculum, but the participation is performed

on a voluntary extracurricular activity basis, to provide allowances to members participating in National Matches, they may be considered to have the same status as civilians within the meaning of 10 U.S.C. 4313 so as to entitle them to a travel allowance of $0.05 a mile and a subsistence allowance of $1.50 a day, and the authority in 10 U.S.C. 4308(a)(8) may be invoked to provide allowances for participation in regional and international matches if the Secretary of the Army upon recommendation of the National Board for the Promotion of Rifle Practice approves the issuance of regulations to this effect. 50 Comp. Gen. 783 (1971).

ROTC members - actual and necessary expenses authorized--Senior Reserve Officers' Training Corps (SROTC) members appointed under 10 U.S.C. 2104 (1976) incurred expenses for lodging and meals when they were required, through no fault of their own, to delay en route to and from field training or practice cruises at locations where no Government berthing or messing facilities were available. SROTC members appointed under 10 U.S.C. 2104 may not be paid per diem but are entitled to subsistence at Government expense. Because the SROTC members were traveling under proper orders and due to a delay en route were required to secure commercial lodging and meals (the arrangements for which were made by U.S. Naval Attaches), reimbursement for actual and necessary expenses is authorized. B-195791, March 3, 1980.

C. Applicants for the Uniformed Services

Failure of responsible officials to provide transportation from place of enlistment to duty station

Enlisted men who are not furnished transportation in kind and meal tickets for travel from place of enlistment to first duty station because recruiting officers failed to provide, or inadvertently denied transportation and subsistence, may be reimbursed for expenses actually incurred, as evidenced by receipts, not to exceed the amount transportation and subsistence would have cost the Government. Reimbursement for actual expenses of official travel performed by a member of the uniformed services by other than the authorized means because of denial or failure of responsible officers to furnish transportation and subsistence in kind, as specifically required by the regulations, is not a commutation of cost of travel nor a change or increase in the benefits fixed by regulation. 35 Comp. Gen. 522 (1956).

Minority enlistments

A person whose enlistment in the Army or the Air Force while under the minimum statutory enlistment age is terminated by the Government due to minority may be regarded

as a "rejected applicant" within the meaning of travel and transportation provisions of section 303(e) of the Career Compensation Act of 1949 to be entitled to transportation in kind upon release from military control. 39 Comp. Gen. 860 (1960).

Enlistments of insane persons

Persons who were enlisted or inducted into the uniformed services prior to the discovery of a prior existing judicial determination of insanity may be regarded as "rejected applicants" within the meaning of travel and transportation provisions of section 303(e) of the Career Compensation Act of 1949, to be entitled to transportation in kind upon release from military control. 39 Comp. Gen. 742 (1960).

Voluntary travel to place of enlistment

United States citizen residing in Spain was erroneously advised by United States Counsel in Barcelona that no facilities were available in Europe to effect enlistment in United States Navy. He traveled at personal expense to New York, where he enlisted. He was not entitled to travel allowance, since if a person travels to place voluntarily for purpose of making enlistment application there, he is not entitled to reimbursement for travel to that place. Fact that member received erroneous information afforded no basis for allowing claim. B-161426, June 30, 1967.

Army member was removed from temporary disability retired list as fit to return to duty. He claimed allowance for travel from Colorado Springs to Denver, Colorado, where he traveled for purpose of reenlistment. In absence of official indication he was authorized or ordered to travel to Denver for purpose of reenlistment, reimbursement for such travel must be denied. However, member was entitled to travel and transportation allowances for travel from place of reenlistment (Denver) to first duty station (Fort Carson, Colorado). B-182928-O.M., September 29, 1975.

D. Recruiting Duty--Extra Expenses

Automobile expenses

Although under 37 U.S.C. 428 and the Joint Travel Regulations a member of armed services whose primary assignment is to perform recruiting duty may be reimbursed for actual and necessary expenses incurred in connection with performance of those duties, recruiter is not entitled to reimbursement by Government for increased cost of extended insurance coverage incurred in connection with use of privately owned automobile in performance of duties where a mileage

allowance is authorized incident to such duties since such allowance is a commutation of the expense of operating an automobile including the cost of insurance. 54 Comp. Gen. 620 (1975).

Meals

Provisions of 10 U.S.C. § 503, providing for intensive recruiting campaigns, do not authorize purchase of meals for school officials assisting such campaigns. Provisions of 37 U.S.C. § 428 and Volume 1 JTR authorize reimbursement of out-of-pocket expenses--including occasional meals--incurred in performance of official duties by recruiting officers from appropriations available to Marine Corps, but do not appear to contemplate luncheon expenses incident to preplanned presentation to eleven public school officials who may assist recruiters. While we will not object to payment of subject voucher, similar expenses should not be incurred unless regulations are revised to authorize them. B-162642, August 9, 1976.

E. Group Travel

In general - no per diem

The officers and airmen who incident to the partial closing of an Air Force base for repairs are sent as a unit, within the contemplation of the Joint Travel Regulations, to another base on temporary duty for varying periods on an "as needed" basis to maintain a bomber alert, and are furnished Government quarters and messing facilities without charge are not entitled to per diem, even though a small portion of the officers of the unit are forced to use commercial facilities and are paid a per diem allowance, and the temporary duty having been performed as a group assignment, the fact that orders are issued to individuals, omitting the name of the unit or detachment, does not defeat the restriction against the payment of a per diem allowance, nor does the payment of per diem to the small number of officers required to live in commercial facilities afford a basis to pay a per diem allowance to those members furnished Government quarters and messing facilities, and the erroneous payments made to them should be recovered. 45 Comp. Gen. 599 (1966). See also B-173943, July 27, 1972.

Erroneous designation in orders

Although the payment of per diem to Army members traveling together as a group by Government conveyance from the same point of origin to the same destination under orders that failed to designate the travel as group travel was contrary to the Joint Travel Regulations, the payment having been based on the erroneous instructions contained in Army

Regulations, no exception will be taken to payments under the involved orders, or similar orders, but if Government meals were furnished and no deduction made from the per diem authorized, the value of the meals should be recovered. 49 Comp. Gen. 692 (1970).

Individual travel not authorized in orders

Under orders which directed a unit to move from Fort Campbell, Ky., to military reservation in Pennsylvania for TDY of approximately 90 days, and which specifically directed travel by commercial air except for certain designated members authorized travel by privately owned vehicle, unit member not so designated but who chose to use his automobile to perform travel was not entitled to mileage allowance. B-173064, June 30, 1971.

Orders retroactively amended to authorize individual travel

The retroactive amendment of orders authorizing travel by privately owned vehicle and directing group travel pursuant to the Joint Travel Regulations after the performance of temporary duty to delete the group travel requirement entitles members traveling by privately owned vehicles to the allowance prescribed by the regulations since the general rule that travel orders may not be revoked or modified retroactively to increase or decrease accrued or fixed rights after the performance of travel does not apply when orders are modified within a reasonable time to correct an administrative error or complete orders to show original intent, and the deletion of the group travel requirement reflects the intent that members who were permitted to travel by privately owned conveyances were exempt from group travel. 51 Comp. Gen. 736 (1972).

F. Participation in Maneuvers-Field Duty

In General

General rule - no per diem--A right to per diem does not accrue to member engaged in combat duty, simulated war games, survival training, and similar field duty, since member does not ordinarily incur more than normal expenses for subsistence in situation that exists at such times. 35 Comp. Gen. 555 (1956).

Under the statute authorizing per diem and other travel allowances for service members on official travel assignments, no per diem at all is ordinarily payable for periods of an assignment that are properly classified as "field duty," since ordinarily service members have no additional living expenses during such periods. Superseded provisions in the Joint Travel Regulations are not interpreted as making sleeping and subsistence conditions

the sole criteria for determining whether field duty is involved because the statutory authority for payments of per diem does not authorize denial without reference to the type of duty being performed. 63 Comp. Gen. 37 (1983).

Exception to general rule--Service members assigned to temporary duty with the Multinational Force and Observers in the Sinai are on field duty are prohibited by regulation from receiving per diem, the Joint Travel Regulations were amended to provide a $3.50 per diem rate for these members. Since this amendment may be considered an exception to the general prohibition in the regulations, and since there is no specific statutory prohibition, paying per diem to such members is authorized. B-209342, July 11, 1983.

Firefighting--As members of the uniformed services ordered to proceed on temporary duty in Government vehicles to assist the Forest Service in firefighting, whether they sleep in Government or personal sleeping bags, in the vehicles, on the ground without sleeping bags, on the floors of warehouses and similar structures, or do not sleep on certain nights because of duty performance, are not performing the type duty identified as maneuvers, joint field

exercises, Reserve training encampments, and similar activities, the payment of per diem to them is governed by the Joint Travel Regulations, and the members who were not charged for meals or sleeping facilities provided by the Forest Service or who did not occupy commercial facilities, are entitled for each day of temporary duty to a per diem of $2.50 and $3.10 for each meal not furnished, the rates prescribed by regulation. 50 Comp. Gen. 773 (1971).

Orders designation

Designation reevaluation--On the basis of a showing that an administrative error was made in designating duty in connection with "Operation Deepfreeze" on the Antarctic Continent as maneuvers, field exercises or other similar activities contemplated by the Joint Travel Regulations and that the amendatory orders were issued on a reevaluation of the actual facts which indicates that the duty relates to the International Geophysical Year and includes research, exploration, construction, and maintenance, per diem payments may be made. Temporary duty orders which designate a particular type of duty as maneuverfield exercise or other similar activity within the purview of the Joint Travel Regulations which preclude payment of per diem will be given effect in the audit of accounts and settlements of claims on the basis of such designation for the reason that the order issuing authority should be well acquainted with the conditions under which the duty will be performed. 37 Comp. Gen. 683 (1958).

Designation clearly erroneous--Marine Corps members were directed to proceed to United States Naval Base, Guantanamo Bay, Cuba, under TDY orders designating the assignment as "field duty," and such designation was error that should have been apparent to order-issuing authority, since record viewed in light of situation in Cuba when orders were issued reasonably established duty contemplated by orders did not consist of maneuvers but rather operational military duty such as was or might be required of any military personnel at Guantanamo, orders could be retroactively amended to authorize per diem. 44 Comp. Gen. 405 (1965).

Maneuvers at "Installation of the Uniformed Services"

In general--Participants on temporary duty in maneuvers, field exercises, and other similar activities including training encampments for ROTC students are not authorized per diem allowances, but this limitation does not apply to temporary duty on an installation where per diem is authorized in accordance with regulations issued by the Secretary of the service concerned. B-177243-O.M., May 1, 1973.

Must be active installation--Field duty at an installation of the uniformed services for per diem purposes within the exception in the Joint Travel Regulations and Army

Regulations has reference to duty at active installation under normal circumstances where quarters and messing facilities are provided and available not only to personnel permanently stationed there but also to personnel assigned on a temporary basis, and, therefore, field duty at an inactive camp where quarters and mess are available does not entitle the member to per diem regardless of whether the member is authorized to be quartered separately from other members participating in field duty. 38 Comp. Gen. 225 (1958).

Certification contrary to fact--Temporary duty performed incident to summer training of Reserve components at Camp McCoy, Wisconsin - an inactive camp operated only for summer training purposes where both Government quarters and meals were furnished may not be regarded as field duty performed at an installation of the uniformed services to entitle the members to per diem under the exception in Army Regulations which is applicable to active installations; and the certification changing the designation of the quarters from field to temporary duty quarters during the close-out phase when the quarters were maintained solely for field duty purposes is without effect to change the quarters to temporary duty quarters and payment of per diem may not be made for this period. 38 Comp. Gen. 388 (1958).

Advance and post maneuver duties

Temporary duty orders which do not authorize per diem for a member of the uniformed services for the reason that the duty constitutes field duty within the meaning of the Joint Travel Regulations and that group travel is directed, although the member traveled alone, may not be regarded as having been issued in error, and that the duty contemplated was critique phase or advance planning incident to field duty for which per diem is authorized, in the absence of evidence to overcome the administrative determination clearly expressed in the orders that the temporary duty directed constitutes field duty, per diem is not payable. 37 Comp. Gen. 627 (1958).

G. Duty Aboard Common Carriers

Passenger cars owned or leased by United States

Duty performed by members of the uniformed services on trains which, although operated by the German Railway System, consist of passenger cars owned or leased on a rental basis by the United States, and used exclusively for Berlin Occupation Status of Forces personnel, may not be regarded as duty on "commercial carriers" for per diem purposes under the Joint Travel Regulations and, therefore, payment of per diem for such duty may not be made. 38 Comp. Gen. 871 (1959).

Military cars attached to civilian passenger or freight trains

Duty performed by members of the uniformed services on military cars which are attached to civilian passenger or freight trains may not be regarded as duty on "commercial carriers" for per diem purposes under the Joint Travel Regulations so as to entitle the members to per diem. 41 Comp. Gen. 59 (1961).

Member performing duty as conductor on military train

An enlisted member of the uniformed services who performs duty as a military conductor on a completely military train between two overseas stations is regarded as being on duty as a conductor on a military train and not aboard a commercial train for entitlement to transportation and per diem allowances under the Joint Travel Regulations, and the travel is merely incidental to the duty so that per diem is not payable. 41 Comp. Gen. 59 (1961).

Military train conductor off duty on return trip

A member of the uniformed services who completes an assignment to duty as military train conductor and on the return trip to his permanent station does not perform any such duty is regarded as being in a normal travel status on the return trip for which per diem is payable under the Joint Travel Regulations. 41 Comp. Gen. 59 (1961).

H. Members of Air Transport Squadrons

Certification of unit commander in lieu of written orders

Members of the uniformed services who under 37 U.S.C. 404(e) receive per diem in lieu of subsistence when performing flights from a permanent duty station to some other point and return without the issuance of orders for specific travel may be reimbursed the miscellaneous expenses contemplated by the Joint Travel Regulations for members in a travel status, and the regulations amended accordingly, in view of the Government's general obligation to make reimbursement for expenses necessarily incurred in performing duty away from a permanent duty station. Although travel orders may not be issued to members covered by section 404(e), claims for reimbursement may be paid on the certification of the appropriate unit commander. 47 Comp. Gen. 477 (1968).

Miscellaneous expenses and travel between home and permanent duty station

Although members of the Military Airlift Command crews who in addition to the per diem in lieu of subsistence prescribed by 37 U.S.C. 404(e) for round-trip flights from a permanent duty station without the issuance of orders for

specific travel are deemed to be entitled to reimbursement for the miscellaneous travel expenses prescribed by the Joint Travel Regulations, they are not considered as performing travel and temporary duty within the contemplation of those regulations and, therefore, may not be reimbursed for the expenses of travel between home or place of abode and the place of reporting for regular duty at their permanent station. 47 Comp. Gen. 477 (1968).

Entitlement dependent upon organization function rather than name or designation

Although members of the uniformed services serving in the newly constituted Fleet Tactical Squadrons and Naval Aircraft Ferry Squadrons are no longer serving with the disestablished Fleet Logistics Support Wings which were expressly designated in section 303(d) of the Career Compensation Act of 1949, to entitle the members to per diem when away from their duty stations, without the issuance of orders for specific travel, the duties of the present assignment and the conditions under which performed are similar and a continuation of the duties of the former Fleet Logistics Support Wings so that the per diem provisions of section 303(d) may be considered applicable to the same extent. 37 Comp. Gen. 232 (1957).

I. TDY Aboard Vessels

"Vessel" defined

Mothballed ship--Naval personnel who are assigned to temporary duty for performance of security and inspection in the quinquennial overhall of Reserve ("mothball") Fleet vessels on which berthing and messing facilities are not generally available, and who occasionally ride the vessels while they are towed to nearby shipyards, are not regarded as traveling on board Government vessels and, therefore, they are entitled to per diem at reduced rates, and the quarters portion of the per diem allowance need not be supported by receipts. 35 Comp. Gen. 607 (1956).

Barracks ship--A barracks ship without any propulsion plant to which Navy personnel are required to report for temporary duty, in connection with the fitting-out or conversion of vessels in the area and on which berthing and messing facilities are provided, need not be regarded as a Government vessel under the Joint Travel Regulations which prohibit per diem for temporary duty aboard Government vessels; therefore, per diem as prescribed in the Joint Travel Regulations for temporary duty in connection with the fitting-out conversion of vessels is for payment, provided that deductions are made for quarters and for meals in the case of enlisted members furnished such on the barracks ship. 39 Comp. Gen. 590 (1960).

Non-self-propelled service craft--Members who were ordered to perform temporary additional duty aboard the YRST-2, non-self-propelled service craft with berthing and messing available on board, are not prohibited from receiving per diem by Volume 1, Joint Travel Regulations, as the YRST-2 is not a "vessel" for purposes of travel entitlements. 54 Comp. Gen. 442 (1974).

No sea duty pay if per diem allowed for service on nonvessel--Members who were ordered to Harbor Clearance Unit Two (HCU-2) but who performed temporary additional duty aboard the YRST-2, which is not a "vessel" for sea duty pay or for travel entitlement purposes may not receive sea duty pay but are not prohibited from receiving per diem by Joint Travel Regulations since while service in HCU-2 is considered sea duty, i.e., onboard a vessel, the temporary additional duty was, in fact, not performed on board a vessel. 54 Comp. Gen. 442 (1974).

"Government" vessel defined

Government-owned ship chartered by private concern--A Navy officer who performed temporary duty on board Government-owned vessels chartered by private concern under an agreement providing for the operation of the vessels under time charter to the Military Sea Transportation Service only, and the latter charter required the private concern to furnish meals to naval personnel assigned to duty on board the vessels at a cost which is a fraction of the cost of meals to personnel traveling aboard a commercial vessel, is regarded as having performed temporary duty on board Government vessels within the meaning of Joint Travel Regulations and therefore, per diem may not be paid under said regulations for such duty. 31 Comp. Gen. 575 (1952).

Ship being transferred to foreign governments--Temporary additional duty performed by naval personnel aboard U.S. Navy vessels which are being transferred to foreign governments but the title to the vessels is retained inthe United States is duty aboard a Government vessel within the meaning of the Joint Travel Regulations, which prohibits payment of per diem for any period of temporary duty aboard a Government vessel because subsistence facilities are available and no abovenormal subsistence expenses are incurred, notwithstanding that in all substantial respects the vessel transferred is similar to that of any other naval vessel of a foreign power, except that title is retained in the United States; therefore, allowance of per diem to personnel assigned to such duty is prohibited. However, Navy enlisted personnel who are assigned to temporary duty aboard a Government vessel incident to its transfer to a foreign government and who are charged for subsistence by the foreign government without receipt of basic allowance for subsistence because of erroneous receipt of per diem

are entitled to be credited basic allowance for subsistence for such temporary duty periods. 38 Comp. Gen. 626 (1959).

Allied ship--Service performed on a British Government vessel by a Marine Corps officer under the exchange officer program between the United States and Great Britain by which the officer was integrated into the Royal Navy and was furnished quarters and messing facilities on the vessel which was his post of duty - comparable to those available on United States Government vessels to members of the United States Navy performing temporary duty aboard a vessel is regarded as temporary duty aboard a Government vessel within the meaning of the Joint Travel Regulations which precludes payment of per diem for such temporary duty. 40 Comp. Gen. 277 (1960).

Availability of quarters and mess

Standard food unavailable--An enlisted man who while stationed in Japan performs temporary duty on board a Navy vessel that maintained berthing and messing facilities oriental in nature for the national civilian mariners that manned the vessel which did not meet the standards of the United States Navy may, nevertheless, not be paid a per diem allowance commensurate with the amount he expended for the food he purchased for the duration of the trip prior to embarking, the Joint Travel Regulations providing that per diem is not payable for any period of temporary duty aboard a Government vessel when both Government quarters and mess are available, and the messing facilities available to the member during his temporary tour of duty constituting a "Government mess," the member is not entitled to the payment of the per diem claimed. 44 Comp. Gen. 32 (1964).

Orders direct "temporary duty afloat" but actual duty is ashore--Although orders detaching a Navy officer from his permanent duty station directed "temporary duty afloat" awaiting further assignment, the officer not having been furnished the quarters and messing facilities contemplated by the Joint Travel Regulations for the period of temporary duty because the staff to which he had been attached was physically located ashore, is entitled to per diem for the duration of the temporary duty, the station from which he was detached to comply with his temporary duty orders having remained his permanent duty station for the period of temporary duty performed prior to discharge, even though his orders contemplated another permanent assignment at the expiration of the temporary duty, and such duty having been limited to the period necessary to effect a further assignment is not considered of indeterminate duration. 44 Comp. Gen. 310 (1964).

Assignment to flagship-duty with ashore staff, no additional subsistence cost--A naval officer detached from duty aboard a vessel who pending separation is placed on temporary duty with a Commander, Submarine Flotilla Two, which although at home base has a flagship, and assigned to an ashore staff position at the home port of the off-crew of the submarine may be paid per diem since the temporary duty was not performed aboard a Government vessel within the meaning of the Joint Travel Regulations. The assignment of the flagship is of no consequence since the temporary duty was performed ashore, and the fact that the temporary duty location was at the home port of the off-crew, or that no additional subsistence cost was incurred by the member, does not affect his entitlement as the temporary duty was not in connection with the training and rehabilitation of the crew, and per diem is a commutation of expenses payable regardless of expenses incurred. 50 Comp. Gen. 723 (1971).

J. Ship Undergoing Overhaul at Place Other than Home Port

Ship being decommissioned for loan to foreign government

U.S.S. Entemedor, home ported at New London, Connecticut, in 1972 underwent a restricted availability overhaul at Philadelphia, Pennsylvania, prior to being decommissioned for loan to the Turkish Government. This constituted an "overhaul" within the meaning of the law and regulations, and permanent crew members with dependents at New London were entitled to round-trip transportation at Government expense. B-177018, December 22, 1972.

Change of home port during overhaul

Where Navy member subsequent to notice of change of home port from Newport, Rhode Island to Norfolk, Virginia, and promulgation of change of home port, but prior to the effective date of the change, reported for permanent duty aboard the U.S.S. Milwaukee and his dependents moved to Chesapeake, Virginia, in the area of the new home port, their transportation entitlements being limited to the distance from the old permanent station to the new home port, and the member performed round-trip travel between the vessel's overhaul site and Chesapeake to visit his dependents, he is entitled to reimbursement for the travel under 37 U.S.C. 406b as Norfolk may be regarded as the vessel's home port for purposes of this travel. B-181445, January 30, 1975.

K. Courier, Escort, and Guard Duty

Couriers

Travel between residence, duty station and terminals--Officers who are assigned to the Pentagon from where they

depart with the classified material they are escorting for the National Airport via Government vehicle and return from the Friendship International Airport by air carrier trucking service - a special delivery service and not a regularly scheduled limousine service for the convenience of all airline passengers - may not be reimbursed the transportation expense involved for round-trip travel between the Pentagon and their residences, in view of the fact that the Pentagon is not a terminal of the carrier incident to either the departure or return travel of the officers and, therefore, there is no authority to reimburse the officers for travel normally required between home and place of duty. 42 Comp. Gen. 544 (1963).

Where courier supplies own rations and sleeping equipment--Performance of temporary duty as a courier officer in charge of three other members designated as guards to accompany a classified security shipment by rail under orders providing that the escort personnel furnish their own rations, cooking facilities, and sleeping equipment in order to remain with the shipment does not entitle the officers to per diem in excess of the minimum rate prescribed by the Joint Travel Regulations (JTR) on the basis that sleeping accommodations will be furnished a member while traveling to the place at which the temporary duty is to be performed, and although the officer furnished his own rations, cooking facilities, and sleeping equipment, his travel by surface common carrier is within the contemplation of the JTR provision, the reduction in the per diem rate being based on the premise that the member while traveling would not have to procure lodgings and that he would not incur expenses for quarters. 43 Comp. Gen. 726 (1964).

Escorts of members' dependents

As travel on public business--The travel of members of the uniformed services who act as escorts and accompany dependents to medical facilities is regarded under 10 U.S.C. 1040 as travel on public business if directed by competent orders, and the members are entitled to travel and transportation allowances in accordance with the Joint Travel Regulations. 47 Comp. Gen. 743 (1968).

Member acting as escort of his own dependents--An Air Force officer stationed overseas whose wife under orders travels by privately owned automobile to and from a hospital for medical treatment may not be paid a mileage allowance for the round-trip transportation, reimbursement being limited to actual expenses, whether a dependent travels alone or with an attendant, absent specific authorization for commuted payments, such as mileage, monetary allowances in lieu of transportation, or per diem. A member who transports a dependent to a medical facility in his privately

owned vehicle for which he is entitled to a travel allowance would not be entitled to an additional amount on behalf of the dependent, the travel allowance being in lieu of actual expenses. 47 Comp. Gen. 743 (1968).

Dependent acting as escort of another dependent--Transportation expenses payable under 10 U.S.C. 1040 are not limited to members of the uniformed services or civilian employees of the Department of Defense; attendants who are neither members nor employees (such as other dependents, as where mother accompanies child) may also be reimbursed under the statute, on an actual expense basis only. B-163954, July 24, 1968, and February 26, 1970.

Failure to secure competent orders in advance-Member and dependent wife were traveling under permanent change of station orders from Homestead, Florida, to Incirlik, Turkey, when wife became ill on aircraft. Member and wife departed aircraft at Rome, Italy, where wife was hospitalized for 2 days. Such 2-day period is properly charged as leave to member, and he is not entitled to reimbursement under 10 U.S.C. 1040 as wife's attendant, since no orders were ever issued authorizing him to act as non-medical attendant. B-174852, March 14, 1972. See also B-203623, March 23, 1982

Escorts of deceased members

Duty performed entirely within corporate limits of permanent duty station--Members of the uniformed services while performing temporary duty as escorts for deceased members within the corporate limits of their permanent duty station may not be paid per diem, even though the distance traveled to the funeral site is over 55 miles. The allowances prescribed in 10 U.S.C. 1482 for escort duty may only be considered in conjunction with 37 U.S.C. 404 and section 408, regarding entitlement generally fortravel performed on public business under competent orders. Under section 404, per diem for temporaryduty is payable only when a member is away from his designated duty station, and for travel within the limits of his permanent duty station, a member under section 408 may only be paid transportation costs. Therefore, the Joint Travel Regulations may not be amended to provide per diem for escort duty at a permanent duty station. 49 Comp. Gen. 453 (1970).

More than one attendant for one deceased member--Air Force member was appointed escort to accompany deceased member from air base in Texas to deceased's home in Michigan. Second airman was furnished transportation request to provide for transportation at Government expense to attend funeral as Group Commander's representative. Second airman was not entitled to per diem, since the law (10 U.S.C. 1482) only authorizes allowances for "an escort of one person" to place of burial. B-173289, September 3, 1971.

Guards for prisoners

Noncommissioned officer in charge of guard detail used transportation request to secure Pullman accommodations on train for purpose of escorting prisoner from Seneca Ordnance Depot, New York, to Fort Jay, New York. However, return travel to Seneca Ordnance Depot was by privately owned vehicle. Since orders authorized, rather than directed, use of transportation request, and since Joint Travel Regulations require transportation request be used only to cover travel by common carrier necessary for delivery of prisoner, member was entitled to mileage allowance and per diem. But since use of privately owned vehicle was not approved as advantageous to Government, per diem was limited to period not to exceed that payable for constructive travel by common carrier over official route. B-129850, January 3, 1957.

L. Travel in Connection With Disciplinary or Judicial Action

Witnesses

Member appearing as Government witness not by reason of military status--The payment of the travel expenses of an officer or employee of the Government appearing as a witness on behalf of the United States is governed by the regulations of the agency in which employed only if the case involves the activity in connection with which the individual is employed or is serving and his expenses are properly payable from an appropriation available to the agency, otherwise pursuant to 28 U.S.C. 1823(a), payment of the travel expenses of a witness comes under regulations prescribed by the Attorney General. Therefore, the Joint Travel Regulations may not be revised to authorize payment of the travel expenses of a member of the uniformed services appearing as a witness for the Government not by reason of his military status but by reason of the Government's requirement in its civil capacity. 46 Comp. Gen. 613 (1967).

Same - agency responsible for reimbursement of travel expenses--Marine Corps member traveled from his permanent duty station to Chicago in November 1967, and in January, February and March 1968, to appear as witness on behalf of United States in case tried in United States District Court, Northern District of Illinois. Case did not involve uniformed services. Member's claim for temporary duty allowances was properly denied, as member should present his claim for reimbursement to the United States Attorney, Northern District of Illinois. B-168947, May 19, 1970.

Member appearing as witness in state criminal proceeding--Regulations may be issued authorizing the payment of travel and transportation allowances of members of the uniformed services who are requested to appear as witnesses for a

State government in criminal proceedings, provided a determination is made in each situation that the travel is necessary and in the interest of the service because the court action is one directly related to the service or its members and is one in which the service has a strong interest. B-202232, July 10, 1981.

Distinction between member's appearance as Government witness and potential accused at court-martial--Member traveled to United States Naval Station, Rota, Spain, where he appeared as material witness for United States in case involving uniformed services. Travel orders directed member's temporary duty in connection with disciplinary action, but during proceedings he was granted immunity from prosecution in return for testimony. Member was not entitled to per diem, since he was in disciplinary action status, even though he testified for United States. B-181216-O.M., November 15, 1974.

Appearance as witness before foreign courts--When the commanding officer of a military installation desires to honor a properly made request for the appearance of a member of his command as a witness before an authorized service court of a friendly foreign force, he may under the authority in 22 U.S.C. 703 issue orders to the member directing his attendance as a witness, and consider the member on official business in the nature of detached service while traveling and while in attendance at the proceedings of the foreign court. The member witness under 28 U.S.C. 1821 would be entitled to the fees and mileage, including subsistence when applicable, authorized for witnesses attending United States courts, payment to be made to the member from funds supplied by the foreign force, in advance if available, or after completion of the service upon availability of the funds. 48 Comp. Gen. 10 (1968).

Member's travel in connection with disciplinary action against him

Travel to attend pretrial investigation--Members who traveled from Annapolis, Md., to Washington, D.C., by privately owned vehicle to attend pretrial investigation in connection with disposition of charges against them were not entitled to mileage allowance. However, since Government transportation was not available to them, they may be reimbursed cost of gas and oil. B-176654, April 11, 1973.

Where member is cleared of all charges--Where member traveled to Washington, D.C., from Annapolis, Md., to attend disciplinary proceedings, he was not entitled to per diem or mileage allowances in connection with required travel, even though all charges were dismissed. However, he could be reimbursed for actual costs of quarters, gas and oil, in an amount not to exceed per diem and mileage allowances he

would have received for ordinary travel. B-176654, May 18, 1973.

Where immunity from prosecution is granted in return for giving of evidence--Member was ordered to United States Naval Station, Rota, Spain, for temporary duty in connection with disciplinary action. While there, he gave material testimony on behalf of United States in exchange for grant of immunity from prosecution. However, this did not change disciplinary action status of TDY, and member did not become entitled to per diem simply because he appeared as witness. He remained entitled to reimbursement only on actual expense basis. B-181216-O.M. November 15, 1974.

Where member is found guilty--Member who traveled from Orange, Texas, to Corpus Christi, Texas, to appear as accused at general court-martial, at which he was found guilty, was entitled to be reimbursed cost of necessary transportation by bus and meal tickets. B-170827, October 12, 1970.

Travel to appear as accused before foreign court--The costs of travel of a member of the Armed Forces, who had been returned to military control under an Administrative Agreement between Japan and the United States, from a military installation to a designated place for psychiatric evaluation in connection with a Japanese criminal prosecution of the member constitute an expense incident to representation before a judicial tribunal within the contemplation of 10 U.S.C. 1037, thelegislative intent of which was to authorize, regardless of military status and independently of any question of public business, such expenditures as are actually necessary to provide adequately for the defense of the accused, including the cost of travel by the accused when necessary in the preparation of his defense; however, nothing in the law or its legislative history authorizes the commutation of such expenditures on a mileage and per diem basis, therefore the member is entitled to reimbursement of the amounts expended by him in performing the travel. 40 Comp. Gen. 218 (1960).

Return of absentees, stragglers, or other members without funds

AWOL member--An enlisted Marine Corps member who, under orders directing travel to a new permanent duty station, deserted and subsequently upon apprehension completed the travel to the duty station over an indirect route at personal expense and by Government means (use of transportation request and Government conveyance) is regarded as completing travel under the original change of station orders which remained in effect entitling the member to payment of a travel allowance for the mixed modes of travel

and, therefore, the member who had the desertion mark removed upon conviction for an unauthorized absence is entitled to mileage computed on the official distance from the old to the new station, less the distance of indirect intermediate travel by transportation request and Government means, plus any per diem to which he may be entitled for the travel performed. 44 Comp. Gen. 140 (1964).

Member on ordinary or emergency leave orders without funds--Where Army member was issued transportation request upon showing he was without funds to purchase necessary transportation for return to his overseas duty station at end of period of leave, member was not entitled to reimbursement of cost of commercial transportation used in connection with emergency leave, paragraph 31 of Army Regulation expressly prohibiting such reimbursement for travel by commercial means, and reimbursement also being prohibited in connection with ordinary leave since it is not on public business. B-180810, October 9, 1974.

Discharge under other than honorable conditions

Distinction between former members released from civilian prisons and from military confinement facilities--The term "discharged prisoners" in section 303(e) of the Career Compensation Act, which defines the classes of military personnel entitled to travel and transportation at Government expense, has reference to prisoners discharged from United States military confinement facilities rather than to former members discharged under other than honorable conditions upon release from confinement in civilian prisons; therefore, the travel and transportation authority in section 303 of the Career Compensation Act of 1949 may not be used as authority for furnishing transportation and subsistence at Government expense for former members released from civilian prisons. 39 Comp. Gen. 206 (1959).

No confinement involved - discharge subsequently upgraded--Air Force member was discharged in 1956 under other than honorable conditions. In 1965 Discharge Review Board issued him discharge certificate "under honorable conditions." Member then became entitled to mileage allowance for travel performed by privately owned vehicle to home of record following discharge, where it appeared he did not utilize transportation request for transportation in kind as authorized by regulation for members discharged under other than honorable conditions, but rather actually performed such travel by privately owned vehicle at personal expense. B-159140, June 30, 1966.

Transportation home pending appellate review--The Military Justice Amendments of 1981, Public Law 97-81, added article 76a to the Uniform Code of Military Justice, which provides that court-martialed personnel sentenced to

receive punitive discharges or dismissals may be compelled to take leaves of absence pending the completion of the appellate review of their cases, in contemplation of their eventual separation from service in absentia under less than honorable conditions. When they are placed on leave they may be provided personal transportation home at Government expense by the least costly means available, in the same manner as is generally authorized for persons separated under conditions other than honorable. B-211797, December 23, 1983; 63 Comp. Gen. _____.

Prisoners

Former members erroneously apprehended--Former members of the uniformed services who, after termination of military

status, have been erroneously apprehended and transported to another area are not within the classes of persons entitled to travel and transportation allowances provided in section 303 (e) of the Career Compensation Act of 1949, and there is no other authority for furnishing transportation and subsistence for return travel to the place of erroneous apprehension. 35 Comp. Gen. 645 (1956).

Release from military as opposed to civilian confinement--The term "discharged prisoners" in section 303(e) of the Career Compensation Act, which defines the classes of military personnel entitled to travel and transportation at Government expense, has reference to prisoners discharged from United States military confinement facilities rather than to former members discharged under other than honorable conditions upon release from confinement in civilian prisons; therefore, the travel and transportation authority in section 303 of the Career Compensation Act of 1949 may not be used as authority for furnishing transportation and subsistence at Government expense for former members released from civilian prisons. 39 Comp. Gen. 206 (1959).

Members paroled and restored to duty--A prisoner who is released from confinement in a disciplinary barracks on commandant's parole continues to be a member of the uniformed services pending appellate review action on court-martial proceedings and is technically in the legal custody and control of the commandant so that he may be regarded as coming within the term "general prisoners" in section 303(e) of Career Compensation Act of 1949 for entitlement to travel and transportation allowances pursuant to competent travel orders. 38 Comp. Gen. 456 (1958).

M. Members on Temporary Disability Retired List

Residence and hospital located in same city

Members of the uniformed services who are on the temporary disability retired list and who, pursuant to competent temporary duty orders, travel for periodic physical examinations to hospitals which are situated in the same city as their homes are not considered to be in a travel status away from the corporate limits of their permanent station during the period of temporary duty so as to be entitled to per diem. 37 Comp. Gen. 302 (1957).

Travel to appear before Physical Evaluation Board

There is no legal objection to implementation of a proposed amendment to the Joint Travel Regulations which would permit payment of travel and transportation allowances to members incident to their appearing at requested hearings of the Physical Evaluation Board held to review decisions to remove the member concerned from the temporary disability

retired list and either retire or separate him for disability. B-181224, December 4, 1974.

N. Hospital Patients

General rule - no per diem

An extension of time of temporary duty at a transfer station prior to release from active duty during which a member is entitled to per diem does not include the period of time the member is a patient in a hospital. B-178329, April 18, 1974.

Travel to hospital

Provisions of the Joint Travel Regulations which preclude per diem for period member is hospital in-patient do not apply for period of time spent traveling to, from, or between hospitals; consequently, member transferred as pipeline patient from Europe to California by medical air evacuation, and who performed no temporary duty as bed-patient or in-patient in hospital during period of ordered travel, was entitled to per diem,B-143222, June 30, 1960.

Type of transfer PCS vs. TDY

Permanent station of a member of uniformed service is the place where his basic duty assignment is performed. Orders to a hospital for the purpose of observation as treatment do not effect a change of permanent station, since the assignment is to a place where no duty is required of him. 48 Comp. Gen. 603 (1969). B-181893, September 16, 1975. However, a member who is transferred to a hospital for extended treatment and is issued a statement to that effect may have his dependents and household goods transported to the hospital at Government expense as for a permanent change of station. 48 Comp. Gen. 603 (1969); 50 Comp. Gen. 473 (1971).

O. Members on Duty with Other Departments or Agencies

No entitlement to same allowances as civilian employees

While civilian employees of the Selective Service System may utilize local public transportation, including taxicabs, at their designated posts of duty under authority applicable to civilian employees of the Government and be reimbursed such expenses, military personnel assigned to duty with the Selective Service System remain members of the uniformed services with compensation fixed by law, which includes pay and allowances, so that in the absence of specific statutory authority therefor, military personnel may not be reimbursed from Selective Service funds for expenses incurred in the utilization of similar transportation. 32 Comp. Gen. 376 (1953).

No entitlement to more than ordinary military allowances

The travel of members of the Army, who are assigned to Military Assistance Advisory Groups established under the Mutual Security Act of 1954, is governed by the directions in the travel orders, and the use of counterpart funds for such travel does not entitle the members to more or greater rights than are provided by the Joint Travel Regulations; therefore, a member whose travel orders directed return via the Atlantic route and provided that travel time in excess of constructive air travel time was chargeable to leave, and who was furnished transportation paid from counterpart funds and mileage for land transportation in the United States, is not entitled to additional payment and since the member's claim for baggage handling charges covers items incurred on behalf of the dependents, which are not reimbursable, no amount may be allowed as reimbursable expenses. 40 Comp. Gen. 140 (1960).

Source of travel funds--A commissioned officer of the Coast and Geodetic Survey serving in Liberia incident to a technical cooperation program under the Act for International Development, on reassignment to duty in Florida, may travel with dependents at own expense from Liberia to New York via Europe using foreign vessel part of the way--no American vessels being available--with leave en route and be reimbursed, including per diem, for such travel not to exceed cost which would be incurred by a usually-traveled route from Liberia to New York, and be paid per diem for rail travel from New York to Florida; also all travel costs may be paid from funds transferred to the Department of Commerce by the Foreign Operations Administration. 33 Comp. Gen. 138 (1953).

Recoupment of overpayments

The unaccounted travel funds advanced by the Federal Aviation Administration to members of the Armed Forces detailed to the Department of Transportation as "Sky Marshals" to prevent air piracy, and who subsequently retired, may be recovered from the retired pay of the members indebted for the outstanding travel funds advanced, pursuant to 5 U.S.C. 5514, notwithstanding the debt arose in other than a military department, as a detailed member remains a member of the Armed Forces subject to recall to duty, and since his paramount obligation is to the military, his pay and allowances are subject to military laws and regulations, and the indebtedness of each individual should be referred to the appropriate military department for collection. 51 Comp. Gen. 303 (1971).

P. Special Per Diem Outside United States

Approval subsequent to TDY

The Joint Travel Regulations may be amended to allow the Per Diem, Travel and Transportation Allowance Committee to approve payments of special per diem rates prescribed in the regulations for duty performed under unusual or extraordinary circumstances outside the continental United States subsequent to the performance of the duty. In such cases, the approval merely constitutes a determination that the duty was in fact performed under unusual circumstances contemplated by the regulations and would not involve retroactive determination of entitlement. B-161396, May 3, 1976.

Duration of entitlement

Where determination was made in accordance with Joint Travel Regulations that Air Force members would be entitled to special per diem just for period July 13-September 30, 1970, for TDY on Jomalig Island, Philippines, because only resort hotel accommodations were available, and TDY period was prolonged to November 20, 1970, members were entitled to special per diem for additional period, since prolongation of TDY was due to circumstances beyond members' control and they remainedsubject to extraodinary living costs during additional period. B-172633, July 20, 1971.

Q. Separation and Retirement

Rate for travel

Service member received retirement orders relieving him from active service on September 30, 1980, and placing him on the retired list effective October 1, 1980. He was paid a mileage allowance for travel to his home of selection based on the rate in effect on September 30, his last day of active duty. He is not entitled to the higher mileage rate which became effective the following day because under Appendix J of the Joint Travel Regulations, the last day of active duty is the effective date for determining allowances for travel to a member upon retiring. B-205351, March 10, 1982.

Delayed and circuitous travel home upon discharge

An enlisted Navy man who had served in Vietnam and was separated in the Philippines where Government transportation to the United States was available but who upon discharge returned to Saigon at personal expense to be married and then traveled by American commercial airline from Saigon to California is considered to have been authorized rather than directed to travel by Government conveyance to

the United States and he may be reimbursed for the commercial air transportation as provided in the Joint Travel Regulations, the reimbursement not to exceed the cost to the Navy to transport him by Government air from Philippines to the continental United States subsequent to discharge. 52 Comp. Gen. 297 (1972).

Travel upon separation paid by civilian employer

Member, who on retirement traveled to his home of selection in Iran, was reimbursed for travel expenses by member's civilian employer. Member is not entitled to reimbursement for travel expenses thereto since such travel was not performed at personal expense as required by applicable regulations. B-185732, March 23, 1976. See also B-182900, February 26, 1976; B-193167, March 2, 1979.

Travel to home of selection upon retirement - failure to establish residence within 1-year period

Visit to intended Residence Within One Year--Retired service member did not qualify for a travel allowance under regulations authorizing travel to home of selection within 1-year of retirement, since although he visited his eventual retirement homesite in the year following his retirement, he did not establish a home there within the 1-year period, but instead lived elsewhere for 4 years. B-165476, July 23, 1976. See also B-203135, October 6, 1981; and B-207144, October 5, 1982.

Travel for purpose other than to establish a residence--An Army officer retired from active service in May 1982, and since then he has continued to reside with his family in Marshfield, Missouri, where they had previously established a permanent residence in 1981. No payment may be made on the officer's claim based on his retirement orders for reimbursement of the expenses of a family trip from Kansas City to Marshfield in August 1982. A service member is generally entitled to transportation to his home of selection within 1 year of his retirement, but no reimbursement is allowable for the expenses of pleasure trips, etc., which are undertaken after retirement for purposes other than a change of residence. B-212353, January 17, 1984.

Extending the One Year limit--Approval is given a proposed revision of Volume 1 of the Joint Travel Regulations to extend the one-year time limit for selecting a home upon retirement in deserving cases under circumstances in which the reason for the delay is in the best interest of the service concerned or the delay will not be to the financial or other detriment of the service concerned, provided it is clearly stated that travel must be incident to separation. B-207157, February 2, 1983.

Travel to home of selection - extension of eligibility period

A retired Army member requested extension of time to complete travel to his home of selection upon retirement over 2 years after the initial 1-year period to complete the travel had expired. The Army denied the request for extension because the record did not meet the regulatory requirements for an extension. Consequently, the member's claim for travel allowances for himself and his dependents for travel performed 3 years after the member's retirement is denied. B-204864, March 15, 1982.

Retired members not entitled to travel to home of selection - allowance for travel to home of record

Members of the uniformed services who, on termination of active service otherwise qualify for travel and transportation to home of record or place of entry on active duty under 37 U.S.C. 404(a) and 406(a), are to be afforded such entitlements regardless of denial of travel and transportation to home of selection under 37 U.S.C. 404(c) and 406(g), in the absence of a statutory requirement that denial of travel and transportation to home of record or place of entry on active duty be made in such

circumstances. 53 Comp. Gen. 963 (1974); 54 Comp. Gen. 1042 (1975). See also B-210526, July 14, 1983.

Retired member called to active duty - travel to home of selection on subsequent retirement

A member who does not make a selection of a home incident to retirement within 1 year of retirement, but has assurance prior to expiration of 1-year limitation that recall to active duty is imminent, may have household goods shipped to home of selection on subsequent retirement following a period of active service. B-194599, May 22, 1979.

Home of selection must be bona fide residence

A member's claim for personal and dependent's travel from his last duty station to a place contended to be his bona fide home of selection for retirement, Kansas City, Missouri, is disallowed, since he has shown no evidence of actual and continuous residence at that place and that fact that his family from whom he is separated have established a residence there does not provide basis for payment. B-191550, August 11, 1978.

Service member's claim for travel by privately owned vessel from Panama City, Panama, where he retired from active duty to a place he claims as his home of selection upon retirement, Panacea, Florida, is disallowed since he returned to Panama, and has shown no evidence of actual and continuous residence in Panama. The fact that he might ultimately move to that location does not provide basis for payment. B-209044, March 1, 1983.

Travel from overseas for retirement processing

Army member who was transferred from Dhahran, Saudi Arabia, to Fort Dix, New Jersey, under orders for purposes of retirement separation processing, and who then traveled on to his home of selection for retirement in Athens, Greece, is entitled to travel allowances for all personal travel performed. However, since his travel from the United States to Greece was at personal expense via commercial airline, and it is not indicated that Government transportation was unavailable, his reimbursement for that travel is limited to the cost for military airlift established by regulations. B-192949, June 6, 1979.

Per diem at processing station

A service member was transferred from overseas to a temporary assignment for retirement processing at Albany, Georgia, which was also his home of selection. He owned a residence there prior to the transfer and lived there for part of the time while awaiting retirement and commuted

from his home to his duty station. In these circumstances he was not entitled to per diem after his arrival at Albany since that was his permanent residence. B-206299, November 15, 1982.

A service member was transferred from a permanent unaccompanied tour overseas to a temporary assignment for retirement processing at Kansas City, Missouri, which was also his ultimate home of selection. His family had maintained their residence in Kansas City during his unaccompanied tour prior to his transfer, and he lived at the family residence while awaiting retirement, commuting from there to his duty station. He was not entitled to per diem after his arrival at the temporary duty station, since in these circumstances it had the effective status of a permanent duty station. B-213925, May 8, 1984.

Home of slection overseas

A service member was transferred from Greece to McGuire AFB, N.J., for retirement processing, and he selected

Taiwan as his home of selection upon retirement. He is entitled to his travel at Government expense from Greece to McGuire and then to Taiwan. However, he is not entitled to his wife's travel from Taiwan to the United States and return to Taiwan because she was residing in Taiwan when his retirement orders were issued. B-195604, September 28, 1979. See also B-192949, June 6, 1979.

Commissioned officers, Public Health Service failure to complete term of service

A commissioned officer of the Public Health Service who does not complete a term of active service to which he agreed in writing may be divested of travel and transportation entitlements in accordance with regulations promulated by the Public Health Service and paragraph M6457 of 1 Joint Travel Regulations, promulgated under 37 U.S.C. 404(b) and 406 (c). 58 Comp. Gen. 77 (1978). See also B-192285, December 15, 1978, and B-201706, March 17, 1981.

VI. LOCAL TRAVEL

A. Distinction Between Local and Nonlocal Travel

Member in travel status ineligible to claim local travel

Local transportation expenses, which are authorized by section 2 (m) of the act of September 1, 1954, for official business within the limits of their duty stations, may also be paid for travel performed in the metorpolitan area of the city in which the station is located, or in a comparable area surrounding the post of duty; however, members who are in a travel status within the meaning of section 303 of the Career Compensaton Act of 1949 may not be paid for transportation under the 1954 act. 35 Comp. Gen. 677 (1956).

Permissible area of local travel

The Joint Travel Regulations may be amended to expand the definition of the term "area" in para. M4500-2 to reflect the view that the area intended to be covered under 37 U.S.C. 408 for reimbursement for travel in the vicinity of a duty station is the normal commuting area of the station concerned. However, in implementing the proposed amendment an arbitrary mileage radius should not be established in setting up the local commuting areas of permanent and temporary duty stations. 59 Comp. Gen. 397(1980). See also B-206503, November 30, 1982.

Travel to carrier terminal not local travel

Since one-way trips by members of the uniformed services between residence or duty station and carrier terminal incident to the beginning or ending of travel away from a

permanent duty station are to be distinguished from travel on official business within the limits of a duty station, which is reimbursable under section 2(m) of the act of September 1, 1954, the reimbursement authority for commutation of such one-way trip expenses on a round-trip mileage basis under section 303(a) of the Career Compensation Act of 1949, is subject to the 7 cents a mile maximum fixed by section 303(a) of the Career Compensation Act of 1949. 39 Comp. Gen. 464 (1959). See also B-206503, November 30, 1982.

Mileage allowance at higher rate for local travel

The travel of a Marine officer who was verbally directed to travel by privately owned vehicle from his permanent duty station at Quantico to Marine Headquarters in Arlington, as well as to various locations in Washington, D.C., incident to temporary duty - travel subsequently approved for reimbursement - is interstation travel within the purview of 37 U.S.C. 404 and reimbursable at the 7 cents per mile rate prescribed by the Joint Travel Regulations rather than at the higher rate provided pursuant to 37 U.S.C. 408, for travel within the limits of a member's station. Although 37 U.S.C. 404 requires travel to authorized by written orders, confirmation of the verbal orders by competent authority shortly after the performance of the travel as being advantageous to the Government may be accepted for the purpose of reimbursing the officer. 52 Comp. Gen. 236 (1972). See also 59 Comp. Gen. 397 (1980); and B-206503, November 30, 1982.

No per diem for local travel

Members of the uniformed services while performing temporary duty as escorts for deceased members within the corporate limits of their permanent duty station may not be paid per diem, even though the distance traveled to the funeral site is over 55 miles. The allowances prescribed in 10 U.S.C. 1482 for escort duty may only be considered in conjunction with 37 U.S.C. 404 and section 408, regarding entitlement generally for travel performed on public business under competent orders. Under section 404, per diem for temporary duty is payable only when a member is away from his designated duty station, and for travel within the limits of his permanent duty station, a member under section 408 may only be paid transportation costs. Therefore, the Joint Travel Regulations may not be amended to provide per diem for escort duty at a permanent duty station. 49 Comp. Gen. 453 (1970).

B. Local Travel Performed At A Temporary Duty Station

See also "Transportation Expenses", supra, this chapter

Reimbursement authorized

Transportation expenses incurred by members of the uniformed services in the conduct of official business at temporary duty stations may be reimbursed in the same manner as for reimbursement of such expenses at permanent duty stations to the extent that payment is not currently provided as incident to the temporary duty orders. 35 Comp. Gen. 680 (1956).

Mileage allowance in commuting between home and temporary duty station

Members under permanent change of station orders directing performance of temporary duty en route may not be paid per diem during period of TDY if they commute daily between their TDY stations and residence type quarters. However, they are entitled to mileage allowances for commuting travel if travel is performed in privately owned vehicles. If such travel is entirely within area defined for local travel in Volume 1 JTR, mileage allowances are computed at rate prescribed. However, if such travel is from outside metropolitan area of TDY station, mileage allowances are computed at lower rate prescribed in Volume 1 JTR for TDY travel. 54 Comp. Gen. 803 (1975). See also B-206503, November 30, 1982.

C. Travel Between Residence and Permanent Duty Station

No reimbursement for normal travel between home and place of duty

Officers who are assigned to the Armed Forces Courier Service located in the Pentagon from where they depart with the classified material they are escorting for the classified material they are escorting for the National Airport via Government vehicle and return from the Friendship International Airport by air carrier trucking service - a special delivery service and not a regularly scheduled limousine service for the convenience of all airline passengers - may not be reimbursed the transportation expense involved for round-trip travel between the Pentagon and their residences, in view of the fact that the Pentagon is not a terminal of the carrier incident to either the departure or return travel of the officers and, therefore, there is no authority to reimburse the officers for travel normally required between home and place of duty. 42 Comp. Gen. 544 (1963). See also 42 Comp. Gen. 612 (1963); 45 Comp. Gen. 30 (1965).

No reimbursement for normal travel between Government quarters and duty location

Air Force members are responsible for bearing the costs of their ordinary commuting travel between their residences

whether they reside in private lodgings or Government quarters, although shuttle bus service may be established for enlisted personnel residing in Government quarters when other forms of transportation, including private automobile, are not adequate to meet their commuting needs. Hence, two Air Force sergeants did not become entitled to travel allowances for commuting by private automobile between their dormitory and duty area simply because shuttle bus service between those places was discontinued as unnecessary. B-214444, October 2, 1984.

Taxicab between home and place of duty outside regular duty hours

A member of the uniformed services dependent on public transportation whose performance of duty outside regular duty hours is during hours of infrequent transportation service or after dark may be reimbursed the expense of taxicab fare for travel between his permanent duty station and place of abode, even though the member is considered to be on duty at all times unless excused, in view of the fact a member experiences the same problems a civilian encounters in similar unusual travel circumstances where the travel of the civilian outside regular duty hours is considered travel on official business entitling him to reimbursement of travel costs. Therefore, the Joint Travel Regulations may be amended to provide reimbursement to members of taxicab fares, subject to the same limitations applied to civilian employees under Bureau of the Budget regulations. 48 Comp. Gen. 124 (1968).

No mileage allowance for automobile travel between home and place of duty outside normal duty hours

Member who uses a privately owned vehicle when called back from his place of lodging to his normal duty location to give technical assistance is not entitled to reimbursement under 37 U.S.C. 408 for travel between those locations since travel between a member's lodgings and his normal duty location must be performed at personal expense even where it is performed before or after normal duty hours or results from ordered performance of additional duties. The regulatory exception to that rule under which a taxi may be used at Government expense applies only in unusual situations during hours of infrequently scheduled public transportation or darkness. B-183225, October 21, 1975. See also B-203014, December 21, 1981; and B-204865, December 29, 1981.

No reimbursement for taxi fare incurred due to automobile breakdown

As a general rule, travel between a member's residence and place of duty is not regarded as travel on official business within 37 U.S.C. 408 (1970) but is the personal responsibility of the member. An exception to that rule, provided by Volume 1, Joint Travel Regulations, does not authorize reimbursement of a taxi fare incurred by a member who had to take a taxi one day because his car would not start and no public transportation was available. The fact that his "regularly scheduled duty hours" were outside normal duty hours does not change this conclusion. B-188786, June 24, 1977.

CHAPTER 5

DEPENDENT'S TRAVEL AND TRANSPORATION ALLOWANCES

I. BASIC ENTITLEMENT RULES

A. Entitlement Personal to Member

Dependent's travel

Travel of ex-spouse after divorce--The spouse of a service member has no travel entitlement in his or her own right. Eligibility for spousal travel is instead derived from the member's personal entitlement to dependent travel. Thus, when the marriage ends in divorce there is no futher right to travel except as recognized in 52 Comp. Gen. 246 (1972) and 53 Comp. Gen. 960,1051 (1974) for the return of an ex-spouse from an overseas duty station incident to the divorce. That return travel must be reasonably related to the divorce and be accomplished within a reasonable time. 61 Comp. Gen. 62 (1981).

Transportation of household goods

Before gaining status as "member"--Member of the Navy Medical Service Corps requests reimbursement of expenses for packing and storing his household goods which he incurred prior to acceptance of his commission and receipt of official orders. Since the applicable statutes and regulations restrict such allowances to "members" of the armed services, the claim must be denied. B-208156, December 30, 1982.

Member's entitlement after divorce--The permanent change-of-station transportation and storage of household goods entitlements are personal to the member to the uniformed sevices. Whether to release household goods in storage to a divorced ex-spouse or to use his tranportation entitlement to ship household goods to his divorced spouse at an alternate location are matters primarily for the member to decide considering any property settlement agreement or court order. 61 Comp. Gen. 180 (1981).

Same-former spouse also a member--It is a matter for the service member to decide whether to use his transportation entitlement to ship household goods to his divorced spouse at an alternate destination. That the ex-spouse is also a service member does not change this. While each member is allowed his transportation entitlement in his own right as a member, if one member agrees to use his entitlement to supplement the other member's entitlement incident to dividing the household goods upon divorce, he may do so. 61 Comp. Gen. 180 (1981).

B. Exclusion Of Certain Members

Lower enlisted grades

Eligibility acquired after effective date of orders--The right to transportation of dependents accrues on the effective date of orders which direct a PCS and there is no authority for the payment of such transportation to the current overseas station when the member attains the necessary grade or completes the required service to be eligible for transportation of dependents after the effective date of the transfer orders. 35 Comp. Gen. 670 (1956). See also 37 Comp. Gen. 715 (1958).

Effect of reenlistment--Members who at the time of discharge and reenlistment at the same station where they had attained the grade for eligibility for transportation of dependents, are in continuous service status and may not be regarded as having met the PCS requirement for reimbursement for transportation of dependents from home to the duty station incident reenlistment. 38 Comp. Gen. 478 (1959).

Member reduced in grade--Where a member in eligible pay grade E-4 was reduced to pay grade E-1 under a general court-martial and is subsequently released fron disciplinary command under orders transferring him to duty pending review of his case by the Court of Military Appeals, he is not entitled to payment for the travel of his dependents incident to the transfer orders. 42 Comp. Gen. 22 (1962). Decision later modified by 42 Comp. Gen. 568 (1963), when additional facts revealed that the member was not subject to the automatic grade reduction and in fact was not actually reduced in grade. However, transportation expenses for dependents were devised since the transfer orders in that case were temporary in nature and as such were not competent PCS orders under which the member is eligible to receive such transporatation benefits.

Effect of commissioning--Member who was not in an eligible grade for transportation of dependents when he was ordered to OCS and who, upon completion of school and appointment as an officer, is ordered to a new permanent duty station may have the travel of dependents from the school to the new station regarded as travel incident to the appointment of members from civilian life to first duty station after commissioning, and is entitled to travel and transportation allowances for dependents. 43 Comp. Gen. 133 (1963).

Aviation cadet - ineligible grade--An aviation cadet ordered to active duty fron civilian life whose dependent wife traveled form their home to his first permanent duty station prior to the date he received his commission is not entitled to reimbursement for the cost of his dependent's travel. Since an aviation cadet is only entitled to the

same allowances and other benefits provided for enlisted members in pay grade E-4, with 4 years' service or less, the right to reimbursement for transportation accrues only after he is commissioned. 44 Comp. Gen. 67 (1964).

Aviation cadet - eligible grade--Member who enlisted in pay grade E-2 and was promoted to E-5 upon arrival at temporary duty station is entitled to dependent's transportation under orders that designate temporary duty station as first permanent duty station as an officer upon his being commissioned. 47 Comp. Gen. 641 (1968).

Promotion to eligible grade while overseas--Members who while assigned to restricted areas, are promoted to grades entitling them to transportation of dependents may be accorded the same transportation benefits upon subsequent PCS to unrestricted areas as personnel who were already serving in eligible grades before leaving the United States; therefore, such promoted members may be reimbursed for dependent travel upon PCS to unrestricted areas even though their dependents begin travel from a place to which they had not been transported at Government expense. 40 Comp. Gen. 577 (1961).

PCS orders cancelled and pay grade reduced after travel--To be entitled to dependent transportation costs, a uniformed service member must be in an eligible pay grade when the transportation is performed. Therefore, where a member received permanent change-of-station orders and his dependents traveled to the new permanent station in anticipation of the change, a subsequent cancellation of those orders and reduction in his pay grade to one ineligible for dependent transportation costs precludes the member's recovery of transportation costs for the return of his dependents to his home of record incident to his discharge from the service. B-211059, September 26, 1983.

Junior enlisted travel - effective date of entitlement

Although the Department of Defense Appropriation Act, 1979, appropriated funds which could be used for extention of travel and transportation entitlements to junior enlisted service members, the regulations authorizing the entitlements were issued under the existing authority of 37 U.S.C. chapter 7 (1967) and 10 U.S.C. 2634 (1976). Therefore, the effective date of the junior enlisted travel entitlements is the effective date of the regulations, which may not be amended retroactively, and not the earlier effective date of the Appropriation Act. B-193879, October 18, 1979.

Cadets and midshipmen

Dependents acquired at academy upon commissioning--Travel performed by a dependent incident to orders received by a

graduate of the United States Military Academy upon receipt of commission as an officer, which orders assign the member to an initial permanent duty station, with temporary duty en route, and which entitled the member to a travel allowance for his own travel on the basis of the distance actually traveled not to exceed that from home or from West Point to the new station by way of any temporary duty station, would entitle the member to reimbursement for dependent travel not to exceed the farther point, home or West Point, to the new station, irrespective of whether the officer's travel is directed from West Point or from home. 38 Comp. Gen. 790 (1959).

Dependent acquired after date travel from academy required--A graduate of the United States Military Academy who, upon receipt of a commission as an officer, is assigned to a new permanent duty station, with temporary duty en route, and who acquires a dependent before the date he is required to commence travel to report to the temporary duty station, is entitled to reimbursement for travel of the dependent to the new station not to exceed travel from farthest point under the officer's orders to the new station; however, if the dependent is acquired after the date of required travel to the temporary station, reimbursement may not exceed entitlement from the temporary to the permanent station irrespective of the place where the dependent is acquired. 38 Comp. Gen. 790 (1959).

Dependent acquired while on temporary duty after commissioning--A graduate of the United States Military Academy who, after receipt of a commission and orders to a new permanent duty station with temporary duty en route, acquires a dependent following arrival at, but on or before the date he is required to depart from the temporary duty point, is entitled to reimbursement for travel performed by the dependent to the permanent duty station, not to exceed entitlement from the temporary to the permanent duty station, irrespective of the place where the dependent is acquired. 38 Comp. Gen. 790 (1959).

Members on active duty for instruction

A member assigned to a school or institution as a student, if the course is to be less than 20 weeks duration, is not entitled to transportation of dependents. B-150203, November 26, 1962; B-144000, November 10, 1960.

Reservists in basic training

An enlisted member of the reserve component called to active duty for the purpose of engaging in basic training of less than 6 months, and a member called to active duty for less than 20 weeks or active duty for training for less than 20 weeks is not entitled to transportation of dependents. See generally, 43 Comp. Gen. 650 (1964).

C. Issurance Of Orders Requirement

Travel without orders

Where dependents of a member of a uniformed service move from an overseas duty station without orders and without authorization from the Secretary concerned, a claim for reimbursement by the member for the dependents' transportation costs on a subsequent permanent change of station of the member must be denied. B-195941, October 18, 1979. See also B-212149, December 16, 1983.

Loss of Travel Orders

Retired military member seeks travel expenses for himself and dependents incident to his permanent change of station in 1973. Member has no copy of his travel orders nor does military recordkeeping entity. Accordingly, since relevant statutes and implementing regulations require written orders from competent authority for payment of travel expenses, and the burden is on the claimant to satisfactorily prove his claim, claim is denied. B-204296, December 9, 1981.

Travel prior to orders

Before PCS orders issued--Members of the uniformed services whose dependents travel prior to issuance of permanent change-of-station orders may not be reimbursed for travel-expenses under 37 U.S.C. 406 (1976). Under paragraph M7003-4 of the Joint Travel Regulations, an exception to the general rule may be authorized provided the voucher presented for payment is supported by a statement from the commanding officer (or his designated representative) of the headquarters issuing the orders that the member was advised prior to the issuance of the orders and performance of travel that such orders would be issued. However, mere notification and administrative recognition of date of eligibility for retirement may not be considered as advise that orders are to be issued. See 52 Comp. Gen. 769 (1973). B-193521, January 26, 1979. See also, B-192007, July 24, 1978; B-193339, June 28, 1979; and B-192165, July 24, 1978.

Because of general information received by an Army officer that he would probably be reassigned to Fort Leonard Wood, Missouri, his dependents moved from Kansas City to Marshfield, Missouri, in August 1981 to establish a residence near that post. A month later permanent change-of-station orders were in fact issued reassigning the officer to Fort Leonard Wood, but reimbursement of the expenses of the family's early move to Marshfield may not be allowed on the basis of those orders. The rule is that the expenses of dependent travel performed prior to the issuance of anticipated permanent change-of-station orders are nonreimbursable unless the claim is supported by a written statement from the orders-issuing authority verifying the service member's receipt of specific advance notification that the orders definitely would be published.
B-212353, January 17, 1984.

After notification before orders issued--Where in contemplation of the deactivation of a military base, a member is selected for an overseas assignment at which he elected to serve an unaccompanied tour but before the orders were issued he was given a humanitarian assignment within the U.S. under orders issued about the same time the overseas

transfer would have been made, the member is entitled to reimbursement for the advance travel of his dependents incident to his PCS transfer within the U.S. on the basis of an administrative determination that the transfer was for the needs of the service, and the acceptance of the commanding officer's certification that the member was advised prior to the issuance of the overseas assignment that they would issue as applying to the advance travel of the dependents to the new duty station. 42 Comp. Gen. 504 (1963).

Costs incurred in contemplation of orders never issued--A member's claim for reimbursement for costs incurred preparatory to a permanent change of station (PCS) where the member had been notified of the PCS but orders were never issued, including loss on sale of a mobile home and furnishings and the replacement cost of furnishings and

appliances may not be allowed because there is no authority to pay such costs. B-192165, July 24, 1978.

Starts before completed after orders issued--An announcement that a member had been selected to receive a commission and that he would attend an indoctrination course, together with a letter from the member's commanding officer to support the fact that the dependents commenced travel prior to effective date of the member's orders and arrived at the new station subsequent to the member, does not indicate that the member had knowledge of the PCS at the time dependents began their travel. Therefore payment of dependent's travel is authorized only from the place where the dependents were located on the effective date of the PCS orders, not to exceed the distance from the place where the dependents had been located prior to travel to the new station. 40 Comp. Gen. 251 (1960).

Prior to release orders--Reimbursement for travel of a dependent wife from the last duty station to home two months before issuance of orders which released the member from active duty is not authorized under the JTR's which contemplate departure of dependents during short period of time between determination to order change of statioh and date of issuance of orders. 34 Comp. Gen. 241 (1954).

Prior to release due to nonselection for promotion-Where an officer of the Air Force was not selected for promotion to the next highest grade and in anticipation that he would be nonselected a second time thus being involuntarily released from active duty moved his household effects and dependents to his home of selection before orders for his release from active duty were issued, no reimbursement may be made for the transportation expenses incurred by the officer. B-193767, January 20, 1979.

Prior to placement on TDRL--A member who, while on leave prior to permanent retirement, traveled to his home is not entitled to a mileage allowance by reason of erroneous advice that his name had been placed on the temporary disability retired list nor to mileage and reimbursement for dependent's travel prior to issuance of competent orders. 36 Comp. Gen. 633 (1957).

Intent to change home port-ship overhaul scheduled--Circumstances where members' permanent change-of-station orders are not timely issued when a ship is scheduled for overhaul because of delay in determining the overhaul port due to Government contract bidding requirements may be considered unusual circumstances incident to military operations. Therefore, regulations may be amended to authorize transportation of household effects in such cases upon a statement of intent to change a ship's home port, but prior to issuance of orders. 59 Comp. Gen. 509 (1980).

Temporary duty orders (see also III. B.)

General rule--The transportation of dependents of members to the temporary duty stations overseas to which the members have been assigned incident to an ordered PCS overseas is not provided for by 37 U.S.C. 406, and, therefore, there is no authority for the promulgation of regulations to permit the travel of dependents to a member's permanent duty station via his temporary duty points, subparagraph (a) limiting the transportation of dependents incident to an ordered PCS to the distance from the old to the new permanent station, and the exceptions to the general rule in subparagraph (e) applying only to situations where orders have been issued, or have been issued under circumstances precluding their use as authority for the transportation of the member's dependents. 42 Comp. Gen. 287 (1962).

Temporary duty changed to permanent--The effective date of orders for entitlement to transportation of dependents of members of a naval air squadron who were issued orders to proceed to a temporary duty station overseas on or before May 1, 1958, and by dispatch of April 29, 1958, received April 30, 1958, the temporary duty station was designated as a permanent station effective August 1, 1958, is April 30, 1958, since when the members reached the overseas station they were at their permanent station for entitlement to transportation of dependents and even though the orders might be canceled before August 1, 1958, a member whose dependents traveled after April 30, 1958, would be entitled to return transportation of dependents. 38 Comp. Gen. 697 (1959).

Modification, cancellation, revocation of Orders

Temporary station made permanent--The effective date of orders for entitlement to transportation of dependents of members of a naval air squadron who were issued orders to proceed to a temporary duty station overseas on or before May 1, 1958, and by dispatch of April 29, 1958, received April 30, 1958, the temporary duty station was designated as a permanent station effective August 1, 1958, is April 30, 1958, since when the members reached the overseas station they were at their permanent station for entitlement to transportation of dependents and even though the orders might be cancelled before August 1, 1958, a member whose dependents traveled after April 30, 1958, would be entitled to return transportation of dependents. 38 Comp. Gen. 697 (1959).

Change of permanent station--A member whose orders transferring him from overseas to a duty station within the United States were changed prior to the effective date by orders directing him to report to another station is entitled to an allowance for the transportation of his

dependents for a distance no greater than from the designated location to which they had been furnished transportation at Government expense from the member's overseas station prior to his relief from that station to the location of the ultimate permanent duty station in the United States to which the travel was actually performed. 33 Comp. Gen. 43 (1953).

Preparatory expenses, order canceled--Passport application expenses incurred by an Army, incident to PCS orders to an overseas assignment which are revoked prior to the commencement of travel by the member and his dependents are preparatory expenses that are not reimbursable under 37 U.S.C. 406a, providing for reimbursement of expenses for travel commenced prior to the effective date of PCS orders that are modified, canceled or revoked, and the transfer orders of the member having been revoked before the member and his dependents departed the old station, absent specific statutory authority in the statute for the reimbursement of preparatory expenses, the claim for passport costs may not be allowed. 45 Comp. Gen. 34 (1965). But see 63 Comp. Gen. 4 (1983).

Amendment or revocation of retirement orders--A member whose dependents traveled to a selected retirement home prior to the issuance of retirement orders that were canceled at his request prior to effective date and then traveled to the member's new permanent duty station is located in the corporate limits of his old station entitled to a monetary allowance for both moves. When orders that direct a PCS, including orders directing release form active duty or retirement are canceled or modified before their effective date for the convenience of the Government and/or in circumstances over which a member has no control, the benefits prescibed by 37 U.S.C. 406a accrue, and the fact the member withdrew his retirement request is immaterial since the Government was under no obligation to accept the request and apparently did so primarily for the convenience of the Government. 53 Comp. Gen. 55 (1973).

Administrative error in orders necessitating PCS and extra expenses--Due to administrative error, a service member's eligibility for a deferral of permanent change of station due to lack of facilities necessary for one of his dependents was not discovered until after his arrival, with dependents, at the new station. He was then reassigned to another station. There is no legal authority to reimburse the member for extra expenses relating to the two changes of station in excess of travel and relocation allowances set by statute and regulation, allowances already received by the member. B-205403, January 8, 1982.

Need to show error of material fact--The wife and children of an Army officer stationed at Camp Zama, Japan, were transported from Japan to Kansas City, Missouri, under

orders issued in May 1981 authorizing an early return of dependents from overseas. In August 1981 they traveled from Kansas City to Marshfield, Missouri, where they established a new residence. In the absence of facts clearly demonstrating that the May 1981 orders were materially in error when prepared in designating Kansas City rather than Marshfield as their intended destination in the United States, the officer may not be reimbursed for the expense of their further travel from Kansas City to Marshfield on the basis of those orders, since travel orders may not be amended retroactively to increase travel allowances except when plain error in the orders' preparation is shown. B-212353, January 17, 1984.

Ship overhaul cancelled--Where member's permanent change-of-station orders are not timely issued when a ship is scheduled for overhaul and the regulations are amended to

permit shipment of household effects before orders are issued, regulations may be futher amended to authorize the return shipment of household effects if the ship overhaul is cancelled. B-195140, June 4, 1980.

D. Travel Performance Requirement

Pursuant to member's ordered travel

Members of the uniformed service have been authorized travel and transportation for their dependents at Government expense from a very early date and upon the basis that such an allowance was payable only when some travel was performed. The statute providing such authorization, presently codified as 37 U.S.C. 406, was enacted in recognition of the hardships members would encounter if some provision was not made for keeping them and their families together. It was never intended to be a gift for travel not performed or for travel which could not be considered as incident to a change of residence resulting from an ordered change of station (PCS), see 33 Comp. Gen. 431 (1954), or in some other way in the interest of or for the convenience of the Government. This right is based on and is no greater than the rights secured to the member under orders incident to his own travel, unless applicable provisions of law provide otherwise. See 46 Comp. Gen. 852, 855 (1967). Although travel and transportation of dependents is authorized under various types of orders, the most common and most frequent is the PCS move.

Within corporate limits of duty station

PCS within corporate limits--A member is not entitled to transportation of dependents at Government expense where the dependents remain at his place of residence on his transfer overseas and then move to a new address in the same city on his reassignment to the former station. 35 Comp. Gen. 167 (1955).

Change in duty assignment - same station--A change in duty assignment from one point to another within the corporate limits of the same city is not a permanent change of station within the meaning of the applicable statute and regulations such as would authorize transportation of dependents. 36 Comp. Gen. 113, 115 (1956).

Change in duty assignment - unusual circumstances--Under the statutory authority of 37 U.S.C. 406(e) (1976), Volume 1 of the Joint Travel Regulations may be amended to allow a service member any necessary drayage and storage of household goods when he experiences an involuntary extension of assignment at a permanent duty station upon completing a training program there, and he is required for reasons beyond his control, such as the refusal of his landlord to renew a lease agreement, to change his residence on the

local economy incident to that extension of his assignment. 59 Comp. Gen. 626 (1980). See also B-208861, November 10, 1982.

Change in residence for personal convenience-- Neither 37 U.S.C. 406(e) nor any other provision of statutory law contains authority which would permit the amendment of Volume 1, Joint Travel Regulations, to allow the drayage of a service member's household goods to a new residence when his duty assignment at a given location is extended, and he then elects solely as a matter of personal preference to move to new living quarters. 59 Comp. Gen. 626 (1980).

Delay in performance

After second PCS--Since the dependents of a member did not exercise the right to Government transportation when the member was transferred from his old permanent duty station in Hawaii to a new permanent duty station in Texas, upon the member's permissive transfer to a subsequent permanent station in California, the dependents may be afforded transportation from Hawaii to California for a distance that does not exceed the distance between Hawaii and Texas. The permissive orders which provided that the transfer was to be at member's expense and that they were to be revoked if he did not desire to do so, did not contemplate travel on public business, did not provide entitlement to the travel of his dependents, and therefore, the entitlement to travel to the permanent duty station (Texas) had not been terminated. 53 Comp. Gen. 667 (1974).

More than two years after orders--A member who more than 2 years after issuance of PCS orders transferring him from a hospital assignment to the area where he had served as a ROTC staff member and where his dependents continued to reside, moved his dependents to on-base housing as his presence was requiredon the base, is not precluded by the delayed move from entitlement to dependent travel, no time limitation being imposed on the exercise of the right to dependent travel incident to PCS, and the fact move was delayed for personal reasons pending the sale of the member's house does not affect his right to move his dependents during the period his orders remain in effect and prior to receipt of notice of a further change of station. 45 Comp. Gen. 589 (1966).

Delayed returns to U.S.--Where, due to disturbed conditions and the nonavailability of transportation timely requested, the dependent wife of a member ordered to a PCS in the United States from his foreign duty station did not travel from the member's foreign station to the U.S. until after he had further PCS, the member may be allowed the commercial cost of the dependent's travel from overseas station

to his present permanent station in the U.S., provided no Government transportation was available for the sea travel performed. 24 Comp. Gen. 887 (1945).

After travel restrictions removed--A member whose dependents incident to his PCS from overseas to a restricted area within the U.S. are moved to a selected home, upon learning when he arrived at the restricted duty station that the restriction had been removed prior to his transfer, is entitled to a monetary allowance in lieu of transportation for dependent's travel from the home selected to his new duty station on the basis the member was on duty at the new station when the restriction on travel was removed. 50 Comp. Gen. 366 (1970).

E. Overseas Travel - Special Rules

Dependents not with member

Member overseas without dependents--A member who interrupted his travel from Saigon to Philadelphia incident to his transfer to the Fleet Reserve to be married in England is not entitled to his dependent's transoceanic transportation at Government expense since the member is considered to have been without dependents at his restricted overseas station. 51 Comp. Gen. 485 (1972).

Promotion to eligible grade--Members who, while assigned to restricted areas, are promoted to grades entitling them to transportation of dependents may be accorded the same transportation benefits upon subsequent PCS to unrestricted areas as personnel who were already serving in eligible grades before leaving the United States; therefore, such promoted members may be reimbursed for dependent travel upon permanent change of station to unrestricted areas even though their dependents begin travel from a place to which they had not been transported at Government expense. 40 Comp. Gen. 577 (1961). See also 24 Comp. Gen. 750 (1945).

Concurrent travel authorized after member travels--A member transferred overseas, whose dependent wife was authorized to travel to the overseas station at the same time as the member, is not entitled under the JTRs to reimbursement for the cost of transportation of wife from the old station to a designated place in the United States and thence to the port of embarkation, but is limited to the costof travel from the old station to the embarkation port even though the member was originally advised that concurrent travel for dependent wife could not be authorized. 33 Comp. Gen. 160 (1953).

Modification of orders--Member whose dependent traveled to a designated place within the United States incident to orders which transferred him to an undisclosed overseas station, and who was subsequently assigned to a permanent

station within the United States by modifying orders issued after effective date of original orders and after member had departed from old station, is entitled under the JTR's to reimbursement for dependent's travel to the designated place and her transportation from there to the new permanent station, even though the member did not actually proceed to an overseas station. 33 Comp. Gen. 332 (1954).

Overseas on short tour

Unexpired tour less than tour length--In the case of a member whose unexpired term of service is less than the prescribed tour to an area outside the U.S. for the area to which assigned, unless the member voluntarily extends his term of service to permit completion of the prescribed tour or the Secretary of the military department concerned grants an exception to the normal overseas tour on an individual basis, transportation of dependents is not authorized. Signing of intent to reenlist would not be viewed as obligating the member to serve for an additional period of time so as to meet the requirements of travel authorization. B-169483, April 22, 1970; B-157874, December 10, 1965 and B-186440, July 6, 1976.

Less than 12 months of tour remaining--Travel to a duty station outside the United States unless the member has a minimum of 12 months remaining in his overseas tour after scheduled arrival of dependents is not authorized. Thus, where a member who shortly before issuance of PCS orders to a restricted area upon completion of an unaccompanied tour of duty at an overseas station is married and pays the cost of his wife's travel to the United States has not met the requirements that he have at least 12 months remaining on his overseas tour after acquisition of a dependent for entitlement to reimbursement for dependent's travel. 47 Comp. Gen. 445(1968).

Dependent acquired overseas--A member married in Honolulu, his home, where his wife continued to reside when he was assignedto Vietnam in an Uneligible grade for dependent travel, who prior to the effective date of the PCS to Texas was promoted to an eligible grade for dependent transportation, nevertheless is not entitled to reimbursement for his wife's transoceanic travel, even though his status is similar to that of amember who acquired a dependent overseas since he did not have at least 12 months remaining on his overseas tour, nor has his dependent been authorized to be present in the vicinity of his overseas station and he, therefore, is regarded as a member "without dependents" and subject to the restrictions of the JTR. 51 Comp. Gen. 362 (1971).

Approval of presence by commander

Travel to U.S.--Travel to the United States at Government expense when the presence of the dependents at the overseas station was not authorized or approved by the appropriate overseas commander is not authorized. 51 Comp. Gen. 362, supra; and 51 Comp. Gen. 485 (1972).

Travel within U.S.--Entitlement to expenses of travel of member's wife from overseas station where member's orders made no provision for her travel, depends on whether her presence overseas was command sponsored. If so, reimbursement may be made for the cost of Government air travel from overseas station to home of record incident to member's separation. If not command sponsored, there is no entitlement to overseas transportation and transportation within continental U.S. is limited to a monetary allowance for the distance between the aerial port of debarkation and the home of record. 53 Comp. Gen. 105 (1973).

Designated location travel

From U.S. designated location to overseas-Transportation of a dependent of a member to the member's overseas station from a place to which the dependent had gone at Government expense under earlier change of station orders within the United States and where the dependent remained after the member was transferred overseas without concurrent travel of dependent being authorized may be regarded as travel from a designated location to the overseas station for reimbursement of the full cost of transportation and the limitation in the JTRs which precludes payment of transportation in excess of the cost from the old to the new station when travel is performed from a place other than the member's old station, is not applicable to transfers to overseas areas. 38 Comp. Gen. 453 (1958).

To location in U.S. certified as bona fide residence-Marine officer transferred from unrestricted duty station in North Carolina to restricted duty station at Okinawa, Japan, certified that dependents' travel to New Hampshire was travel to a designated place for purposes of establishing a bona fide residence. Subsequently, he alleges certification was done because of erroneous advice and that dependents intended to establish residence in Okinawa. Member claims dependents' travel from North Carolina to Los Angeles, California, the port of embarkation for Okinawa. Since member's entitlement vested upon his certification of New Hampshire and dependents' actual travel there, member may only receive dependents' travel allowances to New Hampshire. B-195420, January 9, 1980.

Marine was transferred from an unrestricted duty station in North Carolina to a restricted duty station in Okinawa. He

moved his dependent from North Carolina to his home of record in Dallas, Texas. Subsequently, two of his dependents joined him at personal expense in Okinawa. Upon completion of the Okinawa tour, he was assigned on a permanent change of station to Hawaii. Instead of designating Dallas as his dependent's residence and requesting dependent travel at Government expense from North Carolina to Dallas, at the instruction of travel personnel in Okinawa he filed a claim for and received dependent travel allowances from North Carolina to Seattle, Washington, the dependents' point of debarkation to Okinawa. He should have received dependent travel allowances only from his old duty station to the home in Dallas and then directly from Dallas to his new duty station in Hawaii. B-210205, August 24, 1983.

Dependents visiting member when PCS orders issued-Uniformed service members' dependents were moved at Government expense to designated places in the United States when the

members were transferred to an overseas station to which dependents may not be moved at Government expense. Subsequently, the dependents joined the members at personal expense in the area of the overseas restricted duty station. The dependents were in the area with the members when they were notified of a permanent change of station to an overseas unrestricted duty stataion, but the dependents returned to the designated place in the U.S. prior to travel to the new duty station. The members may be reimbursed dependents' transportation expenses from the designated place to the new permanent duty station since the dependents had established a residence at the designated location to which they returned. B-195643, April 24, 1980.

F. Sea Duty - Special Rules

Dependent travel authorized when sea duty is determined "arduous"

When a member of the uniformed services is assigned on a permanent change of station to sea duty an the duty is determined by the Secretary concerned as being unusually arduous (absent from the home port for long periods totaling more than 50 percent of the time), regulations may be amended to authorize transportation at Government expense of dependents, baggage and household effects to and from a designated place even though the location of the home port or shore station are the same, since such duty is considered sea duty under unusual circumstances as provided for in 37 U.S.C. 406(e) (1970). 43 Comp. Gen. 639 (1964) modified. 57 Comp. Gen. 266 (1978).

Change in home port designation

Qualifications as dependents--Members who are assigned to ship based fleet activity mobile units when they receive notice that the home port of the vessel is changed but who do not move their dependents to the new station until sometime after the effective date in the notice because their unit is deployed overseas at the time, nevertheless, must have the statutory designation of the home port of the vessel as the member's permanent station applied so that the effective date in the orders directing the change of the home base of the vessel is the date for determining the members' dependents who are entitled to transportation at Government expense rather than the constructive date on which the unit actually moved to the new base. 42 Comp. Gen. 167 (1962).

Dependent travel authorized--A member of the naval forces assigned to a vessel the home port of which is changed to a location overseas and 6 months later changed to a location in the United States may be paid a monetary allowance for travel of dependents incident to the change of home port

from the United States to overseas, not to exceed that payable for the distance from the old home port to the port of embarkation, and also paid an allowance incident to the change of home port from overseas to the United States, not to exceed that payable for the distance from the port of embarkation to the new home port, even though no land miles are involved in either change of home ports. 32 Comp. Gen. 485 (1953).

Transfer between ships

Home port same, different home yard--A Navy member who upon reenlistment and prior to a transfer to a new permanent station aboard a vessel home-ported in the United States, returns on leave to his home of record, the Philippine Islands, where he is married, and who a year later is transferred to another vessel at the same home port is entitled to the transportation of his dependents from the Philippines to the home port of the vessels pursuant to the JTR's incident to his first permanent duty station assignment upon reenlistment. 45 Comp. Gen. 477. (1966).

G. Separation Under Less Than Honorable Conditions

Dishonorable discharge--Transportation of dependents of members discharged from the service under other than honorable circumstances may not be authorized at Government expense in the absence of express statutory authority therefor. 37 Comp. Gen. 21 (1957).

Separation or confinement overseas--An amendment to the JTR's to authorize the return transportation of dependents of members who while serving overseas are involved in circumstances requiring separation under other than honorable conditions or confinement is within the purview of Public Law 88-431, which amended 37 U.S.C. 406(h) to permit advance transportation in such circumstances, whether separation is effected overseas or in the United States, and in cases of confinement of the members when there is a determination that the best interest of the dependents and the United States require the return transportation of the dependents and effects. 44 Comp. Gen. 724 (1965). Compare 55 Comp. Gen. 1183 (1976).

Separation in the U.S.--Regulations may not be promulgated under 37 U.S.C. 406(h) (1970) or any other statutory provision to authorize transportation of dependents and household effects of a member of the uniformed services with dependents and shipment of household goods for a member without dependents serving within the United States, incident to the member's discharge under conditions other than honorable similar to the transportation authorized members with or without dependents discharged in such circumstances while serving overseas. B-131632, November 30, 1977.

Under the statutes and regulations currently in effect, service members stationed outside the United States who are separated under less than honorable conditions are authorized return transportation of their dependents and household goods under 37 U.S.C. 406(h), but such authority does not extend to those stationed within the United States. However, under the recently enacted provisions of 37 U.S.C. 406(a)(2)(A), members stationed in the United States who are separated under those conditions are authorized transportation of dependents by the least expensive transportation available, but not household goods. Court-martialed personnel sentenced to receive punitive discharges who are stationed outside the United States and who are placed on appellate leave to await final separation may be allowed transportation of dependents and household goods on that same basis. Such personnel stationed inside the United States and placed on appellate leave may be authorized dependents' transportation but not household goods transportation. B-211797, December 23, 1983; 63 Comp. Gen. _____.

H. Reenlistment At Home Of Record

An enlisted member who with his dependents traveled from a duty station within the United States to the Philippines, the place of his enlistment and residence, for separation, where he immediately reenlisted and was subsequently transferred to England is entitled to reimbursement for both segments of the travel performed by his dependents, because the JTR's precluding reimbursement for the transportation of dependents at Government expense when a member is discharged and reenlists at the same station under continuous service conditions is not for application, as unaware of the member's intent to reenlist, he was ordered to the Philippines for separation under the authority of article C-10105(2), Bureau of Naval Personnel Manual, and subsequent to his reenlistment he was transferred to England under PCS orders. 49 Comp. Gen. 291 (1969).

II. DEPENDENTS, HOUSEHOLD GOODS, MOBILE HOME, POV REQUIREMENTS

A. Status As Dependent

Spouse

Male or female member--The distinction between the dependents of male and female members of the uniformed services was determined to be unconstitutional by the Supreme Court of the United States in Frontiero v. Richardson, 411 U.S. 677 (1973). Therefore, proof of financial dependency which was not required for wives of members may not be required for husbands of members as prerequisite for travel benefits. See 53 Comp. Gen. 116 (1973).

Common law spouse--The marriage of a member in Nevada prior to the date the wife's California interlocutory divorce decree became final is a nullity under the laws of Nevada so that the parties cannot be recognized as husband and wife during the period prior to the final decree. However, after theimpediment was removed, the cohabitation of the member and person he married in Colorado, which recognizes common law marriages, constitutes a common law marriage so that the member qualifies for dependents's allowances. 39 Comp. Gen. 374 (1959). See also B-186179, June 30, 1976.

Proxy marriage--In view of the decision of the courts of the State of New York holding that a proxy marriage performed in the District of Columbia is valid, such a marriage, if otherwise proper, will be recognized by the General Accounting Office as a valid marriage for pay and allowance purposes. 32 Comp. Gen. 173 (1952).

Remarriage after foreign divorce--A service member who married a foreign national in Virginia after he secured an

ex parte divorce from his first wife in the Dominican Republic, where it appears that he did not establish a residence or domicile and where his wife was not present in person or represented by counsel, now seeks dependent benefits for the second wife and her dependents children. This entitlement may not be allowed in view of the longstanding rule that in the absence of bona fide domicile in the foreign country where the divorce is granted, such divorces are considered of such doubtful validity that recognition of the divorce and subsequent marriage is required by court of competent jurisdiction in the United States. Futher, neither the issuance of a state required marriage license nor the issuance of an alien residency card identifying the second wife as the member's spouse, satisfies the court recognition requirement. B-205174, April 12, 1982. But see also 61 Comp. Gen. 104 (1981).

Marriage after orders issued--The right of a member to the transportation of dependents accrues on the effective date of the orders to make a PCS, and marriage after that date and while en route to new station does not entitle the member to transportation of spouse from her home to the new station. 2 Comp. Gen. 712 (1923); 4 Comp. Gen. 438 (1924); and 24 Comp. Gen. 927 (1945).

Marriage before travel required--An officer who was detached from his overseas station without being assigned to a new PCS, such station being assigned upon his arrival at the temporary station in the U.S., is entitled to transportation to the new station for his wife whom he married before the expiration of leave granted after arrival at the temporary station, that is, before he was required to commence travel under the orders assigning a new PCS, the cost not to exceed that from the temporary station. Where, however, orders detaching an officer from his overseas station and assigning to a PCS in the U.S. were amended to authorize dalay en route for purposes of recuperation, ect., prior to completing travel to the new station, the officer, whowas married during the period of authorized delay, on a date after he was required to commence travel, acquired no right to transportation to the new station for his wife by reason of such amended orders. 26 Comp. Gen. 339 (1946) and 38 Comp. Gen. 790 (1959).

Return from overseas after divorce--No objection is raised to a proposed amendment to the JTR's which would permit return travel to the United States of dependents of members stationed overseas who traveled overseas as dependents but ceased to be dependents because of divorce or annulment of the marriage prior to the date the member became eligible for their return travel. 53 Comp. Gen. 960 (1974). See also, B-191100, April 13, 1978; and 61 Comp. Gen. 62, 180 (1981). However, the ex-spouse who incurs the travel

expense may be paid the allowance directly only if the member authorizes such payment. B-193430, February 21, 1979.

After acquired spouse--In the absence of statutory authority, the Joint Travel Regulations may not be amended to allow reimbursement to a member for transportation of dependents acquired subsequent to the effective date of orders assigning the member to a new duty station. 35 Comp. Gen. 673 (1956).

Separation of spouse--A member under permanent change-of-station orders traveled concurrently with his wife, who was traveling under separation orders. He is not entitled to dependent transportation allowance on account of his wife as his dependent since she was paid travel and transportation expenses to her home of record in connection with her separation from active service in the Air Force. However, he may be paid a dislocation allowance at the with-dependent rate on account of his wife since she is considered his dependent on the effective date of his transfer. 63 Comp. Gen. 55 (1983).

Parents

Member of household requirement--A dependent parent of an Army officer who did not accompany the officer to his overseas station but, upon his subsequent transfer to a duty station in the United States, traveled to the new duty station may not be regarded as a member of the officer's household actually residing at or in the vicinity of the overseas station to entitle the officer to reimbursement for the dependent's travel and in the absence of specific authorization for the dependent parent's travel from a place other than the old station to the new station as required under paragraph 7000 of the Joint Travel Regulations, no reimbursement may be made. See also 39 Comp. Gen. 335 (1959), B-183542, December 29, 1975.

Financial dependency requirement--In order to be entitled to reimbursement for the transportation of a dependent mother on change of station member must submit evidence that the mother resides with him as a member of his household and also evidence of dependency of the mother to the same extent as required when claiming rental of subsistence allowances by reason of a dependent mother. 3 Comp. Gen. 109 (1923).

Transportation as related to dislocation allowance--The payment of dislocation allowance to a member without dependents who is receiving BAQ as a member with dependents for her mother who will not join her at her new duty station where she was not assigned Government quarters depends on whether or not the mother resided with the member at the

old station. If she did not, the member is entitled to a dislocation allowance in an amount equal to the applicable monthly rate, but if the mother did reside with the member at the time of transfer, her entitlement to transportation for the mother precludes payment of the allowance even though the mother may not have changed her residence. 52 Comp. Gen. 405 (1973).

Children - Status

Adopted children generally--Where children are placed with a member of the uniformed services for adoption in the

State of California by an agency of the State, the effective date for determining entitlement to dependency benefits is the date an order of adoption has been entered by a court of competent jurisdiction. 60 Comp. Gen. 170 (1981).

Adopted child not supported by member--When a Navy member adopts a near relative who remains with his or her natural parents, the member may only receive increased allowances if he can demonstrate that the adopted child is in fact dependent upon him for support. This requires clear and convincing evidence that the adoption is not merely for increased allowances, and that the member's support provides the child with the necessities of life which would be unavailable without support. B-205314, June 8, 1982.

Illegitimate child--Member may claim a stepchild as a dependent regardless of the fact that the child is the illegitimate child of his spouse and he is not the blood father, by virtue of fact that he has accepted full responsibility for that child by his marriage to the child's mother. B-177061, B-177129, December 13, 1974.

Stepchildren not supported by member--A member who regularly makes substantial contributions to the support, maintenance, and education of his minor stepchild, a member of the household without independent means, may be considered to have stepchild in fact dependent upon him so as to be entitled to reimbursement for the cost of the stepchild's transportation, even though the member's wife receives contributing support from child's natural father. 34 Comp. Gen. 193 (1954) and 34 Comp. Gen. 694 (1955).

Stepchildren - outside contributions to support--Minor stepson of a member, whose wife is receiving Social Security and VA payments as the result of the death of the child's natural father while in armed forces, in an amount sufficient to cover the child's actual monthly living expenses, is not in fact dependent upon the member so as to entitle the member to reimbursement for the cost of the child's transportation incident to change of station. 34 Comp. Gen. 625 (1955). See also B-177061, November 4, 1974, B-196727, May 20, 1980, and B-199433, December 29,1980.

Minor child previously married--A member's minor daughter who, prior to obtaining an annulment of her marriage, traveled to her parent's home incident to the member's retirement orders must be regarded as having a valid marriage status until the annulment was issued, and, therefore, the daughter may not be considered as "unmarried minor child" so as to entitle the member to reimbursement for her transportation. 37 Comp. Gen. 129 (1957).

Child in uniformed services--The fact that the spouse of a member who was transferred is a military nurse does not deprive the member to entitlement for her transportation since the wife traveled during a period that she was in excess leave status, a period during which she was not entitled in her own right to basic pay and allowances prescribed for active duty. 53 Comp. Gen. 289 (1973).

Child a cadet or midshipman--A cadet who is the son of a member is entitled to transportation allowance in his own right and, therefore, such cadet may not be regarded as a dependent for travel purposes incident to a PCS of the member when the PCS is made after the son entered the academy. 39 Comp. Gen. 786 (1960).

Child born after orders--An unborn child on the effective date of the PCS orders of the father may not be considered his dependent for the purposes of transportation at Government expense of persons dependent upon a member on the effective date of PCS orders. However, regulations may be issued to authorize reimbursement for the cost of travel to a member's new station of his child born after the effective date of his PCS orders if his wife's travel prior to the birth of the child is precluded by departmental regulations due to the advanced state of her pregnancy. 50 Comp. Gen. 220 (1970).

Legal custody questions--Dependent children who are not under the legal custody and control of the member on the effective date of his PCS orders are not entitled to be transported at Government expense. Where at the time of member's PCS, divorce action was pending in the courts, and the children were in the legal custody of the wife under temporary court order, member is not entitled to travel expenses of his dependent children. 53 Comp. Gen. 787 (1974) and 51 Comp. Gen. 716 (1972). See also B-1311421, June 3 1957; B-186308, July 22, 1976; and B-178229, September 14, 1973; and B-197144, July 22, 1980.

Member granted retroactive temporary custody--Divorced member whose former wife was given legal custody, care, and control of their children under court order and who subsequently takes actual custody of children and then obtains court order granting him retroactive and prospective temporary legal custody, care and control is entitled to reimbursement for dependent travel since his permanent duty station was changed while he had temporary legal custody. B-197384, August 12, 1980.

Custody on date of assignment--Military member is not entitled to the transportation expenses incurred by his dependent daughter when she traveled to his permanent duty station to assume residence with his because she was not in his custody and control on the effective date of his assignment to that post. B-209105, April 22, 1983.

years of age while the member is serving in such place is not limited to returning the dependent to the U.S. upon assignment of the member to duty in the U.S. The JTR's may be amended to expand dependent travel entitlement to include travel between unrestricted overseas areas incident to PCS orders, or to return such dependents to the United States at Government expense when the member is assigned from an unrestricted to a restricted overseas station. 45 Comp. Gen. 82 (1965).

Majority attained in the United States--The dependent of a service member was authorized travel from Tacoma, Washington, to Maxwell Air Force Base, Alabama, in connection with the member's permanent change of station from West Germany, to Maxwell. Since the dependent was already in the United States, and had attained the age of 21 while in the United States, the orders may not be considered as authorizing travel as a dependent at Government expense. B-212149, December 16, 1983.

After acquired dependent attaining majority while stationed overseas--The joint Travel Regulations may not be amended to authorize transportation at Government expense for the return transportation to the United States of a uniform service member's child acquired overseas when the dependent was less than 21 years of age who was subsequently command sponsored and then became 21 years of age before the member's next permanent change of station. 37 U.S.C. * 406(h), which authorizes return transportation of dependent children from overseas after reaching age 21, applies only to dependents transported overseas at Government expense. B-199424, October 7, 1980.

21st birthday during travel--When a dependent of a member who became 21 years of age after the date a delayed travel authorization for transportation of the dependent to the member's overseas station was issued, but before the time the dependent arrived at the port of aerial embarkation for overseas travel, the member may not be reimbursed for the transportation of the dependent to the overseas station. Entitlement is determined on the basis of the attained age of the dependent on the date of embarkation. 44 Comp. Gen. 98 (1964).

Children remaining overseas after reassignment--The fact that an unmarried dependent transferred overseas at Government expense incident to the assignment of a member remained overseas after reaching 21, and the member's assignment to the United States, only returning to U.S. after the member's reassignment to another permanent duty station within the U.S. does not defeat entitlement to dependent's transportation. Therefore, the member is entitled to the transportation of the dependent from the place at which located overseas to the duty station, at which the member

is located at the time the travel is performed, not to exceed the distance from the old station overseas to the current duty station in the U.S. or from the last station in the U.S. to the current station, whichever is greater. 47 Comp. Gen. 691 (1968).

B. Household Goods, Personal Effects

Goods included

General limitation--The term "baggage and household effects" used in 37 U.S.C. 406 to authorize transportation incident to a temporary or permanent change of station for a member and in the implementing JTR's a term that does not lend itself to precise definition and which has been interpreted to mean in its ordinary and common usage as referring to particular kinds of personal property associated with the home and person, may not be redefined to include all personal property associated with the home and person which will be accepted by a carrier. 52 Comp. Gen. 479 (1973).

Exclusions - boats etc.--The definition of the term "household goods" contained in the JTR's promulgated under the authority of 37 U.S.C. 406(b), may not be revised to enlarge the term to include boat comonents such as outboard motors, seat cushions, life jackets, and other boat gear, as acceptable items for shipment as household goods. Notwithstanding the lack of preciseness of the term "household goods", the term in its ordinary and usual usage is generally understood as referring to furniture and furnishings or equipment--articles of a permanent nature--used in and about a place of residence for the comfort and accommodation of the members of a family, and the term is not viewed as encompassing such items as boats, airplanes, and housetrailers. 53 Comp. Gen. 159 (1973).

Animals--Animal quarantine fee incurred for family pet at service member's temporary duty station while en route to new duty station incident to transfer may not be reimbursed because the relocation of animals is not an allowable transportation-related expense. Futher, the fact that the member was allowed accompanied travel with temporary duty en route does not permit payment of a fee incurred because the family pet was traveling with the family. B-205577, May 18, 1982. See also 27 Comp. Gen. 760 (1948); and B-175383, August 7, 1972.

Personal baggage--An Army officer transported some household goods in his automobile by ferry across the English Channel returning from Germany to the United States rather than having them shipped by the Government with the rest of his household goods. His claim for reimbursement for the ferry charge on the basis that is was incurred primarily to get his houshold goods across the Channel is not allowed. He chose to drive his automobile via that route and take the goods with him as baggage for his personal convenience. The ferry charge was based on a per-vehicle rate including passengers, and baggage carried free for which the regulations provide no transportation entitlements.

The reimbursement he recieved for his personal travel is all that he was entitled to. B-202050, October 9, 1981.

After acquired goods - replacement items--The prohibition in the JTR's that household goods acquired by a member after the effective date of PCS orders may not be transported at Government expense, except houshold goods purchased in the United States when shipped to an overseas station, may be waived for equipment serviceable on the effective date of orders and replaced because of breaking down, wearing out,or otherwise becoming useless after such date and before the date the goods are turned over to the transportation officer or carrier for shipment, and the JTRs may be amended to authorize shipment, within authorized weight allowances, of bona fide replacements of articles in the possession of a member on the effective date of his orders, but the exception may not be extended to retirement or separation from the service cases, the authority in 37 U.S.C. 406(b) and (e), based on the concept of a change of station allowance, not covering items acquired up to a year later that do not relate to the member's service. 43 Comp. Gen. 514 (1964).

Weight limitations

Weight determination primarily administrative matter--The question whether and to what extent authorized weights have been exceeded in the shipment of household effects by members of the uniformed services is considered to be a matter primarily for administrative determination and ordinarily will not be questioned in the absence of evidence showing it to be clearly in error. B-196994, May 9, 1980, See also B-198264, May 6, 1980, B-197984, April 3, 1980, B-197948, December 29, 1980, and B-206951, July 12, 1982.

The General Accounting Office will not disturb the agency's determination of the net weight of a service member's household goods shipment in the absence of clear error or fraud. Where the cumulative effect of circumstantial evidence is insufficient to establish clear error or fraud, the claiment has not met his burden of proof so as to have his claim for excess weight charges collected from him allowed. B-213543, December 7, 1983.

Rebuttal of weight certificates--A weight certificate and weight tickets, which were regular on their face, produced by a certified weighmaster to determine the weight of a household goods shipment and which indicated that the shipment's weight greatly exceeded the authorized shipping weight, can be rebutted. An Air Force member who produced substantial evidence including professional weight estimates made by Air Force employees showed that mover's weight certificate and tickets were clearly in error and invalid. B-206951, July 12, 1982. Compare B-207806, August 24, 1982.

The carrier's mere opportunity to fraudulently increase the weight of a household goods shipment and the carrier's suspension from traffic for reasons of poor service do not constitute sufficient evidence to establish that weight the carrier charged for on a particular shipment was erroneous or fraudulent when that weight is based on the required weight tickets. B-213543, December 7, 1983.

Weight of subsequent move not acceptable--Rebuttal evidence of the weight of household effects shipped in a subsequent permanent change-of-station (PCS) move is not sufficient to show that the properly determined weight of household effects shipped in a previous PCS move was incorrect. B-198264, May 6, 1980. See also B-194315, October 24, 1979, B-207806, August 24. 1982.

Additional weight for professional goods--A military member who is authorized to ship professional books, papers, and equipment along with household goods may receive credit for the weight of such items. The administrative determination of the weight of professional materials, based on the shipper's inventory, will be accepted where the member, who claims allowance for additional weight, has may presented no clear evidence showing it to be incorrect. B-195606, March 5, 1980. See also B-196994, May 9, 1980.

Additional weight for necessary furnishings acquired overseas--Two letters issued by an Army officers's headquarters indicated that household goods acquired overseas through marriage "can qualify" for an additional weight allowance authorized for furnishings acquired when those normally provided by the Government are unavailable. The officer questions the Army's denial of the additional allowance in shipping his household goods. The Army did not interpret the letters as requiring that the additional allowance be granted and they were not the statutory regulations establishing the weight allowances. We do not view those letters as binding on the Army and find that Army considered the member's request under appropriate regulations and did not abuse its discretion in denying the request. B-204679, August 21, 1982.

Increase after retirement--The right of a member to transportation of household effects accrues on date of retirement. The allowance to be shipped at public expense is that authorized at the time the right accrues, and delay in shipment does not entitle the member to an increase in weight promulgated by amendment of regulations subsequent to the date of the member's retirement. 10 Comp. Gen. 312 (1931).

Effect of promotion--The right to transportation of household effects accrues on the effective date of the orders to make a PCS. The allowance to ne shipped at public expense is that established for the rank held on such date, and a promotion in rank while household goods are en route between the old and new permanent stations does not increase the weight to be shipped at public expense. 8 Comp. Gen. 528 (1929).

Shipment before promotion--The transportation of a member's household effects on PCS being a service in kind, promotion after transportation accomplished does not authorize an increase in the weight allowance to be shipped at public expense, notwithstanding the promotion is effective prior to the date on which the change of station order is required to be obeyed and the member could have delayed the shipment until a date subsequent to the effective date, and date of acceptance, of the promotion. 16 Comp. Gen. 68 (1936)..

Liabilty for excess weight

PCS orders rescinded--A member whose change of station orders are rescinded subsequent to the shipment of his household goods in excess of his weight allowance, and his reassignment necessitated the reshipment of the goods not withstanding the Government's action was beyond his control is nevertheless liable for the additional cost incurred for the shipment of the excess weight over the circuitous route. The authority in 37 U.S.C. 406a to reimburse a member for the expenses incurred prior to the effective date of PCS orders that are later conceled, revoked, or modified is limited to the travel and transportation expenses prescribed in 37 U.S.C. 404, 406, and 409, and, therefore, the member may not be relieved of the liability, imposed in the JTR's to pay the cost of shipping the excess weight over the circuitous route. 49 Comp. Gen. 225 (1969).

Erroneous advice as to entitlement--Army member, pursuant to permanent change of station orders, shipped houshold goods and unaccompanied baggage in excess of his prescribed administrative weight allowance. Under paragraph N8007-2, 1 JTR, the member is liable for all costs attributable to shipping the excess weight. The fact that the member may have received erroneous advice concerning his transportation entitlements does not serve to relieve him of his liability since the Government is not bound by incorrect statements of its agenct and employees. B-197948, December 29, 1980.

Excess baggage shipped by mistake--Army member whose household good sshipment exceeded her weight allowance seeks reimbursement for the excess weight charge on the grounds that the movers arrived 2 days earlier than expected and packed goods which were not to be shipped because she was unable, for reasons beyond her control, to supervise the packing. The claim is denied since there is no authority for the Government to pay a member's transportation costs in excess of those authorized by statutory regulations. B-199111, March 17, 1981.

Member does own packing--The cost of the excess weight charged to an officer of the uniformed services incident to the shipment of household effects and books partially packed by him--the carrier packing the remainder of the shipment not including a charge for the items packed by the officer--may not be recomputed by prorating the carrier's packing cost on the excess weight reduced by the constructive weight of the items packed by the officer rather than prorating the packing cost against the total excess weight, the officer having been permitted for his convenience to ship effects in excess of authorized weight allowances upon agreemant to pay the additional cost, received a benefit for his packing service in the reduction of the overall costs on which his pro rata share is based, and the

officer is chargeable for excess costs prorated on the basis the excess net weight bears to the total net weight, and computed on all costs of transportation. 44 Comp. Gen. 652 (1965). See also B-203036 (1), February 9, 1982.

Goods not reweighed--An Air Force member's claim for refund of shipping charges collected from him for the excess weight of his household goods on the basis that the administrative regulations directing that his household goods be reweighed were not followed may not be allowed in the absence of some other evidence that the weight was in error since such regulations are procedural in nature and do not apply to administration or interpretation of entitlements. Since the weight of the household goods was established at origin by the certificate of a public weighmaster and since no error in such weight is alleged or shown, that weight must be used in determining the member's liability. B-190687, March 22,1978. See also, B-194733, March 10, 1980, B-189888, March 22, 1978, B-194961, July 23, 1979, and B-192618, November 9, 1978.

Navy's assessment of excess weight charges based on weight tickets issued by a certified weighmaster is a valid basis for computing net weight of a member's household goods. That assessment cannot be cchanged based on the member's allegations that the scales were operated by the carrier's parent company; the driver refused to reweigh tare weight on independent scales; the carrier, subsequent to the move, was suspended from military traffic; and illegally increasing weight has been practiced by some in the moving industry. B-213543, December 7, 1983.

Service member claims refund of the shipping charges collected from him for the excess weight of his household goods on the basis that the administrative regulations directing that his household goods be reweighed were not followed. His claim may not be allowed in the absence of some other evidence that the weight of the goods was in error since regulations requiring reweigh are procedural in nature and do not govern entitlements. Since the weight of the household goods was established at origin and since no error in such weight is alleged or shown, that weight must be used in determining the member's liability. B-207950, February 8, 1983.

No advance notice of excess weight--A service member is charged the cost of shipping household goods in excess of his weight allowance, but asserts that because the transportation officer failed to notify him of the excess weight in accordance with Army regulations, he should not be charged for the costs. The regulations authorized by 37 U.S.C. 405 providing entitlement to transportation of household goods are contained in Volume 1, Joint Travel Regulations (1 JTR), not the Army regulations, Para.

M8007-2, 1 JTR, provides that cost of shipping household goods in excess of authorized weight will be borne by the member. Failure of a transportation officer to notify member of excess weight is not a criteria for exempting a member from paying these costs. B-199109, August 15, 1980. See also B-195606, March 5, 1980.

Audit on excess weight--A proposed procedure to establish a minimum weight of 300 pounds for the examination of shipping documents of household goods shipped to determine if there are excess costs on account of members exceeding their authorized weight allowances would not satisfy the audit requirements of the U.S. General Accounting Office and may not be approved as there is no legal basis for disregarding shipments weighing less that 300 lb. in determining whether excess costs are involved when to do so could serve to permit shipment at Government expense of weights in excess of those prescribed by the JTR's implementing 37 U.S.C. 406 authorizing shipment. Moreover, departments have the responsibility to maintain adequate controls in order to determine when shipments involving excess costs have been made and to take appropriate action to recover the amount of any access costs. 50 Comp. Gen. 705 (1971).

Orders requirements

No orders issued--An Air Force member who was required to vacate family type Government quarters because his dependent departed the quarters permanently to accept employment some distance away is not entitled to be reimbursed moving expenses he incurred when he personally moved his household goods to the place where his dependent was working. In the absence of permanent change of station of retirement orders, the member could only be reimbursed expenses if the move was ordered due to some unusual situation related to military necessity. B-208815, January 10,1983.

Shipment prior to orders - military necessity--Although household effects of members may be moved at Government expense within prescribed weight allowances under the authority of 37 U.S.C. 406(b) incident to a PCS, the JTR's preclude shipment at Government expense when shipment occurs prior to the issuance of orders, except upon certification by proper authority that shipment was due to an emergency, exigency of the service, or required by service necessity. The authority for the transportation of dependents, baggage and household effects between points in the U.S. in unusual or emergency circumstances when incident to military operations or need may not be extended to authorize transportation long prior to issuance of PCS orders solely on the basis of dependent's need. 52 Comp. Gen. 769 (1973).

Shipment prior to orders - evidence of shipment--A former Navy member who claims reimbursement for shipping his household effects and supports his claim with receipts indicating that the shipment was made 11 months prior to the issuance of permanent change-of-station orders may not be reimbursed since generally shipment of household effectrs prior to orders is not authorized. His statement that the shipment was made after his orders were issued, not on the date of the receipts, is insufficiently supported to overcome the strong presumption that the shipment was made about the time of the receipt of dates. B-194556, June 13, 1979.

Shipment prior to orders-personal reason--Military member is not entitled to transportation of household goods in advance of orders, since shipment without orders was for personal, not military reason. Military member indicated he was informed that he had 72 hours to clear post and that in 48 hours orders would be issued, but he shipped goods without waiting for orders. Further, orders were not immediately forthcoming because of member's actions delaying separation from active duty until a medical determination could be made in his case. B-197522, November 24, 1980.

Shipment prior to orders-family emergency--In a family emergency, a military member relied on a transportation agent's approval to arrange for transportation of household goods and travel of dependents to his home of record about 1 month before he applied for retirement and 6 weeks before retirement orders were issued providing for his retirement a year later. In the absence of military emergency or a written statement from the member's commander advising him that orders would be issued, the transportation officer has no authority to approve personal arrangements for transportation and travel prior to issuance of orders, and regulations dealing with claims procedure provide no authority for payment. The claim for reimbursement of personally arranged, advance transportation and dependent travel costs cannot be paid. B-215000, August 27, 1984.

Changed orders--When a member of the uniformed services incident to his transfer overseas is authorized the movement of dependents and household effects, but after shipment of the effects, his dependents are unable to join him because of illness or other personal reasons, and his tour is changed to an unaccompanied tour, the return of the member's household effects at Government expense from the overseas duty station to a designated place in the U.S., Puerto Rico, or a territory or possession of the U.S., may not be authorized. The transportation of household effects of a member at Government expense may be authorized pursuant to 37 U.S.C. 406(b) only in connection with a duty station change, except in unusual or emergency

circumstances (37 U.S.C. 406(e)), or if it is in the best interest of the member, his dependents, or the United States (37 U.S.C. 406(h)). 49 Comp. Gen. 695 (1970). Overruled in part by 55 Copm. Gen. 1183 (1976).

No change of station involved

Involuntary extension of assignment--Under the statutory authority of 37 U.S.C. 406(e) (1976), volume 1 of the Joint Travel Regulations may be amended to allow a service member any necessary drayage and storage of household goods when he experiences an involuntary extension of assignment at a permanent duty station, and he is required for reasons beyond his control, such as the refusal of his landlord to renew a lease agreement, to change his residence on the local economy incident to that extension of his assignment. 59 comp. Gen. 626 (1980).

Private quarters declared unfit--both military members and civilian employees at overseas permanent duty stations who are required to vacate local housing leased because no Government quarters were available may be paid drayage costs to move their household goods to other housing on the local economy when the quarters they occupy are declared by medical personnel to no longer meet extablished health and sanitation standards on the basis military members must obey orders and civilian employees move for the convenience of the Government. However, neither are entitled to drayage when the move to other non-Government quarters results from a landlord refusing to renew a lease or otherwweise permit continued occupancy as such a change of quarters is not for the convenience of the Government. 52 Comp. Gen. 293 (1972).

Ship to ship PCS at same home port--A naval officer who, incident to transfer from sea duty aboard one ship to staff-based duty aboard another ship at the same home port, performs duties in the nature of shore duties and occupies Goverenment quarters ashore must, nevertheless, have the assignment viewed as a ship-to-ship assignment at the same home port and not a PCS for entitlement to transportation of household effects and, therefore, shipment of the member's household effects from nontemporary storage to assigned quarters at Government expense may not be authorized. 46 Comp. Gen. 263 (1966).

Move into Government controlled housing--The drayage of household effects of members stationed overseas from local economy housing to former rental guarantee housing, which is also privately owned, may not be considered as incident to a directed move to Government quarters nor a movement involving unusual or emergency circumstances to be authorized at Government expense under 37 U.S.C. 406, and, therefore, an amendment to the JTRs to permit drayage at

Government expense in such cases may not be authorized. 45 Comp. Gen. 569 (1966).

Shipment of personal effects - unusual circumstances--The cost of shipping the personal effects of Navy member to and from a vessel that is away from its home port and home yard, effects that normally would accompany a member on his PCS but for the circumstances of the travel, may be paid without regard to the PCS allowance for household goods, or to the fact that the cost of the shipment will exceed the cost of shipment from the old home yard or port to the new home yard or port, and the JTR's may be amended to provide, within authorized weight allowances, for the transportation of the personal effects incident to the transfer of a member to and from a permanent duty station aboard ship, the broad authority in 37 U.S.C. 406 for transportation of baggage and household effects on a PCS covering both the movement of effects for use ashore by dependents and those personally required by the member. 45 Comp. Gen. 480 (1966).

Reimbursement for self moves

Use of commercial transportation--An Air Force sergeant who received orders reassigning him from Spain to North Dakota sent a copy of the orders to his wife in New Hampshire with directions to arrange for the temporary storage and transport of their household goods. An Air Force transportation officer instructed her to make her own arrangements and she followed those instructions. Reimbursement of all commercial storage costs is authorized since service personnel become entitled to transportation (including temporary storage) of household goods at Government expense upon receipt of permanent change-of-station orders, and a member is entitled to reimbursement of all expenses actually incurred (rather than just constructive costs) if the transportation officer declines to accept responsibility for his household goods shipment. B-206294, December 15, 1982.

Advance of funds--The JTR's may not be amended to allow advance payment for rental vehicles for transportation of personal property, and related expenses as the advance payment provisions in 37 U.S.C. 404(b) limit such payments to member's personal travel, and in absence of specific authority for advance payment for transportation of personal property, 31 U.S.C. 529 precludes the issuance of regulations which would authorize such advance payments. 54 Comp. Gen. 764 (1975).

Personal labor nonreimbursable--due to the birth of this third child, a member's request for assignment from 2-bedroom to 3-bedroom Government quarters was granted. Member was informed that he did not qualify for Government

move, and he moved himself. Later the member is informed that he was entitled to move at Government expense and he filed a claim. Member's entitlement is governed by 1 JTR, para. M8500 which allows member to be reimbursed actual expenses incurred. Since member indicates that his only expense was non-monetary (i.e., personal labor expended), the claim is denied. B-195148, March 7, 1980. See also B-190072, August 19, 1980.

"Do-it-yourself" moves

Weight certificates required--The military services' requirement that in order to qualify for an incentive payment under the do-it-yourself household goods moving program, a member must have certified scale weight certificates establishing the weight of the goods, is in accordance with the law and implementing regulations. Therefore, although the move may have been only a short distance, was accomplished without a motor vehicle, and the use of a commercial scale was impractical and a Government scale was not available at the time of the move, the incentive payment may not be made without the weight certificates. In the absence of a change in regulations, the weight certificate requirement will be applied since this is a matter for administrative determination. 60 comp. Gen. 145 (1980). See also B-191016, April 20, 1979, and B-201115, February 27, 1981.

Failure to follow procedures--Air force member who moved household effects under the do-it-yourself program did not follow the procedures set out in the regulations of the Air Force; particularly, he did not obtain acceptable evidence of the weight of the goods transported. In view thereof and in view of numerous irregularities in connection with the move and the submission of the claim, payment of the incentive allowance may not be allowed. B-198476, July 28, 1980. See also B-206744, May 18, 1982.

Use of privately owned station wagon and trailer--To support a claim for a do-it-yourself household goods move incentive payment, an Air Force member presented two household goods weight certificates showing combined weight exceeding his maximum weight allowance of 8,500 pounds. One ticket for 6,700 pounds reflected weight in a truck rented by the Government, and may be allowed. The other, for 4,730 pounds, reflected combined weight in a station wagon and towed trailer. Since regulations do not permit do-it-yourself reimbursement based on transportation of household goods in a station wagon, that weight could not be considered; nor could the weight in the trailer be considered since there was no certificate showing its weight separately. B-215448, December 4, 1984.

Use of a borrowed vehicle--Although the language of the Joint Travel Regulations appears to preclude participation in the "do-it-yourself" program by members transferring household goods via borrowed privately owned vehicle, such a conclusion would be inconsistent with the putrposes of the program. Thus, we agree with PDTATAC that the term "privately owned," as found in 1 JTR paragraph M8400, was used merely as a means of distinguishing the vehicle in question form rental and commercial vehicles, and does not require ownership of the vehicle by the relocation member. 59 Comp. Gen. 34 (1979).

No change in duty station--Properly directed moves without a change in duty station by military members under 37 U.S.C. § 406(e) are not precluded from the do-it-yourself household goods movement program authorized by section;

747, Department of Defense Authorization Act, 1976. Section 747 refers only to 37 U.S.C. § 406(b) (change of station moves); however, transportation of household goods under section 406(3) is that authorized under section 406(b) and neitherthe legislative history nor implemeneting regulations show an intent to preclude section 406(e) moves from the program. 60 Comp. Gen. 145 (1980).

Nontemporary storage

Assigned to isolated station in U.S.--Members who are assigned under PCS orders to duty on San Clemente Island and Santa Rosa Island located 30 miles from the California coast--where dependents are not permitted to join the members are not regarded as being assigned to duty beyond the continental United States for nontemporary storage of household effects but are regarded as being assigned to a restricted area in the continental United States for entitlement to shipment of household effects to a designated location. 39 Comp. Gen. 540 (1960).

Assignment requiring some offshore duty--Members who are assigned under PCS orders to duty at the Texas Towers and who are rotated at 30-day intervals between their restricted station offshore and the location of the parent organization at Otis Air Force Base--which is not a restricted station for transportation of dependents may not have the duty at the Texas Towers considered sea duty or overseas duty or duty to a place in the United States where, due to military restrictions dependents are not permitted to join the member for 20 weeks for entitlement to nontemporary storage or shipment of household effects to a designated place at Government expense. 39 Comp. Gen. 540 (1960).

During extended temporary duty--Regulations authorizing nontemporary storage of household effects of members ordered to temporary duty for periods in excess of 6 months when such nontemporary storage is not in connection with any PCS or predicated on a particular Government need or the assignment or vacation of quarters are regulations without legal effect and, therefore, payments made for such nontemporary storage in addition to the per diem and other travel and transportation allowances for temporary duty are not proper, and nay storage charges incurred may not be paid. 45 Comp. Gen. 350 (1965).

During temporary duty pending transfer to Fleet Reserve--A Navy member stationed in Puerto Rico and entitled to home of selection transportation of household goods was detached from Puerto Rico and sent on temporary duty to Naval Training Center, Orlando, Florida, pending transfer to the Fleet Reserve. His household goods were shipped to nontemporary storage in Jacksonville, Florida, incident to his transfer to Orlando. Within 1 year after transfer to Fleet Reserve,

member chose Puerto Rico as home of selection and had goods timely shipped from nontemporary storage to that location. Under Volume 1, Joint Travel Regulations, the costs of movement and storage of goods within member's authorized weight allowance until arrival at home of selection are to be borne by the Government. B-198936, January 6, 1981.

Tours of duty overseas extended--The involuntary extension of an overseas tour of duty being marked departure from the usual practice of rotating members from overseas to the United States, the extension may be viewed as the unusual or emergency circumstances contemplated by 37 U.S.C. 406(e), which authorizes the movement of dependents and household goods without regard to the issuance of orders directing a change of station. Therefore the JTR's may be amended to authorize reimbursement to members who are unable to renew their leases for local economy housing for the extended tour of duty and who incur the expense of drayage to storage, and drayage from nontemporary storage to local economy quarters. 51 Comp. Gen. 17 (1971).

Extension of storage - missing persons--The requirement in the JTR's that the Secretary concerned or his designee at the termination of each year a member is in a missing status must determine the need for and authorize an extension of the nontemporary storage of the household and personal effects of the member provided under the regulations is in accord with the language of 37 U.S.C. 554(b) and its legislative history and, therefore, the regulations may not be amended to delete the yearly approval requirement to provide for the continuation of nontemporary storage so long as a member is in a missing status. 51 Comp. Gen. 392 (1972).

Storage in private facilities--Where nontemporary storage of member's household goods otherwise is proper, reimbursement is not authorized for storage in member's apartment as the JTR's in accord with 37 U.S.C. 406(d) authorizes such storage only at Government or commercail facilities. 54 Comp. Gen. 387 (1974).

Replacement items--When household effects placed in nontemporary storage at Government expense incident to a PCS of a member are totally destroyed by fire, nontemporary storage charges to the extent they would have been authorized for the destroyed goods may not be paid on replacement items, the member upon placing the original effects in nontemporary storage having exhausted his shipping weight allowance in view of the fact that 37 U.S.C. 406(a), which authorizes nontemporary storage in lieu of the shipment of household effects not needed at a new statiion, contemplates that nontemporary storage rights will not exceed shipping entitlement; therefore, the member may not be furnished nontemporary storage at Government expense for the additional weight of the subsequently acquired

replacement household goods not immediately needed at his new station, even though acquired to replace weight destroyed while in nontemporary storage. 44 Comp. Gen. 290 (1964).

Removal from storage prior to orders--The removal of household goods from nontemporary storage prior to the issuance of new PCS orders for delivery to the same local area from which the household goods were placed in sstorage may be authorized as an alternative to continued storage when chenged circumstances necessitate that dependents return to or remain at or in the vicinity of the old station after placement of the effects in storage, and the Joint Travel Regulations may be amended accordingly. 45 Comp. Gen. 771 (1966).

Removal from storage after divorce--Nontemporary storage at Government expense of a service member's household goods should be terminated as soon as practicable after a State court awards the stored property to the member's ex-spouse and the member declines to use his transportation allowance to ship the goods to his divorced spouse. However, the goods may be retained in storage for a reasonable time, not to exceed the member's entitlement period, while the ex-spouse arranges for the disposition of the goods. 61 Comp. Gen. 180 (1981).

Temporary storage

Not authorized in excess of 180 days--Air force member is not entitled to reimbursement for excess costs of the temporary storage of his household goods beyond 180-day limitation contained in JTR's notwithstanding the "deferral" of his departure date from the old station, since his permanent change-of-station orders not modified, and he received an initial 90 days plus 90 days' additional temporary storage which is all that is authorized. B-192057, August 30, 1978.

Need for administrative approval at destination--A Navy member entitled to home of selection transportation of household goods following transfer to Fleet Reserve, has goods timely shipped from nontemporary storage to home of selection location, but was denied temporary storage at that latter location by the receiving transportation officer. Member claims right to temporary storage of goods at home of selection at Government expense. Para. 8260-3 of Volume 1, Joint Travel Regulations, authorizes temporary storage at destination only when all three conditions stated therein are fulfilled, one of which requires approval by receiving transportation officer. In absence of such approval, no legal basis exists to reimburse member any portion of cost for that temporary storage. B-198936, January 6, 1981.

No entitlement in connection with intracity drayage--An Army officer transferred on permanent change of station orders from San Francisco, California, to Fort McPherson, Georgia, authorized his household goods to b e placed in temporary storage by his wife. The goods were stored in Oakland, California, for 4 months and then, on instructions from the member and his wife, delivered to an address in San Francisco. Member is liable for the temporary storage charges since the intracity drayage may not be considered shipment and temporary storage in connection with intracity drayage is not authorized. B-199110, March 30, 1981.

Misshipment after expiration of entitlement--Member who was released from active duty placed his household goods in storage in Pensacola, Florida. After expiration of 180-day period for Government paid temporary storage, he requested shipment of household goods to his home in Sherman, Connecticut. Due to Navy error carrier did not have street address and map to find employee's home so household goods were placed in storage in Brookfield, Connecticut. Member may be reimbursed storage and transportation costs incurred in reshipment from Brookfield to his home in Sherman since paragraph M8012 of Volume 1 of the Joint Travel Regulations allows service to forward improperly shipped goods at Government expense. B-204621, December 22, 1981.

C. Mobile Homes

Status as mobile home

Railroad car--A Pullman rail car converted and used as a residence by a member qualifies as a mobile dwelling and the member is entitled to the trailer allowance prescribed by 37 U.S.C. 409, which contemplates payment on a mileage basis for overland travel, since there is no indication in section 409 that the allowance is not applicable to a privately owned Pullman car transported overland by rail, and subject to tariff charges, as well as to highway movements. 51 Comp. Gen. 806 (1972).

Houseboat--Transferred member of the Air Force may be reimbursed the cost of tranporting the houseboat he uses as his dwelling under 37 U.S.C. § 409, which permits the transportation at Government expense of a mobile home dwelling, because it is determined that a boat may qualify as a "mobile home dwelling" under the law. 48 Comp. Gen. 147 (1968) is overruled and regulations issued to implement that decision need not be applied so as to exclude payment for transporting boats which are used as residences. 62 Comp. Gen. 292 (1983).

Election of mobile home transportation

Delivery impossible due to breakdown--When a member elects the trailer allowance authorized by 37 U.S.C. 409 in lieu of household effects shipment and dislocation allowance, and delivery of the trailer is precluded by breakdown or damage en route in circumstances beyond the control of the member, his entitlement to reimbursement on a trailer allowance basis continues even though the household effects are shipped to the new station. The total cost of such shipment may not exceed the trailer allowance payable had the trailer reached destination, and where the trailer is shipped under a Government bill of lading, household effects reimbursement is limited to the amount of the trailer

allowance to destination, less the cost to the Government to haul the trailer to the breakdown point, and a trailer allowance, in effect, having been paid, no dislocation allowance is authorized. 44 Comp. Gen. 809 (1965).

Change of orders after goods shipped--The election by a member to move his households goods rather than his house-trailer from his home of record to Columbus, Georgia, where he had rented an apartment, because he anticipated dury in Vietnam, may not be revoked when the overseas orders were canceled, and the member paid the trailer allowance authorized in 37 U.S.C. 409 in lieu of a dislocation allowance and shipment of baggage and household goods. Unless erroneously informed of benefits an election is irrevocable, for an additional election or reelection may not be authorized, and finality in the settlement of claims is essential. Sionce the member was aware of the amounts payable whatever his election and he chose to move his household goods as the most beneficial arrangement for him, he is not entitled to an adjustment of cost. 51 Comp. Gen. 509 (1972).

Advance payments

A Pullman rail car converted and used as a residence by a member qualifies as a mobile dwelling and the member is entitled to the trailer allowance prescribed by 37 U.S.C. 409, which contemplates payment on a mileage basis for overland travel, since there is no indication insection 409 that the allowance is not applicable to a privately owned Pullman car transported overland by rail, and subject to tariff charges, as well as to highway movements. 51 Comp. Gen. 806 (1972).

Missing persons

The wife of a member missing in action moved her household effects in her mobile home and was denied reimbursement for the expenses incurred in the movement of the trailer, as 37 U.S.C. 554 in providing for the travel and tgransportation of dependents and household and personal effects of members in a missing status does not specifiically include a house-trailer, nevertheless, may be reimbursed the expense of the trailer movement since the amount involved is less than it would cost the Government to comply with the provision in the Joint Travel Regualtions authorizing the shipment of household goods when a member is in a missing status for more than 29 days, either to his official home of record or the residence of his next of kin. 51 Comp. Gen. 763 (1972).

Relocation at permanent station

Trailer court declared off limits--The costs incurred by a member incident to the movement of his house trailer

without a PCS from a trailer court declared "off-limits" by the base commander in order to protect the health and welfare of Armed Forces personnel living in the trailer court may be reimbursed to the member, even though there was no change in the member's assignment to create entitlement to the trailer allowance prescribed by 37 U.S.C. 409, as the cost resulted from the base commander's exercise of his authority pursuant to regulation, in connection with the proper administration of the base, and the reimbursement to the member treated as an operational expense chargeable to the appropriation for Operation and Maintenance. 52 comp. Gen. 69 (1972).

Payment of telephone charges--Member who incurs telephone relocation charges in connection with an ordered move from quarters is entitled to reimbursement for such expense. The prohibition contained in 31 U.S.C. 679 (1970) against the use of appropriated money for telephone serevice installed in any private residence or private apartment was not meant to preclude the reimbursement of telephone reconnection charges caused by Government action over which the member had no control. 56 Comp. Gen. 767 (1977). This decision overruled 54 Comp. Gen. 661 (1975).

Telephone charges - retroactive effect--A member's contention that the holding in 56 Comp. Gen. 767 (1977), concerning reimbursement of telephone installation charges, should be applied retroactively is rejected since that decision was a changed interpretation of 31 U.S.C. 679 (1970), which overruled or modified previous decisions and, therefore, is to be given prospective application only. Accordingly, a claim which arose before date of that decision may not be considered under the new rule announced therein. B-190389, January 3, 1978.

D. Privately Owned Vehicles

Incident to injury or illness

Pursuant to 37 U.S.C. § 554, members of the uniformed services who incure an injury or become ill while "on active duty" and extended hospitalization is required, are entitled to the transportation of one privately owned motor vehicle. However, since the statutory language and legislative history clearly indicate an intent to limit the entitlement to members on active duty, the Joint Travel Regulations may not be amended to include those persons whose retirement or separation from the uniformed services is caused by illness or injury since they are then not on active duty. B-200099, January 6, 1981.

Incident to overseas assignment

Transfer to restricted station--Upon reassignment under orders of members from unrestricted duty areas in an

accompanied status to restricted areas on a non-accompanied basis within an overseas command, the members although entitled under the Joint Travel Regulations to the transportation of dependents to a designated place, even though the dependents are not required to be moved, and to shipment of household goods to the same place, may not ship at Government expense a motor vehicle for the personal use of dependents, the reassignment not coming within the unusual and emergency conditions contemplated by 37 U.S.C. 406(h), authorizing the return of dependents, baggage, household effects, and motor vehicle to the United States when orders have not been issued, or cannot be used; therefore, 10 U.S.C. 2634 governing and limiting the shipment of a motor vehicle to a member's new station, the JTR's may not be amended to authorize transportation of a motor vehicle incident to the reassignment. 44 Comp. Gen. 796 (1965).

To other than new station--The privately owned motor vehicle moved by a member to a port of embarkation in the U.S. under PCS orders to an unrestricted area overseas prior to reassignment to a restricted area, the dependents either remaining or returning to the opposite coast, comes within the scope of 10 U.S.C. 2634 and section 2634 authorizing transportation of one motor vehicle at Government expense incident to a PCS to an overseas station for the personal use of a member or his dependents, the JTRs may be amended to authorize the ocean shipment or a POV between coastal ports or the U.S. for the use of dependents. 45 Comp. Gen. 577 (1966).

In advance of orders--the shipment of POV's prior to the receipt of PCS orders by members of the uniformed services may be authorized on the basis the phrase "ordered to make a change of permanent station" in 10 U.S.C. 2634(a), the authority for transportation of motor vehicles, is identical to the phrase used in 37 U.S.C. 406(a) to authorize the transportation, of a member's dependents, pursuant to which the JTR's provide for the transportation of dependents in advance of orders when supported by a certificate by appropriate authority stating that the member was advised by prior issuance of the PCS orders that such orders would issue. 50 Comp. Gen. 376 (1970).

Orders amended, revoked or modified--Since the term "household goods" as defined in the Joint Travel REgulations did not include a POV and 10 U.S.C. 2634, providing for ocean shipment of the vehicle incident to a PCS was silent as to shipment of the vehicle when orders are amended, canceled, or revoked, shipment of POV at Government expense in such circumstances was not authorized. 56 Comp. Gen. 544 (1966). But see 10 U.S.C. 2634 as amended by Public Law 93-548, December 26, 1974, which specifically authorizes shipment of POV is such circumstances.

Leased vehicle

Member with long-term leased motor vehicle is not entitled to shipment of leased vehicle overseas at Government expense since 10 U.S.C. 2634 and the JTR's provide vehicle must be owned by the member, and a long-term lease is a bailment agreement in which the lessee is given possession, but the lessor retains ownership. 53 Comp. Gen. 924 (1974).

Mode of shipment

Air carrier--The term "privately owned American shipping services" as used in 10 U.S.C. 2634 authorizing the overseas transportation at Government expense of a privately owned motor vehicle of a member ordered to make a PCS is limited to vessels and the JTRs may not be revised to include such transportation by air freight even if the use of air freight is limited to a not to exceed the cost of shipment by vessel basis. 54 Comp. Gen. 756 (1975).

Land transportation--The authority in 10 U.S.C. 2634 for the shipment at Government expense of POV of members ordered overseas on a PCS does not peremit the land movement of vehicles from one port to another in order to; utilize U.S. flag shipping--and although it is permissable to ship vehicles by water at Government expenses from one port to an alternate port for transhipment to U.S. flag carriers, prudent management should require owners to deliver their vehicle to the ports from which U.S. flag shipping is available--nor is the land movement of vehicles between two ports authorized under section 2634 where the vehicle is delivered to a port from which no ocean tgransportation is reasonably available. 50 Comp. Gen. 615 (1971).

Water-rail service--The rejection by the Military Sea Transportation Service of Alaska Steamship Company tenders offering rates for the transportation of POV's of military personnel from Seattle to Anchorage by water-rail service is required in the absence of statutory authority for the use of water-rail service. 45 Comp. Gen. 608 (1966).

Ferry fares

Transoceanic ferry - English channel--Although there is no authority in the regulations under which full fare (including that part attributable to transportation of the automobile) for Hovercraft crossing of the English Channel may be paid incident to temporary duty travel of military personnel, it does not appear that payment of such full fare would be objectionable under appropriate regulations if travel by automobile, including transoceanic ferry service, is specifically authorized as advantageous to the

government since the transportation of the automobile may be considered as incident to authorized travel of the member in appropriate circumstances. 55 Comp. Gen. 1072 (1976).

Alaska ferry system--Incident to PCS member's POV was transported via Alaska State Ferry System from Juneau, Alaska to Seattle, Washington. Member is entitled to such transportation at Government expense since "privately owned American shipping services," as used in 10 U.S.C. 2634 authorizing the transportation at Government expense of a POV of a member ordered to make a PCS, includes State-owned vessels. 55 Comp. Gen. 672 (1976).

Newfoundland ferry--Since there is no highway in the Goose Bay area, Canada, over which a member could drive his automobile to his new United States duty station without using long-distance ferries, the JTR's pursuant to 37 U.S.C. 404 and 406, may be changed to treat long distance ferry transportation as transoceanic travel. Furthermore, under 10 U.S.C. 2634(a), Canadian Pacific Railroad ferries may used in the absence of the availability of American vessels and if a member must arrange for the vehicle transportation, his travel orders should authorize the arrangement and his reimbursement voucher attest to the nonavailability of U.S. registered vessels. 53 Comp. Gen. 131(1973).

Where mileage is paid--A member who, after receiving payment on a mileage basis for travel incident to a PCS from the U.S. to Newfoundland, claims reimbursement for the cost of ferry fares for travel between NOva Scotia and Newfoundland may not have the ferry travel regarded as "transoceanic travel" in view of specific exclusion in the definition of "transoceanic travel" of travel between the U.S. and the island portion of Newfoundland; therefore, the member having receiving payment for his travel and his dependents by POV on a mileage basis, which payment is a commutation of all transportation expenses, including ferry fares, no additional payment for ferry costs is authorized. 41 Comp. Gen. 637 (1962).

Passenger charge included--Where the charges for crossing the English Channel via hovercraft are imposed for the transportation of the motor vehicle and not for the transportation of the driver and passengers, a member who drove his POV incident to a PCS, accompanied by his dependents, and incurred a ferry expense to cross the channel may not be reimbursed on the basis of applying a percentage of the vehicle fare assessed for its transportation across the English Channel to the transportation of the drive and passengers in the vehicle, the member having paid no fare for his or his dependents transportation via the hovercraft. 49 Comp. Gen. 416 (1970). See also B-202050, October 9, 1981.

Cost reimbursement

Government shipment requirement--Where a member entitled under 10 U.S.C. 2634 and 37 U.S.C. 406(h) to Government arranged free ocean transportation of a POV upon a PCS overseas, personally arranges and pays for the commercial shipment of a POV, the cost of the ocean transportation, absent specific statutory authority, may not be reimbursed to the member, and the law authorizing the ocean transportation of POV conferring no shipping entitlement on member personally, nor providing for the reimbursement of personal expense incurred for the commercial transportation arranged by him, the JTRs may not be amended to authorize reimbursement of transportation costs to members personally arranging for the shipment of motor vehicles to their permanently assigned overseas station. 45 Comp. Gen. 39 (1965). But see 51 Comp. Gen. 838 (1972).

Government erroneously refuses to ship--A member eligible to have his automobile shipped at Government expense pursuant to 10 U.S.C. 2634 incident to his transfer overseas, who when erroneously denied such transportation arranged and paid for shipping the vehicle by commercial means, is entitled to partial reimbursement in the amount the Government would have been charged by the Military Sealift Command (MSC) under its applicable schedule of rates if Government had arranged for the shipment. Regulations denying an eligible member reimbursement for the cost of shipping his privately owned vehicle overseas by commercial means when he personally arranges for the cost of shipping his POV overseas service because the Government erroneously refused to do so may be amended to provide for partial reimbursement based on MSC costs. 45 Comp. Gen. 39 and other similar decisions modified. 51 comp. Gen. 838 (1972).

Government delays shipment--Army member seeks reimbursement for 23 days of car rental expenses he incurred because of delay in shipment of his privately owned vehicle incident to his change of station. Although the delay was unnecessary, the member may not be reimbursed car rental expenses since there is no authority in statute or regulation which would allow reimbursement. B-205113, February 12, 1982.

Foreign-made automobile--A member stationed overseas who had purchased a foreign-made vehicle overseas prior to entry on active duty may not be reimbursed the expenses of shipping the privately owned vehicle when he received permanent change-of-station order to the United States since 1 Joint Travel Regulations, para. M11002-3, specifically prohibits the shipment of foreign-made privately owned vehicles at Government expense. B-210528, August 25, 1983.

Replacement vehicle overseas--Volume 1 of the Joint Travel Regulations may be amended to authorize shipment of a replacement vehicle for a member of a uniformed service stationed overseas for a protracted period when his vehicle becomes impractical to repair because of normal deterioration and wear. The law requires only that replacement became necessary for a reason beyond the control of the member and that replacement is in the interest of the United States. B-212338, December 27, 1983.

III. REIMBURSEMENTS AND LIMITATIONS

A. Denial of Travel To Dependents Otherwise Qualified

Dependent on active duty

Cadet or midshipman--A cadet who is the son of a member is entitled to transportation allowance in his own right and, therefore, such cadet may not be regarded as a dependent

for travel purposes incident to a PCS or the member when the PCS is made after the son entered the academy. 39 Comp. Gen. 786 (1960).

Member on excess leave--The fact that the spouse of a member who was trasferred is a military nurse does not deprive the member to entitlement for her transportation since the wife traveled during a period that she was in excess leave status, a period during which she was not entitled in her own right to basic pay and allowances prescribed for active duty. 53 Comp. Gen. 289 (1973).

Dependent receiving Government travel as civilian

Civilian employee transferred at approximately same time as military member spouse is entitled to mileage plus per diem for PCS of herself and her children if her transfer in the civilian capacity is found to have been in Government's interest, but mileage allowance paid to member for travel of his dependents would consequentlys be for recovery, since duplicate payments of PCS entitlements may not be made for same purpose. 54 Comp. Gen. 892 (1975).

Member entitled to military and civilian transportation--employee who receives appointment to manpower shortage position with Nuclear Regulatory Commission contemporaneously with discharge from military service has dual entitlement to transportation of household goods. Government will bear expenses of employee's move up to the larger of the two entitlements. See B-177743, February 2, 1975, and B-173758, October 8, 1971.

However, the cost factors involved in the shipment of the household goods by the Army on a Government Bill of Lading and the cost factors which compose the commuted rate payable by civilian agencies may not be interchanged to increase or decrease an employee's entitlement. B-196535, April 22, 1980.

Travel by foreign vessel or airplane

Government payment for any portion of travel performed by a foreign registered vessel or airplane, if American registered vessels or certified air carriers are available by the usually traveled route, is prohibited by law and regulations. B-179445, September 21, 1973; B-180946, May 15, 1975; B-150187, May 12, 1976; B-188991, July 18, 1977; B-193419, March 29, 1979; B-195302, October 17, 1979; B-198872, February 20, 1981; B-203625, February 22, 1982.

Transportation provided by foreign Government

Free travel available - travel By POV--When a member stationed overseas travels incident to a PCS with his

dependents by POV for personal convenience and at his own expense over a route for which free rail transportation by a foreign government is partially available, the member may not be paid mileage for that portion of the travel for which there is free rail transportation, even if it would have been impracticable to utilize the rail transportation. 43 Comp. Gen. 675 (1964).

Travel by railroad operated by U.S.--Although members who utilize their POV for travel on a PCS may not be reimbursed the cost of transportation or paid monetary allowance in lieu of transportation when rail transportation is made available by a foreign government at no cost to U.S. or the member, where the travel involved could be performed on foreign trains operated substantially at U.S. expense and considered Government conveyance, the regualtion respecting the availability and utilization of Government conveyance is for consideration in reimbursing the members using their POVs. 45 Comp. Gen. 151 (1965).

Travel paid by employer on retirement

Member, who on retirement traveled to his home of selection in Iran with his wife on an American flag commercial air carrier chartered by his new employer and who had travel expenses paid by his employer, is not entitled to reimbursement of air travel expenses since the travel of dependent was not performed at personal expense as required by applicable regulations. 55 Comp. Gen. 761 (1976).

No permanent residence established

Pleasure trip or visit--Travel expenses of dependents for pleasure trips or for purposes other than with intent to change the dependent's residence may not be considered an obligation of the Government. The act which authorized transportation of dependents of members "when ordered to make a change of permanent station" did not authorize transportation of dependents for visits or personal travel and the fact that express instructions were not issued in the JTR'sa did not enlarge the scope of the law or change the existing rule. 33 Comp. Gen. 431 (1954). See also B-198961, March 18, 1981, B-207834, December 9, 1982.

College students' travel overseas for vacation period--The decision holding that a member of a uniformed service is not entitled to reimbursement for the travel of his college student-dependent from the United States to the new overseas duty station as dependent travel incident to the member's permanent change of station when the travel is performed only for a brief visit, is reaffirmed. Enactment of legislation authorizing annual round-trip transportation for student-dependents of members stationed outside the United States and the entitlements of civilian employees of the Government in similar circumstances do not provide evi-

dence that Congress intended to change the longstanding interpretation that dependent travel incident to a change of permanent station must be for the purpose of establishing a residence in order to be considered an obligation of the Government. B-198961, October 4, 1984.

Personal convenience--There is no authority for a dependent to travel at Government expense to a service member's last duty station under his permanent change-of-station orders, where the sole purpose of the member's transfer is retirement processing and he has no intention of establishing a permanent home at or near the last duty station. A member is not entitled to have his dependents accompany him at Government expense on a temporary assignment for personal convenience to a place where they do not intend to establish a permanent home. B-203527, March 10, 1982.

To shipyard after change in home port notification--A member who reports for duty aboard a vessel undergoing conversion at the New York Naval Shipyard after the date of official notification that the home port would be changed to Long Beach, California, but prior to the effective date of the change so that he comes within the restrictions of the JTR precluding the movement of dependents at Government expense to the New York Shipyard after official notice of the home port change may be regarded as separated from his dependents because transportion at Government expense is not authorized to a place not intended to establish a permanent residence. 43 Comp. Gen. 553 (1964).

Travel to attend school

Travel in advance of PCS orders--Transportation of the dependents of a member from his old station to a city other than the member's new station for the purpose of attending college, and in anticipation of PCS by the member, but in advance of the issuance of orders therefor, is not transportation incident to the member's PCS and is not reimbursable. 2 Comp. Gen. 567. (1923).

Travel after PCS orders--A member is not entitled to Government transportation for a dependent who subsequent to a PCS from Hawaii to Texas travelled to Florida to attend school and for health and welfare reasons in absence of indication that travel was for purpose of establishing a residence not of a temporary nature. 53 Comp. Gen. 667 (1974). See also B-207834, December 9, 1982.

Transportion for schooling--Transportation of the dependents of a member from his old station to a city other than the member's new station for the purpose of attending college, and in anticipation of change of station by the member, but in advance of the issuance of orders therefor, is not transportation incident to the member's PCS and is not reimbursable. 2 Comp. Gen. 567 (1923).

B. Temporary Duty Involved

Prior to reporting to permanent station

Prior to reporting to first permanent station--Appropriating is available for the transportation of dependents of members only in connection with permanent movement of the member, and therefore is not available for the transportation of the dependents of a Reserve member to his first duty station which was a temporary one. 21 Comp. Gen. 175 (1941). See also B-197401, June 11, 1980.

Prior to permanent change of station--A member upon completion of OCS is ordered on a 2-year overseas PCS tour without dependents, preceded by temporary duty at a place to

which he moves his wife is not entitled to a mileage allowance for that travel on the basis of a subsequent assignment to an indefinite tour of overseas duty, permitting the concurrent travel of dependents, the member's status of entitlement to travel expenses for dependents arising not under the PCS orders, but acquired in connection with his indefinite tour of duty overseas after the wife's travel had been performed, travel not intended for the purpose of establishing a residence; therefore, the payment of a monetary allowance to the member for the travel of his wife to his temporary duty station is not authorized. 45 Comp. Gen. 316 (1965).

PCS after TDY for humanitarian reasons--The transportation allowance rights of members who, after issuance of temporary duty orders transfering the members for humanitarian or hardship reasons to a new station, are subsequently assigned to permanent duty at the same location as the temporary duty point or at another station are for determination on the basis of the permanent duty orders so that the member's entitlement to transportation of dependents at Government expense is from place where the dependents are located, upon receipt of the orders not to exceed the cost from the old to the new station, or, if the old permanent station is outside the United States, from the appropriate port of debarkation in the United States to the new station. 39 Comp. Gen. 188 (1959).

Prior to release

Transfer pending appelate review--A member in an eligible grade who is transferred to duty pending appellate review of a general court-martial conviction, is not entitled to dependent's transportation allowances, his assignment pending appellate review being of a temporary nature. 42 Comp. Gen. 568 (1963).

Transfer for separation processing--A member transferred under PCS orders from overseas to a station for separation is not entitled to travel expenses for his dependents or the separation station since the station at no time was the member's permanent duty station, nonwithstanding his transfer was deemed a PCS and he was assigned to serve as executive officer. Whether a duty assignment is permanent or temporary is determined by considering orders, and the character, purpose, and duration of an assignment. the member's orders evidencing detachment from overseas for separation, the PCS orders and interim assignment as executive officer did not change the character of the separation transfer. 53 Comp. Gen. 44 (1973). See also 53 Comp. Gen. 105 (1973). B-192949, June 6, 1979; and B-195604, September 28, 1979.

Away from permanent station

Instruction of less than 20 weeks--While a member assigned as a student to a school for 20 weeks or more is entitled to transportation of dependents to such place, a member assigned as a student to two schools or courses of instruction totaling 20 weeks or more, but less than 20 weeks at any one place, is not entitled to reimbursement for travel of wife incident to such assignments, even though his orders stated the two classes were to be considered one course of instruction. 32 Comp. Gen. 569 (1953). See also 34 Comp. Gen. 260 (1954). B-193353, February 9, 1979.

Bona fide extension of temporary duty--Members ordered to TDY in connection with fitting out a vessel, to be followed by duty aboard the vessel when commissioned are not entitled to payment for the travel of dependents incident to the delayed commissioning of the vessel, for although the orders did not specifically provide a period of time for the TDY, they did imply TDY limited to fitting out the vessel, and the bona fide extension of the TDY did not place such duty in the indeterminate status contemplated by the JTR's for entitlement to dependent's travel, and the member's orders in substance being change of station orders to the vessel with intervening periods of temporary duty, there is no basis for reimbursement for dependents' travel. 43 Comp. Gen. 474 (1963).

Travel to awards ceremonies--There is no authority to issue regulations authorizing travel and transportation expenses of dependents to accompany members who are receiving honor awards, nor for payment of such expenses of dependents to receive awards themselves. 55 Comp. Gen. 1332 (1976).

Prior to overseas transfer

Training duty and overseas assignment--The authority for the transportation of the dependents of a member from his old to his new permanent duty station does not permit allowing a member assigned to 20 weeks or more of training duty under PCS orders that are silent as to his subsequent, immediate transfer to a restricted overseas area, the alternative right to move to the training station or to select a location, even though the member is officially advised of the overseas assignment, the training assignment constituting a PCS and not an intermediate assignment for further transfer overseas to a restricted area and, therefore the JTR's may not be amended to authorize the transportation of dependents to a location designated by a member. 46 Comp. Gen. 852 (1967).

En route to overseas assignment--The transportation of dependents of members to the temporary duty stations overseas to which the members have been assigned incident to an

ordered overseas PCS is not provided for by 37 U.S.C. 406, and, therefore, there is no authority for the promulgation of regulations to permit the travel of dependents to a member's permanent duty station via his temporary duty points. 42 Comp. Gen. 287 (1962).

Change to with dependent tour overseas--A member who upon completion of OCS is ordered on a 2-year overseas PCS tour without dependents, preceded by temporary duity at a place to which he moves his wife is not entitled to a mileage allowance for that travel on the basis of a subsequent assignment to an indefinite tour of overseas duty, permitting the concurrent travel of dependents, the member's status of entitlement to travel of dependents at government expense arising not under the PCS orders, but acquired in connection with his indefinite tour of duty overseas after the wife's travel had been performed, travel not intended for the purpose of establishing a residence within the contemplation of the JTR's; therefore, the payment of a monetary allowance to the member for the travel of his wife to his temporary duty station is not authorized. 45 Comp. Gen. 316 (1965).

C. Alternate Origin Or Destination

Limited to travel between old and new station

Under the law, transportation of dependents of members incident to an ordered change of station is limited to the distance from the old to the new permanent station, and, in the absence of specific statutory provisions, there is no authority for the promulgation of regulations which would authorize excess transportation of dependents of personnel formerly in ineligible grades or newly acquired dependents of eligible personnel based on an ordered PCS alone, whether the stations involved are overseas or in the United States. 37 Comp. Gen. 715 (1958). See also 27 Comp. Gen. 510 (1948); 26 Comp. Gen. 339 (1946); 24 Comp. Gen. 927 (1945); 4 Comp. Gen. 438 (1924); 2 Comp. Gen. 567 (1923).

From temporary station to new station

A member whose wife traveled at personal expense from their home to his temporary duty station where she was residing when he received orders which detached him from his old permanent station and assigned him to a new permanent station near the temporary duty location may be reimbursed for dependent's travel not to exceed the distance from his home to the old permanent station and from the temporary duty station to the new permanent station. 34 Comp. Gen. 467 (1955).

D. Modes Of Transportation

Transoceanic ferry

A member who, after receiving payment on a mileage basisfor travel incident to a PCS from the United States to Newfoundland claims reimbursement for the cost of ferry travel between Nova Scotia and Newfoundland may not have the ferry travel regarded as "transoceanic travel" in view of the specific exclusion in the definition of "transoceanic travel" of travel between the United States and the island portion of Newfoundland; therefore, the member having received payment for his travel and his dependents by POV on a mileage basis pursuant to the JTRs', which payment is a commutation of all transportation expenses, including ferry fares, no additional payment for ferry costs is authorized. 41 Comp. Gen. 637 (1962).

Air travel using special military leave fare

Marine Corps member and his dependent who perform at personal expense circuitous transoceanic travel by commercial airline authorized by permanent change-of-station orders is entitled to reimbursement at Military Airlift Command rates for direct travel between duty stations despite having used commercial airline's reduced military fare contrary to Department of Defense (DOD) instruction providing that such fares may not be used by active duty members whose travel will be paid by DOD. B-198660, August 19, 1980. Also compare 51 Comp. Gen. 828 (1972).

Mixed modes

Travel by POV and air--Although the JTR's, prescribing that when travel of dependents of members is performed entirely or in part by a POV, the official highway distance is the official distance for mileage payment purposes does not contain a provision in the JTRs providing that the mode of transportation used by a member between his duty station and the local common carrier terminal may be disregarded in determining whether the travel is performed by common carrier, in computing mileage payments for travel by identical means, no distinction between a member and his dependents is required. However, where incident to a PCS, dependents of a member travel by POV to an air terminal that is not the local common carrier terminal for the old duty station, the member is entitled to a mileage allowance based on the official carrier mileage, but only to payment on the basis of the official highways distance. 47 Comp. Gen. 470 (1968).

Use of different mode by some dependents--Statute authorizing the travel and transportation of dependents and the

regulations issued pursuant thereto entitle a member ordered to make a PCS to be furnished transportation for all eligible dependents and therefore, where a member has dependents in such numbers that when traveling at the same time between the same points all cannot travel by POV and some necessarily travel by common carrier on transportation requests, said member may be reimbursed for the others. 33 Comp. Gen. 77 (1953).

Government transportation

Available Government transportation not used--When transportation by Government vsessel is available but not utilized and transoceanic travel is performed at personal expense, the monetary allowance in lieu of tranportation is payable from old station to port of embarkation for Government vessels. Thus, where a member's dependents traveled to Canal Zone at personal expense by commercial air carrier pursuant to member's PCS from Texas to the Canal Zone and after issuance of travel authorization, monetary allowance is payable in lieu of transportation of dependents computed on distance from Texas to New York, port of embarkation for Government vessels. 37 Comp. Gen. 274 (1957).

To place of retirement overseas--Retired member who selected foreign city as home without requesting permission to reside in a foreign country as required by Army regulations, and who with wife traveled to such an overseas home by commercial means after personal reasons made it necessary to decline use of available Government transportation, is not entitled under the JTR's to reimbursement for his traveling expenses or for the transportation of his wife. 34 Comp. Gen. 130 (1954).

Comparative cost when commercial means used--In the determination of the amount reimbursable to members for transoceanic travel for themselves and their dependents after the conversion of the Military Sea Transportation Service (MSTS) and the Military Air Transportation Service (MATS) to industrial fund financed activities when different charges for each service were levied, the proper measure for application is the cost of the least expensive available transportation service as between MSTS and MATS that would have met the transportation requirements of the traveler and his dependents. 41 Comp. Gen. 100 (1961).

Fear of air travel

Where only Government air transportation is available to a member upon change of duty station from overseas to the United States and because his wife is afraid to travel by air he is authorized to travel at his own expense by commercial surface transoceanic travel to the extent it would have cost the Government to provide air transportation he

was entitled to under the JTR's. The member is also entitled to a monetary allowance incident to the land travel performed by him from his overseas duty station to the point where Government travel would have been available and from the aerial point of debarkation in the United States to the new duty station. 48 Comp. Gen. 409 (1968).

E. Miscellaneous Expenses

Tips

Under the authority in 37 U.S.C. 406, to prescribe regulations for reimbursement of the travel expenses of dependents upon the basis of the same elements of costs authorized for the members themselves as reimburseable travel expenses, the JTR's may be amended to provide for reimbursement to members for the tipping expenses incurred by or for dependents aboard commercial vessels, the per diem paid to a member for his transoceanic travel covering incidental expenses such as tipping. 46 Comp. Gen. 792 (1967).

Animal quarantine charges

Animal quarantine fee incurred for family pet at service member's temporary duty station while en route to new duty station incident to transfer may not be reimbursed because it is not an allowable transportation or transportation-related expense. Further, the fact that the member was allowed accompanied travel with temporary duty en route does not permit payment of a fee incurred because the family pet was traveling with the family. B-205577, May 18, 1982.

Advance travel allowances

Advance travel allowance is limited to the personal travel of the member and nothing in the statutes or legislative history indicates it was intended to permit advance payment of the travel of member's dependents. 40 Comp. Gen. 77 (1960).

IV. AUTHORIZATION UNDER UNUSUAL CIRCUMSTANCES

A. Travel When Orders Are Not Issued

Travel in unusual or emergency circumstances

Travel authorized--Subsections (e) and (h) of Section 406, Title 37, United States Code provide for allowances payable incident to the movement of dependents under emergency or unusual circumstances. Only a transportation allowances are authorized for such movements and since no PCS is involved, there is no entitlement to other benefits that accrue upon a PCS move. 50 Comp. Gen. 83 (1970).

Travel not authorized--Claim for reimbursement for dependents' travel expenses from outside the United States to a point within the United States incurred as a result of an emergency of a personal nature must be denied since the regulations at the time the expenses were incurred required advance approval of the travel which was not obtained and although regulation was amended subsequent to the dependents' travel, it cannot provide a basis for authorizing payment, since regulations may be amended prospectively only, except to correct obvious error. B-200641, April 21, 1981.

After alert for overseas transfer--An alert putting designated units on notice that a change of station to an overseas area is pending and that all preparations should be taken for the operational movement of the unit does not conform to the requirements of a competent travel order and ;may not be treated as a change-of-station order to relocate dependents; however, relocation may be accomplished pursuant to 37 U.S.C. 406(e) providing authority for relocation in unusual or emergency circumstances, the word "including" used in the section not limiting the Secretaries to the enumerated unusual or emergency situations, and the JTR's may be amended to provide for the transportation of dependents of those members who are not on duty at the places mentioned in the statute, provided the actual movement overseas commences within 90 days or less after an alert notice and time does not permit the issuance of orders for the relocation of households before overseas deployment. 45 Comp. Gen. 208 (1965).

After extension of short-term PCS assignment--The Joint Travel Regulations may be amended to authorize in certain unusual situations the movement of a service member's dependents and household goods to his new duty station upon the extension of his assignment although he had initially moved them to a location near his previous duty station because his new assignment was of relatively short-term duration. The type situations contemplated include where a member attends a service-operated college for 1 year's training and he demonstrates such knowledge and ability that he is asked to join the faculty because of the needs of the service concerned. B-208861, November 10, 1982.

Prolonged deployment of ships--Where members attached to ships are deployed overseas for a prolonged period of time, the maintenance of a residence at the home port or home yard no longer serves the purpose for which intended and could result in undue hardship, therefore, may be regarded as the unusual circumstances contemplated by 37 U.S.C. 406(e), that auathorizes the transportation of dependents whether or not PCS orders issued, and the dependency situation of the members permanently assigned to the vessel concerned is the same as the newly assigned members. 45 Comp. Gen. 159 (1965).

Shipment of personal baggage--As members of the uniformed services are assigned to an overseas restricted duty area, or to duty aboard a vessel operating in the area without a change-in-quarters assignment, the shipment and storage of clothing and personal effects, regardless of rank, which they are required to dispose of does not fall within the "unusual or emergency circumstances" provisions of 37 U.S.C. 406(e), and the JTR's may not be amended or authorized the shipment and storage of the personal baggage of members from the overseas restricted area, point en route, or from locations of the ship to a designated place, or nontemporary storage. 45 Comp. Gen. 442 (1966). Overruled in part by 55 Comp. Gen. 1183 (1976).

Evacuation from overseas post

Applicable outside U.S.--Dependents who are evacuated from overseas to the States of Hawaii and Alaska, or to the Panama Canal Zone, Puerto Rico, or a territory or possession of the United States may not be regarded as evacuated from "places outside to inside the United States" within the meaning of 37 U.S.C. 405a, which provides allowances for dependents evacuated from overseas, in view of the definition in the JTR's that the term "United States," for the purposes of travel and transportation allowance, means "the 48 contiguous States and the District of Columbia", and in view of the legislative history of the law indicating that Congress did not intend to change the longstanding definition of the term "United States," a regulation to permit payment in such cases would not be proper. 44 Comp. Gen. 789 (1965).

Travel delay due to unrest overseas--Where there was an ordered evacuation of dependents of members serving in Cyprus, and dependents en route to other destinations in the general area were delayed because of a suspension of commercial transportation to destinations east of Rome, Italy, evacuation allowances may not be authorized under current regulations, nor may such regulations be amended to permit evacuation allowances for dependents en route to a station at which an evacuation of dependents is not ordered, in the absence of statutory authority. 54 Comp. Gen. 754 (1975).

Early return from overseas

Return in the national interest--A member whose dependents are returned from overseas pursuant to the JTR's relating to national interest determination prior to the termination of the member's overseas tour of duty may be regarded as having his station changed to a restricted station for entitlement to family separation allowance payments if a secretarial or higher determination is made that the return of the dependents is for reasons of national interest. 43 Comp. Gen. 332 (1963).

For personal reasons--A member whose dependents are returned from overseas under the JTRs involving personal situations may not have such circumstances regarded as due to military requirements to convert the member's overseas station into a restricted station to entitle him to family separation allowances. 43 Comp. Gen. 332 (1963).

Dependents travel without orders not authorized--Where dependents of a member of a uniformed service move from an overseas duty station without orders and without authorization from the Secretary concerned, a claim for reimbursement by the member for the dependent's transportation costs on a subsequent permanent change of station of the member must be denied. B-195941, October 18, 1979.

Financial or marital difficulties--For members stationed overseas, situations designated as "financial difficulties" and "marital difficulties" are not conditions justifying giving overseas members preferential benefits over members in the United States, and, also, return for lack of housing facilities and educational facilities are matters which should be determined before the member goes overseas. 38 Comp. Gen. 28 (1958).

School facilities lacking--The unavailability of high school facilities to the child of a member 2 years after the member who on a 3 year overseas tour was aware of the lack prior to his departure is not the unusual or emergency circumstances contemplated by 37 U.S.C. 406(e) for the advance transportation of dependents. 47 Comp. Gen. 151 (1967). 57 Comp. Gen. 343 (1978).

Lack of employment for spouse--The advance return from overseas to the United Statres of those dependents unable to locate acceptable employment overseas may be authorized at Government expense under the broad authority for advance return when the best interest of the individual and the U.S. which was added by Public Law 88-431 as subsection (h) to 37 U.S.C. 406 because section 406(e) limited advance returns to "unusual or emergency circumstances." However, 37 U.S.C. 406(h) authority does not contemplate the advance return of dependents because they "lack suitable recreational activities" at the overseas station. Furthermore, advance returns are also authorized by the JTRs when situations embarrassing to the U.S. are to be avoided and in situations which have an adverse effect on a member's performance of duty. 52 Comp. Gen. 847 (1973).

Upon induction or enlistment of dependents--Although travel of a dependent to the overseas station of a member incident to the member's PCS is not for the convenience of the Government, the return of the dependent, upon passing his pre-induction tests overseas, to the place in the United States where he registered for military service may be

considered an obligation of the Government. Therefore, under 37 U.S.C. 406(h), profiding for the advance return of dependents to the United States, the JTR's of a dependent from overseas to the place to which ordered to report for induction upon determination that providing transportation at Government expense would be in the best interest of the Government. 46 Comp. Gen. 767 (1967).

Misconduct of dependents--A member whose dependents are returned from overseas under the JTR's relating to the involvement of dependent in an incident embarrassing to the United States, prejudicial to the command, or affecting the dependents' safety may not be regarded as shaving his overseas station converted to a restricted station by such circumstances for entitlement to family separation allowance payments and, therefore, before payment of family separation allowance is made there should be a certification by the officer directing the return of the dependent that the conditions necessitating their return were not caused by their own misconduct. 43 Comp. Gen. 332 (1963).

B. Death Or Missing Status

Member missing or dead

Evacuation necessary when member is missing--When it is necessary to evacuate the dependents of a member on active duty who is officially reported as dead, injured, or absent for a period of more that 29 days in a missing status, transportation may be provided for dependents, personal effects, and household effects, to the member's official residence, to the residence of the dependents, or as otherwise provided, but no other allowances are payable incident to the evacuation. 49 Comp. Gen. 299 (1969). See 50 C.G. 83 (1970). 47 C.G. 556 (1968).

Upon death of member--The proposed changes in the JTR's to combine and consolidate entitlements to transportation of dependents and household effects of members in cases of their death occurring while they are in receipt of basic pay and in cases where the members are officially reported in a casualty status under the Missing Persons Act, are, regarded as proper, except for the change which would authorize transportation allowances for dependents and household effects of members who die within 1 year after release from active duty. 44 Comp. Gen. 43 (1964).

C. Hosptialization and Medical Treatment

Member injured or ill

Member on active duty--Members who incur injury by any means--whether or not they are in a duty, leave, or en route status--are entitled to the transportation of

dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and the JTR's may be revised accordingly. However, absent reference in 37 U.S.C. 554 to disease or illness, the section does not apply to members who become ill or contract a disease which does not result in his death in an active status. 49 Comp. Gen. 101 (1969). Note, however, 37 U.S.C. 554 was amended by Public Law 93-548, Section 3(1)(A) by adding "ill" following "injured."

Member not on active duty--Pursuant to 37 U.S.C. § 554, members of the uniformed services who incur an injury or become ill while "on active duty" and extended hospitalization is required, are entitled to the transportation of one privately owned motor vehicle. However, since the statutory language and legislative history clearly indicate an intent to limit the entitlement to members on active duty, the Joint Travel Regulations may not be amended to include those persons whose retirement or separation from the uniformed services is caused by illness or injury since they are then not on active duty. B-200099, January 6, 1981.

Travel and transportation after hospitalization--A member whose dependents had moved at Government expense "as for a PCS" incident to his assignment to a hospital for extended treatment would be entitled to the further transportation of his dependents upon his transfer from the hospital to a permanent duty station. He would also be entitled to a dislocation allowance upon the relocation of his household incident to the transfer from the hospital. 50 Comp. Gen. 473 (1971).

Prolonged treatment of member--A "permanent station" meaning a place where a member is assigned for duty, the definition of a permanent station in the JTR's may not be broadened to include a hospital in the United States to which a member is transferred for prolonged hospitalization from either a duty station or other hospital in the United States, therefore, the regulations may not be amended to permit payment, when a member is so hospitalized, of the dislocation allowance provided in 37 U.S.C. 407(a) (1) for members whose dependents make an authorized move "in connection with his change of permanent station." However, the regulations may be amended to authorize the allowance on the same basis dependents and baggage are transported to a hospital, that is "as for a permanent change of station" upon the issuance of certificate of prolonged treatment. 48 Comp. Gen. 603 (1969).

Expenses of civilian attendant--Upon ill military member's arrival at medical facility, the member's attendant traveling with him has ordinarily completed his or her

assignment. The attendant is entitled to reimbursement of actual expenses for a reasonable time while awaiting report on patient and arranging for return travel but there is no authority to reimburse the former attendant for subsistence expenses incurred while he or she remains with member for personal reasons. B-199607, April 22, 1981.

Medical care for dependent

Illness and death of dependent--A member's dependents who were authorized, incident to a minor child's illness, to return from overseas station to a place in the United States for the dependent's hospitalization, and who subsequently travel to the member's home of record incident to the child's death and burial may not have the travel beyond the place of hospitalization designated as the ultimate destination in the orders regarded as authorized travel for reimbursement purposes and, therefore, the travel allowance payable to the member is limited to the cost of the dependent's travel from the overseas station to the place of hospitalization and from there to the member's new station under orders which authorized his reassignment to a duty station in the United States. 43 Comp. Gen. 152 (1963).

Patient's travel expenses--A member stationed overseas whose wife under orders travels by POV to and from a hospital for medical treatment may not be paid a mileage allowance for the roundtrip transportation, reimbursement under the law and regulations being limited to actual expenses, whether a dependent travels alone or with an attendant, absent specific authorization for commuted payments, such as mileage, monetary allowance in lieu of transportation, or per diem. A member who transports a dependent to a medical facility in his POV for which he is entitled to an additional amount on behalf of dependent, the travel allowance being in lieu of actual expenses. 47 Comp. Gen. 743 (1968).

Travel as outpatient--Pursuant to 10 U.S.C. § 1040(a), dependents residing with members of the uniformed services stationed outside the United States are entitled to transportation to the nearest appropriate medical facility at Government expense when adequate care is not available in the locality. The statute's legislativee history indicates a congressional intent to allow reimbursement of all transportation expenses necessary under the circumstances. Therefore, the Joint Travel Regulations may be amended to allow reimbursement for actual expense of local transportation of a dependent receiving outpatient medical care outside the locality of the member's duty station when such care is determined to be medically necessary. B-202964, February 23, 1982.

Medical examinations for passport--The fees for the medical examination of alien dependents of members in connection

with obtaining visas is not a reimburseable expense, 37 U.S.C. 406(a) and (c) authorizing only transportation of dependents at Government expense and, although the Secretaries may authorize reimbursement for the same miscellaneous transportation expenses for dependents as is authorized for members, such as passports, visa fees, and photographs and birth certificate costs, but not including medical examination fees, absent express authority the physical examination fees considered medical and not transportation cost and incurred for the benefit of the member and his dependents are not proper charges against appropriated funds and the JTR's may not be amended to authorize the reimbursement of medical examination fees for alien dependents incident to securing visas. 44 Comp. Gen. 339 (1964).

Lodging and subsistence expenses not payable--In the absence of statutory authority, the Joint Travel Regulations may not be amended to authorize lodging and subsistence expenses of dependents of military personnel outside the United States traveling to obtain medical care since only transportation for medical care is specifically authorized for such dependents under 10 U.S.C. 1040(a) (1976). B-194616, June 4, 1980.

Travel home after hospitalization--Where travel orders authorized return transportation of dependent mother to Canal Zone after medical treatment in the United States by military air or commerical air, variations of itinerary authorized as determined by competent DOD medical authorities, may be reimbursed cost of commerical air travel for return, rather than being limited to equivalent military air cost, in view of mother's condition, even though she traveled to an alternate destination, Medellin, Columbia. B-197475, October 17, 1980.

Expenses of civilian attendant-orders required--Air Force member unable to accompany his dependent mother on an air flight on a return trup to his permanent duty station in Panama after she had received medical treatment in the United States hired an attendant to accompany her. Since no invitational travel orders were issued to the attendant as required by paragraph M6403, Volume 1, Joint Travel Regulations, member may not be reimbursed for attendant's air fare. B-197475, October 17, 1980.

Same-meals and lodging at hospital--Non-Governmental civilian attendant who escorted an ill military member from his duty station in Spain to the hospital in the United States seeks reimbursement of actual expenses for food and lodging for time she remained in the area where the member was hospitalized. Since the attendant received reimbursement of actual expenses up to the maximum in the applicable regulation, 1 JTR, para. M6151-4, there is no basis for additional reimbursement. B-199607, April 22, 1981.

CHAPTER 6

PAYMENT ON SEPARATION OR DEATH

I. SEPARATION PAYMENTS

A. Accrued Leave Pay

When and how payable

Untimely claim for payment of accrued leave for military service during World War II--Claims for payment of accrued unused leave as a result of military service during World War II are governed by the provisions of the Armed Forces Leave Act of 1946, as amended, 37 U.S.C. 34 (1946 and Supp. IV, 1951), which requires that members discharged prior to August 9, 1946, must make claim to the Secretary prior to June 30, 1951, in order to receive payment. Therefore, where a claimant merely contends he made a timely filing but offers no proof of that fact, there is no authority for payment of the claim. B-190192, October 13, 1977.

Combination of cash settlement and carryover of leave prohibited--The authority in 37 U.S.C. 501(b) providing an option to an enlisted member of the uniformed services who reenlists in his armed force on the day after the date of discharge to receive either a lump-sum settlement for unused accrued leave to his credit at time of discharge, or to carry the leave forward into the new enlistment does not permit a member to elect a combination of cash settlement and carryover of unused leave. Neither the act of August 4, 1947, which prescribes two choices to an enlisted person to receive a full cash settlement of accrued leave at date of discharge, or to carry over unused leave to a new enlistment, nor its restatement in section 501(b) suggests any combination of cash payment and carryover of leave was contemplated. Therefore, the administrative interpretation and application adopted contemporaneously with the 1947 act and consistently followed thereafter may not be changed to permit the combination of a cash settlement and carryover of leave. 45 Comp. Gen. 580 (1966).

Carryover of minus leave balance prohibited--A minus leave balance in the account of a member of the United States Marine Corps on the day his enlistment expired and was extended for 2 years is excess leave which may not be carried forward but is for checkage against the member's final pay account under the expired enlistment in accordance with the Navy Comptroller Manual. Although the member would be entitled to a lump-sum leave payment pursuant to 37 U.S.C. 501(b), or to carry any unused leave balance forward as though he had been regularly discharged and had immediately

reenlisted, there is no authority for carrying a minus leave balance forward, and the member having been advanced leave in excess of accrual, the minus leave balance is excess leave for checkage against his pay account, since 37 U.S.C. 502(b) limits pay and allowances to the number of leave days authorized by 10 U.S.C. 701. 43 Comp. Gen. 539 (1964).

Marine Corps member who takes 19 more days of leave than he would accrue prior to the expiration of his first extension of enlistment had pay and allowances withheld from him upon return from leave for the 19 days pursuant to Department of Defense regulations. Although the member subsequently entered into a second reextension of enlistment which would enable him to earn more leave than the excess he used, there is no authority to repay him the withheld pay and allowances. 58 Comp. Gen. 708 (1979).

Unused leave at time of retirement - use for longevity purposes prohibited--Under section 4(c) of the Armed Forces Leave Act of 1946, which provides that any member of the Armed Forces discharged after August 31, 1946, having unused annual leave to his credit at time of discharge, shall be compensated for such leave in cash on the basis of the pay and allowances applicable on the date of discharge, and that such leave shall not be considered as service for any purpose, members of the Armed Forces who are about to be retired are not entitled to take their accrued annual leave in lieu of a lump-sum payment, since there is no indication in the act or its legislative history of an intent to confer on the member the right to elect to continue in an active duty status for the period of his accrued leave after an administrative decision has been made to effect his discharge or release from active duty. 40 Comp. Gen. 545 (1961).

Retired member retained on active duty without break in service--An officer who was placed on the retired list of the Navy but retained on active duty without break in service is not separated or released from active duty within the contemplation of the term "discharge" as used in the Armed Forces Leave Act of 1946, as amended, and therefore such officer is not entitled to cash settlement for unused leave upon being placed on the retired list; however, upon release from active duty the officer may be compensated, within statutory limitations, for unused leave then to his credit. 30 Comp. Gen. 328 (1951).

Commissioned officer reverting to warrant officer--An officer who, while serving on active duty as a lieutenant colonel in the Army of the United States, accepted an appointment as a Regular Army warrant officer but continued to serve for several months in the higher temporary grade is regarded as having continuous service, so that on

release from active duty as lieutenant colonel, Army of the United States, and reversion to the permanent Regular Army warrant officer grade, he is not entitled to a lump-sum payment for accrued unused leave. 35 Comp. Gen. 25 (1955).

Army Reserve officer voluntarily relieved from active duty and then voluntarily recalled without a break in service--An Army Reserve officer on indefinite active duty assigned to the Selective Service System who is voluntarily relieved from active duty in the Army and immediately thereafter is voluntarily recalled to active duty in the same grade in the Army Reserve and assigned to the Army National Guard without any break in service is not entitled to payment for accrued leave or travel allowances. B-193799, July 13, 1979.

Public Health Service Commissioned Officers--Under a statutory proviso enacted in 1950 granting a Public Health Service (PHS) officer a final settlement for unused accrued annual leave upon his separation from active duty if "his application for (that) leave is approved by the Surgeon General," PHS has long required a PHS officer who breaches his active duty commitment to be divested of leave. Regulations so providing are clearly valid, since the statutory proviso plainly authorizes the Surgeon General to deny leave applications in appropriate circumstances and Congress had not modified that statutory authority. 37 U.S.C. 501(g). 58 Comp. Gen. 77 (1978) affirmed. B-201706, March 17, 1981.

Accrued leave at time of enlistment extension--Under the act of January 2, 1968 (10 U.S.C. 509), which authorizes the extension and reextensions of a term of enlistment for not to exceed 4 years by members of all the services, and provides entitlement to the same pay and allowances as though the member had reenlisted, and considers that all extensions of an enlistment are one continuous extension, an accrued leave settlement is restricted to the first extension of an enlistment. In the absence of legislation prior to the 1968 act of any provision granting the same benefits upon the reextensions of an enlistment, the language of the 1968 act is construed as restricting an accrued leave settlement to the first extension of an enlistment. 48 Comp. Gen. 127 (1968).

Members in missing status--Although section 847 of the Department of Defense Appropriation Act, 1978 Public Law 95-111, 91 Stat. 886, 907 (1977) prohibits the use of funds appropriated by it for payment to any member of the uniformed service for unused accrued leave in excess of 60 days, this section does not operate to prevent payment to members in a missing status for unused accrued leave in excess of 60 days pursuant to 37 U.S.C. 501(h) and 10 U.S.C.

701(g) since the sole purpose of the appropriation restriction is to prevent the sale of unused accrued leave upon reenlistment. B-191457, August 7, 1978.

Accrued leave in excess of 60 days at retirement or death--Under 37 U.S.C. 501(f) and 1976 and 1977 appropriation acts payment for uniformed services members' accrued leave is limited to no more than 60 days' unused accrued leave during their military careers. No exceptions to that limit are provided which would authorize payment in excess of 60 days for an Air Force member who dies on active duty or retires on medical disability with more than 60 days' accured leave. Also, claims for such leave do not contain such elements of legal liability or equity as would warrant submission to Congress under the Meritorious Claims Act, 31 U.S.C. 236 (1976). B-199071, July 16, 1980.

Computation of payment

Station allowances and Variable Housing Allowance--The lump-sum payment for accrued leave, not to exceed 60 days, provided in 37 U.S.C. 501(b) for all members of the uniformed services upon separation is authorized to be computed at regular military compensation consisting of basic pay and subsistence and quarters allowances. Therefore, an Army officer upon retirement entitled to payment pursuant to paragraph 40401 and Table 4-4-5 of the Department of Defense Military Pay and Allowances Entitlements Manual may not have his payment increased by including station housing and cost-of-living allowances in the computation of the 60 days' accrued leave to his credit as these allowances are not payable by virtue of membership in the uniformed services but accrue incident to particular duty, assignments. 51 Comp. Gen. 312 (1971). See also B-201117, February 18, 1981, to the same effect concerning the Variable Housing Allowance.

Basic allowances for subsistence (BAS) and for quarters (BAQ)--An amendment to 37 U.S.C. § 501(b) deleted inclusion of allowances in lump-sum leave payments to military members upon discharge; however, a saving provision retained entitlement to include the allowances for leave accrued prior to the amendment. Although the claimant contends that the services' regulation determining when a member will be charged with use of preamendment leave frustrates congressional intent of the saving provision, in view of the services' authority to prescribe regulations for accrual and use of leave, the language and legislative history of the amendment, the regulation is proper. Although member had 60 days accrued leave at the time of his retirement, as the member used 6 days more leave than he had accrued in a postamendment year which under regulation were

charged to his 60-day carryover of preamendment accrued leave, BAS and BAQ may not be included in computation for 6 days accrued leave. 58 Comp. Gen. 635 (1979).

Additional pay for retention on vessel in foreign waters--The 25 percent increase in basic pay received pursuant to 10 U.S.C. 5540 by naval enlisted members who are retained on active duty on vessels in foreign waters after expiration of enlistment, not being considered base and longevity pay or allowances within the meaning of section 4(c) of the Armed Forces Leave Act of 1946, is not for inclusion in the computation of payments for unused leave upon discharge or release from active duty. 38 Comp. Gen. 691 (1959).

Enhanced pay for members holding special positions--Under section 4(c) of the Armed Forces Leave Act of 1946 the compensation for unused leave is based on the pay and allowances received on the date of discharge rather than the commissioned or enlisted grade of the member and, therefore, an enlisted Marine Corps member who was serving as band leader and receiving the pay of an officer on date of discharge is entitled to payment for accrued unused leave computed on the basis of the pay of the commissioned grade. 35 Comp. Gen. 699 (1956).

Additional pay of permanent professors at United States Air Force Academy--Permanent professor at United States Air Force Academy with over 36 years of active service computed under 37 U.S.C. § 205, is entitled to $250 per month "additional pay" pursuant to 37 U.S.C. § 203(b). Such additional pay is not an element of base (rank) and longevity (years of service) pay, but accrues to particular individuals incident to a particular duty assignment, and as such does not constitute "basic pay" for the purposes of computing lump-sum leave entitlements in accordance with 37 U.S.C. § 501(b)(1). B-192818, February 9, 1979.

Erroneous payment for accrued leave

Record correction - restored to active duty-Reservists who receive payments for unused accrued leave under 37 U.S.C. 501 (1970) upon involuntary separation from active duty, but whose records are corrected to expunge the fact of such separation, are liable to repay amounts received for unused leave; however, they are entitled to be recredited for days of unused leave up to the 60-day maximum prescribed by 37 U.S.C. 501(f) (1970). 56 Comp. Gen. 587 (1977).

Record correction - restored to active duty - waiver of erroneous payments--Requests for waiver of erroneous payments submitted by Army members retroactively restored to active duty through the correction of their military records, will ordinarily be favorably considered only to an extent which will prevent the indebtedness upon his actual

return to duty, however, waiver of further amounts may be granted for leave payments required to be collected but where the leave cannot be restored, but has been lost, as a result of the statutory limitation on leave accrual. 57 Comp. Gen. 554 (1978).

Effect of disciplinary or adverse administrative action

Court-martial sentence which includes forfeiture of pay and allowances--A Marine Corps officer whose sentence for violating the Uniform Code of Military Justice on November 22, 1972, was approved as to the forfeiture of pay and allowances, but not as to dismissal, and finally executed on December 18, 1972, following which the officer was detached from duty and ordered to travel to his home of record without entitlement to active duty pay and allowances, where he was released on December 31, 1972, and transferred to the Reserves with 45 days' unused leave is entitled to pay and allowances through December 17, 1972, pursuant to the interpretation of 10 U.S.C. 857 and 871 that the day of the execution of a sentence controls, but not to payment for the unused leave as the forfeiture imposed was "all pay and allowances." 52 Comp. Gen. 909 (1973).

Leave pending review of Court Martial sentence--A military member, who has been convicted and sentenced by court-martial to dismissal, or dishonorable or bad conduct discharge, and, pursuant to 10 U.S.C. § 876a, has been ordered to take leave pending the completion of appellate review of his case, is entitled to payment for accrued leave to his credit on the day before that leave began, even though his sentence included forfeiture of pay and allowances. That accrued leave is to be computed on the basis of the rate of pay applicable to the member on the day before the leave begins even though he may have been in a nonpay status at that time. B-212663, May 2, 1984.

Court-martial set aside and member restored to all rights--A service member's enlistment expired after he was confined as a result of a court-martial conviction. Thereafter, he was placed in a parole status in lieu of remaining confinement time, which status was terminated on date confinement would have ended. He was then placed in an excess leave status pending appellate review of his conviction. Upon review the conviction and sentence were set aside and all rights restored including leave accrual. He is entitled to leave accrual through the last day of parole, not to exceed 60 days. While pay and allowances accrued only through last day of parole (59 Comp. Gen. 12) payment of lump-sum leave is to be based on rates of basic pay in effect on the date of the member's discharge, even though he was not returned to a duty status. 59 Comp. Gen. 595 (1980).

Records corrected to show honorable discharge but not to delete court-martial pay forfeiture--A dishonorably discharged enlisted man whose military records were corrected to show honorable discharge, but not corrected to delete pay forfeiture provisions of court-martial sentence, is entitled to travel allowance and mustering-out pay which are incident to honorable discharge; however, payment may not be made for any unused leave which is part of member's compensation for active military service. 34 Comp. Gen. 95 (1954). See also B-178320, August 9, 1977.

Records corrected to rescind court-martial sentence but not to show active duty status--Although an officer of the United States continued on active duty for 2 months subsequent to the imposition of a court sentence, the correction of his military records to show the rescission of the court sentence not reflecting the active service, neither the Army Board for Correction of Military Records nor the Secretary of the Army recognizing the existence of a de facto status for the period, the officer is not entitled to the active duty pay and allowances claimed, nor did he earn or accrue additional leave in the period, and in the absence of fraud, the authorized correction of the records made is final and conclusive under 10 U.S.C. 1552(a) on all officers of the Un:ted States. 44 Comp. Gen. 143 (1964).

Upgrade of discharge - effect on pay grade--The change of an undesirable discharge to general under honorable conditions under 10 U.S.C. 1553 for an Army enlisted member who at the same time had been reduced in grade from master sergeant to private, first class, pursuant to the mandatory provisions in the regulations applicable to undesirable discharges, removes the ground for the reduction in grade and makes the reduction a nullity so that restoration to the grade of master sergeant is required; therefore, payment of pay and allowances and accrued unused leave at the time of discharge should be made on the basis of the master sergeant grade--the grade in which the member was serving at the time of discharge. 41 Comp. Gen. 703 (1962).

Upgrade of discharge - documentation required to substantiate payment for leave

If the character of a former service member's discharge is upgraded from undesirable to honorable, the former member may gain entitlement to certain military benefits he would have received at the time of his original discharge--such as payment for unused accrued leave--had that discharge been granted under honorable conditions, provided that sufficient documentation has survived to substantiate his entitlement. B-193417, February 16, 1979. See also B-140972, October 27, 1979, and B-203752, March 2, 1982.

Upgrade of discharge - leave records lost or destroyed--Former Army member's claim for payment for unused accrued leave at time of discharge, based on administrative action to change the character of his discharge from under other than honorable to under honorable conditions, must be disallowed, where the discharge occurred in 1967 and in the intervening period all records which might establish how many days of accrued leave, if any, he had at the time of his discharge, were lost or destroyed. B-193417, February 16, 1979. See also B-140972, October 24, 1979; B-213654, March 6, 1984.

Reserve members

Leave accrual under separate training orders--The fact that the more than 30 days of continuous active duty for training and travel time served by a Reserve officer was performed under two sets of orders issued on different dates does not defeat his entitlement to a lump-sum payment for the accrued leave earned pursuant to 10 U.S.C. 701, there being no requirement that the active duty be directed by but one order or even that all the duty be related so long as it qualifies for the accrual of leave and that it is continuous for at least 30 days. Therefore, the statutory right to accrue leave, existing independently of administrative authorization, may not be defeated because of the issuance of two separate sets of orders on different dates, and the officer having accrued leave incident to the performance of his training duty is entitled to a lump-sum payment for the unused leave to his credit. 43 Comp. Gen. 802 (1964).

Member recalled to active duty with no actual break in service--The immediate recall to involuntary active duty of naval reservists who upon completion of a prescribed period of service are released from active duty may not defeat their right to payment for accrued unused leave and to mileage allowances which are due members of the uniformed services released from active duty at the expiration of prescribed periods of service, even though there was no actual break in service. 42 Comp. Gen. 35 (1962).

Member injured - leave accrual while hospitalized-A member of the Marine Corps Reserve who while on his initial period of active duty for training sustains an injury determined to be in line of duty may receive pay and allowances in accordance with 37 U.S.C. 204, after expiration of the initial tour of duty while hospitalized and until he is fit for military duty, but during such period reservist is not considered to be in active military service within the meaning of 10 U.S.C. 701(a) which would entitle the member to leave. 54 Comp. Gen. 33 (1974). See also 41 comp. Gen. 706 (1962).

Member injured - extends duty tour and performs limited service--Member of Marine Corps Reserve entitled to receive pay and allowances under 37 U.S.C. 204 for period subsequent to the termination of the initial active duty for training, who then returned to his Reserve unit where he performed military duties as a photographer, having agreed to extend his active duty for a period of about 6 months or until physically qualified for release from active duty, may be regarded under 10 U.S.C. 683(b) to be on active duty until discharged and is entitled to active duty pay and allowances, and leave under 10 U.S.C. 701(a). 54 Comp. Gen. 33 (1974).

B. Readjustment Pay

Repealed in 1981

10 U.S.C. 687, which had authorized a readjustment payment for certain reservists separated from active duty after completing at least 5 years of continuous active duty, was repealed effective September 15, 1981, by section 701 of the Defense Officer Personnel Management Act, Public Law 96-513.

Service which determines eligibility for and amount of readjustment pay

Temporary disability retirement with over 5 years service--Reserve officer who is placed on temporary disability retired list with entitlement to retired pay after serving over 5 years of continuous active duty is not entitled to readjustment pay. Readjustment pay does not accrue to a Reserve officer who serves over 5 years of continuous active duty if upon release from active duty the member is immediately eligible for retired pay based entirely on his military service which includes retired pay for a member on the temporary disability retired list. B-206133, February 1, 1983.

More than 4-1/2 years but less than 5 full years of service--Under 10 U.S.C. 687(a) readjustment pay is provided for an Armed Forces reservist who is involuntarily released from active duty and has completed, immediately before his release, "at least five years of continuous active duty" computed by multiplying his years of active service by two months' basic pay of his grade at the time of release. That statute further provides that "/for/ or the purposes of the subsection--. . . (2 a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded . . . ." The "rounding" provision, as is clear from the statute's legislative history, applies only in computing the amount of readjustment pay, and not in determining eligibility therefor; hence, a reservist must serve a minimum of five full years of continuous active duty before his involuntary release in order to qualify for readjustment benefits. Cass v. United States, 417 U.S. 72 (1974), citing views expressed by the Comptroller General.

Period of active duty in different services--The 5-year continuous active service requirement for entitlement to the lump-sum readjustment payment provided by statute does not specify that the active duty must be performed in the same military service; therefore, active duty as a Reserve in one service may be combined with active duty in another service. 37 Comp. Gen. 357 (1957).

Combination of Regular and Reserve service--The holding in Washburn v. United States, 161 Ct. Cl. 46 (1963), that a member of a Reserve component involuntarily released from active duty may combine Regular and Reserve service in determining eligibility for readjustment pay provided under section 265(a) of the Armed Forces Reserve Act of 1952, as added by the act of July 9, 1956, will be followed. The court holding and legislative history establishing no specific portion of the 5-year period of continuous service immediately prior to separation required for eligibility for readjustment pay, as a minimum period of duty in a Reserve component,

readjustment pay may be paid to a member who has only a limited amount of Reserve service within the 5-year period, provided he is actually serving on extended active duty in a Reserve capacity when involuntarily released. 43 Comp. Gen. 240 (1963).

Combination of enlisted and officer service--Members of the Reserve components of the uniformed services may have active service in an enlisted status and in an officer status combined to complete the 5-year period of continuous active duty to qualify for readjustment pay by section 265 of the Armed Forces Reserve Act of 1952, as added by the act of July 9, 1956. 36 Comp. Gen. 129 (1956).

Active duty for training periods--Active duty for training performed on or after August 10, 1956, by a member of a Reserve component of the Armed Forces may be considered as active duty to determine eligibility for, or the amount of, lump-sum readjustment pay under the act of July 9, 1956. 39 Comp. Gen. 223 (1959).

Exclusion of periods for which other severance type pay received--In the computation of readjustment pay provided for members of Reserve components who are involuntarily released from active duty, all prior periods of service for which the member received severance pay, separation pay, or release from active duty pay must be excluded, the legislative history evidencing the intent to preclude in the computation of the readjustment pay the counting of any type of severance pay, separation pay, or release from active duty pay. 42 Comp. Gen. 242 (1962).

Periods of absence without leave, etc.--Periods when Reserve members of the uniformed services are absent without leave, in confinement, awaiting trial which results in conviction, and lost time due to misconduct do not automatically terminate the member's enlisted or active duty status, and, therefore, such periods are not regarded as "breaks in service" as the term is used in section 265 of the Armed Forces Reserve Act of 1952, as added by the act of July 9, 1956, and such periods do not have to be deducted in the computation of the member's 5 years of continuous service required to qualify for readjustment benefits. However, in determining the amount of the lump-sum readjustment payment due a member of a Reserve component on involuntary release from active duty, the term "each year of active service" requires the deduction of periods of unauthorized absences when the member has deprived the Government of his services by his own misconduct. 36 Comp. Gen. 390 (1956).

Requirement that members be released and that release be involuntary

Retained on active duty for physical evaluation--A Reserve officer scheduled for release from active duty before completing 5 years of continuous active duty for purposes of entitlement to readjustment pay under 10 U.S.C. 687 (1970) requested and was granted a 6-week extention of service due to his wife's pregnancy. Prior to beginning service on the extension he was found medically unfit for release and was retained on active duty for physical evaluation, thus serving over 5 years continuous active duty. His release from active duty was involuntary since he had requested augmentation to the Regulars unconditonal further duty three times in the preceding years but had been refused each time. Therefore, he is entitled to readjustment pay. 57 Comp. Gen. 451 (1978).

Retained on active duty at member's request--Navy Reserve officer with less than 5 years continuous active duty ordered to be released requested and was granted a limited extension of active duty for the express purpose of receiving maternity benefits for his wife which resulted in completion of more than 5 years continuous duty upon release. Readjustment pay is not payable under 10 U.S.C. 687(a), since his release upon completion of the materninty extension based on his agreement to leave the service upon the date specified by the Navy in authorizing the extension was voluntary. B-183492, December 30, 1980.

Release cancelled--Reserve Warrant Officer's request to remain on active duty was erroneously denied. After orders were issued for his release with entitlement to readjustment pay he committed himself to expenditures which he could not meet when his released and entitlement to readjustment pay were cancelled. There is no legal authority to pay this claim based on the member's actions in anticipation of receipt of that pay nor are there equities involved which would justify reporting the claim to Congress under the Meritorious Claims Act of 1928. B-189206, August 2, 1977.

Separated but subsequently enlisted--A Reserve officer who, after involuntary release from active duty following at least 5 years of active service, enlists in a Regular component in the same or another military service on the next day or at any later time may be regarded as released from active duty for entitlement to the lump-sum readjustment payment provided in section 265 of the Armed Forces Reserve Act of 1952. 37 Comp. Gen. 357 (1957).

Dual officer and enlisted status--Members of a Reserve component of the uniformed service who have dual status, as an officer and an enlisted or warrant officer, and who change

from one active duty status to another are not involuntarily released from active duty for lump-sum readjustment payments as provided by section 265 of the Armed Forces Reserve Act of 1952, as added by the act of July 9, 1956. 36 Comp. Gen. 403 (1956).

Release after making unconditional offer to perform additional duty tour--If the offer of a Reserve officer in a "failed of selection" status to unconditionally serve for an additional regular tour of duty is not accepted, he is entitled to the lump-sum readjustment payment authorized by the act of July 9, 1956, and if his offer is accepted and the additional tour of active duty of the member is cut short because he failed a second time of selection for promotion, the officer would be entitled at that time to receive a lump-sum readjustment payment. 46 Comp. Gen. 68 (1966).

Offer to perform additional tour contingent upon being given choice of assignment--A Reserve officer in a "failed of selection" status whose request for an active duty agreement for 1 year at the termination of his current agreement is contingent upon assignment to a particular type duty and geographic location is not entitled to receive a lump-sum readjustment payment incident to his release from active duty. The member not having unconditionally volunteered for an additional regular tour of duty, his separation upon the expiration of his active duty commitment is not the "involuntary release" contemplated by the act of July 9, 1956, for entitlement to a lump-sum readjustment payment. 46 Comp. Gen. 68 (1966).

Early release requested after being refused additional tour of duty--A member of a Reserve component who has volunteered for an additional tour of duty which the military service concerned refused to grant, and who then requests and is granted release from active duty prior to the completion of his tour of duty, may not receive the readjustment pay provided by the act of July 9, 1956, which added section 265 to the Armed Forces Reserve Act of 1952. 36 Comp. Gen. 129 (1956).

Separated for pregnancy and waives board hearing--Under 10 U.S.C. 687(a), a member of a Reserve component, or a member of the Army or Air Force without component, who is relieved from active duty "involuntarily," is entitled to readjustment pay, ad since it is mandatory under the Air Force regulation which established procedures governing the separation of officers, to discharge a woman officer when a determination is made by a medical officer that she is pregnant, she is considered involuntarily separated and entitled to readjustment pay whether she is separated with or without her consent, the sole determining factor being that of pregnancy. Therefore, a Reserve officer separated

without her consent by reason of pregnancy who waived the hearing and board recommendations in 10 U.S.C. 1163(a), having been involuntarily separated is entitled to readjustment pay. 50 Comp. Gen. 229 (1970).

Released due to moral or professional dereliction - records correction--Upon the correction of the military records of an officer of the United States Army under 10 U.S.C. 1552 to reflect the withdrawal of the court sentence imposed on him, the officer became entitled to readjustment pay, his military records now showing that he had been honorably discharged, that such discharge must be presumed to be not because of moral or professional dereliction, and that his release from active duty after having completed at least 5 years of continuous active duty was involuntary. The officer by reason of the correction of his military records, having become entitled to all the benefits due on the basis of the corrected record, his rights are for determination as though his original records had shown the information contained in the corrected records. 44 Comp. Gen. 143 (1964).

Type of involuntary separation - computation of readjustment pay--Air Force Reserve officer may not be paid readjustment pay computed on basis of more favorahle formula provided in 10 U.S.C. 687 (1976) on basis that he was separated for "homosexual tendencies" and not "substandard duty performance" (which requires computation on less favorable formula), when Air Force records show authority for his separation as regulation providing for separation for substandard duty performance. Separation from Air Force and reasons therefor are within jurisdiction of Air Force. If officer believes authority given for his separation is erroneous, he may seek to have his record corrected by Air Force under 10 U.S.C. 1552 (1976). B-192220, November 17, 1978.

Records correction - erroneous payment -liability

When Army officers involuntarily separated from active duty subsequently obtain records correction to show continuation on active duty, readjustment payments made upon separation under 10 U.S.C. 687 (together with payments received for accrued leave on separation and for interim Reserve duty) are thereby rendered erroneous, and such payments may therefore be considered for waiver under 10 U.S.C. 2774. 56 Comp. Gen. 587 (1977). See also B-195558, December 14, 1979.

Transferred to retired reserve

A retired commander, USNR, had 28 years, 6 months, and 28 days of service for basic pay purposes and 11 years, 8 months, and 29 days of active service when he was released

from active duty under 10 U.S.C. 6389 because he twice failed of selection for promotion, and who because he had not reached age 60 was placed on the retired list without retired or readjustment pay, meets the continuous active duty requirement of 10 U.S.C. 687 on the basis that his service from December 11, 1962, to July 1, 1971, was not interrupted by a break in service of more than 30 days. Nevertheless, he is not entitled to readjustment pay because neither his transfer to the Retired Reserve in lieu of discharge or the expiration of his active duty orders on the day he was transferred to the Retired Reserve pursuant to 10 U.S.C. 6389 is considered to be an involuntary release from active duty within the purview of 10 U.S.C. 687. 51 Comp. Gen. 799 (1972).

Election of benefits

Change of election to receive severance pay--Reserve members of the uniformed services who, on involuntary release from active duty, make an election to receive a lump-sum readjustment payment under section 265 of the Armed Forces Reserve Act of 1952, as added by the act of July 9, 1956, may not subsequently change the election to receive severance pay. 36 Comp. Gen. 390 (1956).

Splitting period of service into segments to obtain both severance and readjustment pay--A Navy Reserve officer who, incident to release from active duty, is eligible for both a readjustment payment and an aviation lump-sum payment is required under section 265(b)(5) of the Armed Forces Reserve Act of 1952, to make an election to receive one or the other, and there is no authority incident to a single release from the service to permit the member to take all of one and part of the other even though the service period applicable to one of the severance payments is excluded. 37 Comp. Gen. 713 (1958).

More than one readjustment payment--In the computation of the second payment of readjustment pay under 10 U.S.C. 687 where the first payment has not been repaid, only the amount of the prior payment is required to be deducted pursuant to 10 U.S.C. 687(d), in order to avoid duplicate payments of readjustment pay for the same period of active service, and where the previous payment was repaid, the period covered by that payment is to be treated as a period for which no payment was made. 43 Comp. Gen. 315 (1963).

Readjustment payment subsequent entitlement to retired pay

Voluntary refund of readjustment payment tax consequences--The acceptance of the readjustment pay authorized under the act of July 9, 1956, as amended, for Reserve officers upon involuntary release is not mandatory, the statute providing that a member of a Reserve component

who is involuntarily released is entitled to a lump-sum readjustment payment, and nothing in the act of legislative history demonstrating an intent to make acceptance of readjustment pay mandatory. Consequently, upon refunding the amount of the readjustment payment received, the member is placed in the same position as if he had not received readjustment pay insofar as retired pay is concerned. The effect of such a refund with respect to taxes is for consideration by the Internal Revenue Service and State tax agencies. 43 Comp. Gen. 311 (1963).

Deduction of 75 percent of readjustment pay from retired pay--A member of a Regular component of the uniformed service, as well as a reservist, upon completion of 20 or more years of active service is required upon retirement to refund 75 percent or the readjustment pay received as a member of a Reserve component after June 28, 1962. Section 1(4) of the act of June 28, 1962, providing for the deduction of 75 percent of the readjustment payment received by a reservist from his retired pay when qualifying for retirement under any provision of titles 10 and 14, Unites States Code, contemplates deduction of readjustment pay received from the retired pay of both Regular and Reserve members of the uniformed services. 43 Comp. Gen. 402 (1963).

Effect of bankruptcy--An Air Force officer who received readjustment pay upon discharge subsequently enlisted and completed 20 years of active duty for retirement. Upon retirement, the member's retired pay was withheld until an amount equal to 75 percent of his readjustment pay was recouped as is required under 10 U.S.C. § 687(f). Although the member received a discharge in bankruptcy effective shortly after he retired, this did not entitle him to receive the retired pay withheld under section 687. Deduction from retired pay in the amount of 75 percent of readjustment pay is not a debt and, therefore, it is not discharged by an adjudication of personal bankruptcy. B-204404, November 13, 1981.

Waived erroneous readjustment payment - not subject to recoupment--In the case of Army members retroactively restored to active duty by the correction of their military records, waiver of erroneous payments made to the members incident to their invalid release from active duty would not operate to validate the member's release or to create any valid separation payments; hence, the amounts waived would not later be subject to recoupment under 10 U.S.C. 687(f) (1970), which requires that readjustment payments be deducted from retired pay if the member qualifies for retirement for years of service. 57 Comp. Gen. 554 (1978).

Retirement for disability rather than longevity--The fact that a Reserve officer of the uniformed services who

qualified for voluntary retirement after 20 years of active service under 10 U.S.C. 8911 is retired for disability and elects retired pay pursuant to 10 U.S.C. 1401 computed on the basis of his disability does not preclude the application of the statute requiring recoupment of 75 percent of a readjustment payment made to a member of a Reserve component who qualifies for retired pay under any provision of titles 10 or 14 that authorizes retirement upon completion of 20 years of active service. 46 Comp. Gen. 684 (1967); 46 Comp. Gen. 107 (1966).

C. Disability Severance Pay

Entitlement

Less than 6 months of active service--The legislative history of the disability severance pay provisions in section 403 of the Career Compensation Act of 1949 indicates a congressional intent that members of the uniformed services with less than 6 months of active service would not be entitled to severance pay, and the specific elimination of fractions of a year of less than 6 months in the computation of severance pay in 10 U.S.C. 1212(b) requires the conclusion that members with less than 6 months of active service at time of separation are not entitled to disability severance pay. 39 Comp. Gen. 291 (1959).

Separation based on disability is ineffective--An enlisted member who was paid disability severance pay, and lump-sum leave incident to a discharge which was subsequently determined not to have terminated the member's active duty status because the member was hospitalized for a new disability prior to the effective date of the discharge is considered in an active duty status after the discharge so that checkage should be made for payments made incident to the ineffective discharge. 39 Comp. Gen. 766 (1960).

Discharge with severance pay - attempted retroactive cancellation--Where a member of the Marine Corps was discharged without severance pay because of a disability, and subsequently the Secretary of the Navy directed that action to be taken to issue a discharge with such pay, the member is not entitled to severance pay under section 402(a) of the Career Compensation Act of 1949, as the purported retroactive cancellation of the original discharge is ineffective in the absence of evidence to show that it was procured through fraud or misrepresentation. 31 Comp. Gen. 665 (1952).

Discharge without severance pay - claim barred by 6-year statute of limitations--The exception to the 6-year statute of limitations, 31 U.S.C. 71a, tolling the running of the 6-year period for members of the armed forces in wartime, is applicable only to members on active duty and does not

apply to the claim of a former Navy member for retired pay which first accrued while he was on the temporary disability retired list dischanged from that list. 59 Comp. Gen 463 (1980).

Disability incurred while in pay forfeiture status--A member of uniformed services who incurred a disability while in a pay forfeiture status is not entitled to the disability severance pay which is authorized by the Career Compensation Act of 1949 for members who incur disability while entitled to receive basic pay, even though the Secretary of the Department remits the unexecuted portion of the sentence including all uncollected forfeitures. 34 Comp. Gen. 65 (1954).

Disability incurred during period of confinement after enlistment expired--An Army enlisted member whose enlistment expired while he was in confinement pending appellate review of a court-martial sentence was not entitled to pay subsequent to the expiration of his enlistment and, therefore, is not entitled to disability retirement or severance pay under 10 U.S.C. 1201 or 1203 for a disability incurred during that period. B-192082, December 21, 1978.

Convicted of certain crimes--Severance pay authorized under section 405 of the Career Compensation Act of 1949 to members of the uniformed services upon separation is a lump-sum payment, as distinguished from "retired," "retirement," "retainer," or "equivalent pay" which refer to payments of a continuing nature, and, therefore, the term "equivalent pay" as used in act of September 1, 1954, which prohibits annuity payments to members or former members who are, or have been, convicted of certain offenses, does not preclude payment of severance pay. 35 Comp. Gen. 293 (1955).

Medically unfit at time of induction--Where medically unfit persons were released on the basis of a void induction prior to 48 Comp. Gen. 377 holding that physically or mentally unqualified inductees into the military service are entitled to basic pay, and if qualified to disability retirement or separation under 10 U.S.C., chapter 61, the military records of the erroneously released persons may be corrected to show discharge as of the date of release from military custody and control, any disability retirement or severance pay determination effected under 10 U.S.C. 1552 to consider the aggrevation of an unfit condition acquired while on duty. Absent a change in a physical condition while on active duty, discharge may be made for the convenience of the Government without disability retirement or severance pay, and all discharged persons may be informed of their entitlement to the pay and allowances that accrued prior to release. 49 Comp. Gen. 77 (1969).

Computation

Higher permanent Reserve grade at time of separation--The similarity of language in the disability retired pay provisions in section 402(d) of the Career Compensation Act of 1949, with respect to computations based on rank, grade or rating at time of retirement and in the disability severance pay provisions in section 403 of the act--superseded by 10 U.S.C. 1372 and 10 U.S.C. 1212, respectively-requires the same construction; therefore, members of the uniformed services who held higher permanent Reserve grades at time of disability retirement are entitled to higher grade. 38 Comp. Gen. 268 (1958).

Highest temporary or permanent grade in which served satisfactorily--Although the provisions of 10 U.S.C. 1372 are applicable only in a case where a member of the Armed Forces is retired for physical disability under section 1201 or 1204, or placed on the temporary disability retired list under section 1202 or 1205, where the provisions of 10 U.S.C. 1212(a)(2)(B)(ii) are for application in a closely comparable situation in computing the disability severance payment of a member of an armed force separated under section 1203 or 1206 by reason of physical disability, the rule in Friestedt v. United States, 173 Ct. Cl. 447, should be followed; however, absent statutory amendment the case may not be expanded and applied to retirement statutes such as 10 U.S.C. 3963(a), 3964, 6151, 8963 and 8964 on the basis the words "temporary grade or rank" are to be read "temporary or permanent grade or rank," and only the officers and enlisted men within the purview of section 1212(a)(2)(B)(ii) who were paid disability severance pay below their highest permanent grades are entitled to relief under the Friestedt rule. 46 Comp. Gen. 17 (1966).

Disability found during examination for promotion-An officer of the uniformed services whose physical disability was not considered disqualifying prior to a physical examination qualifying him for a promotion denied by a physical evaluation board, upon his subsequent simultaneous transfer as a second lieutenant to the temporary disability retired list under 10 U.S.C. 1202 and advancement to the grade of first lieutenant under clause (4) of 10 U.S.C. 1372, is entitled to retired pay and disability severance pay computed on the basis of the higher grade; and, since the first determination of physical disability did not disqualify the officer for service, the disqualifying disability for which he was retired may be considered as having been discovered as a result of a physical examination for promotion within the purview of clause (4) of 10 U.S.C. 1372. 50 Comp. Gen. 156 (1970).

Time on temporary disability retired list--Time spent on the temporary disability retired list by a member of the

uniformed services after the expiration of the 5-year period prescribed in 10 U.S.C. 1210(b) may be included in determining the rate of basic pay for purposes of computing disability severance pay coming within the scope of 10 U.S.C. 1212(a)(A), the member's status on the temporary disability retired list not automatically terminating at the expiration of the 5-year period prescribed for the payment of temporary disability retired pay, but continuing until removal of his name as prescribed in 10 U.S.C. 1210(c) or (f), or until terminated in some other manner, such as by resignation or death. 42 Comp. Gen. 52 (1962). See also 37 Comp. Gen. 823 (1958).

More than 12 years' service - second payment of severance pay--A Navy enlisted man who, after discharge for physical disability and receipt of a severance payment based on 11 years, 3 months and 20 days' service, reenlisted and was subsequently discharged for disability with a total of 13 years, 2 months and 1 day of active service is precluded by the 12-year service limitation in 10 U.S.C. 1212--which is a limitation on the amount to a particular individual rather than a limitation as to the amount which may be paid for each separation--from receiving another severance payment based on total service, but the member may receive an additional severance payment on the basis of the remaining period of active service not to exceed a total of 12 years. 37 Comp. Gen. 289 (1957).

Receipt of retired pay or veterans' benefits for same disability

Compensation from Veterans' Administration--The action of a Naval Retiring Board in ordering a lieutenant in the Nurse Corps discharged for physical disability with severance pay 2 years after she had been released from active duty and transferred to the retired list without pay relates to the time of her active release and, inasmuch as she has been accruing compensation from the Veterans Administration for the same disability in an amount which exceeds the amount which would have been paid as severance pay at the time of original release, she is not now entitled to severence pay. 35 Comp. Gen. 300 (1955).

Disability compensation paid by the Veterans Administration must be withheld by that agency from a former member in an amount equal to any disability severance pay received by the member under 10 U.S.C. § 1212 for the same disability. Pay for inactive duty training performed may not be paid in such cases unless the Veterans Administration interrupts benefits entitlement and holds in abeyance the collection of disability severance pay. In such a case inactive duty training pay may be paid if a waiver is executed as required by 10 U.S.C. § 684. B-207913, April 15, 1983.

Records correction - placement on permanent disability retired list--Although the disability severance pay recoupment provisions in 10 U.S.C. 1212(c), which require deduction of severance pay when a former member of the uniformed services becomes entitled to other compensation for the same disability, relate to benefits awarded by Veterans' Administration, 10 U.S.C. 1212(c) and 1213, concerning the effect of separation on benefits, evidence an intent that a member is entitled to only one benefit arising from the same disability; therefore, a member in receipt of disability severance pay when his military records are corrected

to place him on the permanent disability retired list with entitlement to retired pay from the time that he began receiving disability severance pay must have his retired pay withheld by the military service, plus the severance pay withheld by Veterans' Administration, until the amount of severance pay has been recovered. 41 Comp. Gen. 597 (1962).

D. Severance Pay Other Than Disability

Repealed in 1981

Chapters 359 and 859, and section 1167, of title 10, United States Code, which had authorized severance pay for certain Regular officers separated for reasons other than disability, where repealed effective September 15, 1981, by sections 109(b)(3) and 213 of the Defense Officer Personnel Management Act, Public Law 96-513.

Entitlement and computation

Discharge during probationary period--A Regular Army officer with less than 3 years' service who was recommended for elimination because of substandard performance of duty properly was discharged without severance pay since the officer was not discharged under 10 U.S.C. chapter 359, sections 3781-3787. Therefore, section 3781 prescribing that a board of officers may be convened to review the record of the officer to determine if he sould be eliminated or required to show cause for his retention on the active list is not for application and the officer is considered to have been discharged under 10 U.S.C. 3814, which provides for discharge without severance pay while an officer is in a probationary status with less than 3 years service. 51 Comp. Gen. 81 (1971).

Second passover for promotion - efect of request for early release--A lieutenant junior grade who having failed of selection for promotion to the grade of lieutenant for the second time would have been honorably discharged with over 6 years of service on June 30, 1965, had he not requested and been granted a discharge on April 1, 1965, properly was paid severance pay computed on the basis of over 4 years but less than 6 years of service. There is no authority to allow an officer to count as service the time between discharge and mandatory release, and therefore, the officer discharged on April 1, 1965, before completing over 6 years of service, and not entitled to credit for constructive service, may not be paid the difference between the severance pay received and the amount of severance pay that would have been due had he reached the longevity step of over 6 years of service. 47 Comp. Gen. 639 (1968).

Recoupment - when required

Subsequent retirement for nonregular service--Where certain provisions of law governing separation from the active list authorize severance pay, and require refund of such pay upon retirement, but where other provisions such as 10 U.S.C. 3786 and 8786 do not state such requirement in the absence of such a limiting statutory provision or a clear indication of congressional intent to the contrary, refund of severance pay is not required as a condition precedent to the receipt of retired pay under 10 U.S.C. 1331. 53 Comp. Gen. 921 (1974).

Records correction to show continued active duty and transfer to retired list--A naval officer with more than 17 years of service, honorably discharged on June 30, 1958, with severance pay, and thereafter accepting Federal civilian employment, whose naval records are corrected to show continuation on active duty until June 30, 1960, and transfer on July 1, 1960, to retired list, may not retain the severance pay and civilian earnings received. The officer having been credited with active duty pay from July 1, 1958, through June 30, 1960, and placed in a retired pay status on July 1, 1960, in accordance with the corrected record, the severance pay was for adjustment in his account, and his retired pay rate exceeding $2,500 per year having caused his civilian employment to come within the prohibition of the dual employment act of July 31, 1894, as amended. 43 Comp. Gen. 235 (1963).

Records correction to show resignation rather than involuntary separation--Upon the correction of military records under the authority of 10 U.S.C. 1552 to show the resignation of an Air Force officer in lieu of discharge with severance pay and his appointment as an officer in the United States Air Force Reserve and immediate active duty in that status, the officer having been placed in the same positon insofar as his right to pay and allowances is concerned as though he had not been discharged and paid severance pay, the legal basis of the severance pay was removed and the payment became an erroneous payment, subject to collection under the act of July 15, 1954 (5 U.S.C. 5514), which limits the amount to be deducted to not over two-thirds of the pay from which the deductions are made. Therefore, the entire amount of the officer's retired pay need not be immediately withheld to liquidate his indebtedness as is the case when the correction action authorizes payment of retired pay retroactively to the time the member was paid severance pay. 42 Comp. Gen. 617 (1963).

II. DEATH PAYMENTS

A. Death Gratuity

Distinguished from pay and allowances

Where claimant obtained Mexican divorce from prior spouse and subsequently married deceased member, fact that Coast Guard paid her the deceased member's unpaid pay and allowances as designated beneficiary under clause (1) of 10 U.S.C. 2771(a) does not stop Government from challenging validity of marriage as such payment was neither determinative of question of her marital status nor was such question even in issue, since by statute the designated beneficiary has primary entitlement to the unpaid pay and allowances under 10 U.S.C. 2771, but surviving spouse has primary entitlement to the death gratuity under 10 U.S.C. 1477. 55 Comp. Gen. 533 (1975).

Entitlement of surviving spouse

Conflicting claims, generally--Where neither of two conflicting claimants to a death gratuity payable under 10 U.S.C. 1475-1480 can clearly establish entitlement to payment as the surviving spouse of the deceased service member, the gratuity may not be paid to anyone unless and until more conclusive evidence is submitted in the matter, or a certified copy of a decree of a court of competent jurisdiction establishing entitlement is presented. B-207214, November 4, 1982.

Conflicting claims, Good-faith putative spouse--Where several women, each purporting to be the widow of a deceased member of an Armed Force, submit conflicting claims for entitlement to the death gratuity due under 10 U.S.C. §§ 1475-1480 (1976), and there is a sufficient basis in the record to support a finding that only one claimant is the surviving spouse, her claim will be allowed to the preclusion of all others. Although Louisiana law permits a good-faith putative spouse to take an equal share in the civil effects of a putative marriage, she is not entitled under the Federal statute to a portion of the death gratuity as a surviving spouse. B-209076, August 25, 1983.

Spouse cannot be located or identified--The gratuity provided in 10 U.S.C. 1475-1480 that is payable upon the death of a service member may be paid to survivors only according to the priority list contained in 10 U.S.C. 1477. Since surviving children are lower in priority on that list than a surviving spouse, the children may not be paid when there is an eligible spouse, even though the current address of the spouse is unknown or the spouse cannot currently be identified because of conflicting claims. B-187581, January 6, 1977, and B-207214, November 4, 1982.

Spouse's claim barred by statute of limitations--A member of the Army was killed in 1945, and his wife's claim for the six month's death gratuity was presented to the Army in 1945, but apparently was not paid due to a lack of supporting documents, and the claim apparently was not received by GAO until 1973. Since the pertinent records have been destroyed, and in view of the time limit for presenting claims provided by 31 U.S.C. §§ 71a and 237 (1970), the claim may not be paid. B-189889, September 29, 1977.

Attempt to defeat spouse's rights by contrary designation--An enlisted man of the Coast Guard cannot defeat the right of his widow to the 6 months' gratuity upon his death under the conditions named in the act, by designating his father as the person to receive such gratuity. 1 Comp. Gen. 547 (1922).

Common-law marriage--Payment of the 6 months' gratuity to a person claiming to be the common-law widow of a deceased soldier is unauthorized where the evidence presented is insufficent to show with convincing certainty all the requisites necessary to establish the fact of a common-law relationship of man and wife. 11 Comp. Gen. 138 (1931).

Marriage by proxy--The 6 months' death gratuity may be paid to the nondesignated widow of a serviceman--resident of California--who was married by proxy in Mexico, where proxy marriages are valid, in the absence of a ruling of the California courts on the vality of proxy marriages performed in a State recognizing such marriages. 33 Comp. Gen. 305 (1954).

Member's death caused by surviving spouse--Wife of enlisted man who killed husband following quarrel, but who was not indicted by grand jury which returned "no bill," may not be allowed 6 months' death gratuity in the absence of evidence clearly absolving wife of any felonious action incident to husband's death. 34 Comp. Gen. 103 (1954). See also 55 Comp. Gen. 1033 (1976).

Surviving spouse accessory to member's death--The claim of the widow of a deceased Air Force member for the 6 months' death gratuity (10 U.S.C. § 1477) is denied where claimant pleaded guilty to bring an accessory before the fact to voluntary manslaughter in connection with the member's death and the facts fail to establish her lack of felonious intent. Denial of the claim is based on the long-standing policy which prohibits payment of benefits to a beneficiary who acted with felonious intent in bringing about the death of the member upon whose death the benefits become payable. B-188403, May 5, 1977.

Waiver of rights by spouse--When a member and his wife were separated and an agreement was executed by them prior to the time the member entered the Air Force whereby the wife waived all rights and other benefits to which she may be entitled as a result of the member's possible future military service and the member designated his mother to receive the 6 months' death gratuity in the event there was no surviving spouse, the mother's claim was properly disallowed because 10 U.S.C. 1477(a) provides that the surviving spouse shall be paid the gratuity and a simple waiver of an unknown future right does not afford a legal basis for payment of the gratuity due from the United

States to someone other than the recipient designated by statute. 54 Comp. Gen. 152 (1974).

Wife's remarriage without obtaining a divorce--A married service member, was declared missing in action in April 1969, and a presumptive finding of his death was made in February 1978. Where his spouse remarried in August 1973, without obtaining a divorce, his parents are not entitled to the 6 month's death gratuity under 10 U.S.C. § 1447(a) because the member was survived by a spouse. B-193503, March 8, 1979.

Divorce not recognized in State of domicile--The legal status of the spouse of an officer of the uniformed services who had been granted a divorce by the State of Nevada that was not recognized by the wife's matrimonial domicile, the State of North Carolina, in court proceedings in which she was also granted support and custody of the child born of the marriage, and at which the husband was present and consented to the decree, remained that of the officer's wife. Therefore, upon the death of the officer, the wife having maintained her status as lawful spouse is entitled to the payment of the 6 months' death gratuity, and the fact that the officer had consented to the decree of the North Carolina court is assurance the Government will receive a good acquittance by payment of the gratuity to the deceased officer's widow. 49 Comp. Gen. 116 (1969).

Divorce proceedings not finalized--The 6 months' gratuity authorized to be paid to the widow of an enlisted man of of the Navy who died while on the active list, is not barred where the enlisted man died after the granting of an interlocutory decree of divorce but before 6 months had expired, under a State statute which provides in specific terms that decrees of divorce shall not become final and operative until 6 months after the trial and decision. 6 Comp. Gen. 704 (1927).

Divorce obtained through fraud--Where the decree of divorce of an Army officer from his first wife was set aside subsequent to the officer's death by a court of competent jurisdiction because of fraud, the person whom the officer married after such decree was obtained may not be regarded as having been the wife, or the widow, of such officer to whom payment of the 6 months' death gratuity pay may be made; rather, the first wife, who remained the officer's wife and who, upon his death, became his widow, is entitled to such gratuity. 26 Comp. Gen. 327 (1946).

Attempt to set aside divorce subsequent to death--Six months' death gratuity may not be allowed the alleged widow of a deceased Army officer on the basis of a decree of a State court, subsequent to the death of the officer purporting to vacate a former decree of divorce a vinculo

matrimonii, which under its own terms and the statutes of the State had become final and had been so accepted and acted on by the parties, in the absence of satisfactory evidence that the court had jurisdiction of the cause and all interested parties to vacate the former decree. 16 Comp. Gen. 890 (1937)

Remarriage valid where performed but not where prior divorce obtained--Remarriage in another State of a divorced soldier within the period prohibited by the statute of the State where the divorce was granted, being recognized as valid in the State where the marriage was celebrated, payment of 6 months' death gratuity, because of the death of the soldier, to the wife by the said remarriage, is authorized. 19 Comp. Gen. 56 (1939).

Entitlement of member's children

Member remarried

Claim of ex-wife guardian of minor children of deceased member for 6 months' death gratuity may not be allowed since records show that member remarried and was apparently survived by spouse who, although she never filed claim and has not been located, is the only eligible beneficiary under 10 U.S.C. § 1447(a)(1) (1970). However, if guardian can show that member had no spouse on date of death, or that his spouse died before her claim was barred (31 U.S.C. 71a (Supp. V, 1975)), then further consideration is to be given the guardian's claim. B-187481, January 6, 1977.

Payment to natural guardian of member's children--As the 6 months' death gratuity payment is not considered an asset of the estate of the deceased member of the uniformed services but is in the nature of survivor insurance that is payable in accordance with Federal law to persons listed in 10 U.S.C. 1477, the principal concern of the Government is to obtain a good acquittance when payment to a minor is involved; therefore, when a State statute provides for a good acquittance, payment of the death gratuity due the minor child of a deceased member of the uniformed services may be made to the natural guardian of the child (and former spouse of the member) upon compliance with the requirements of the law of the State in which the claimant resides, thereby avoiding the cost of obtaining legal guardianship in the settling of small estates. 47 Comp. Gen. 209 (1967).

Acknowledged illegitimate child--The 6 months' death gratuity statutes authorizing payments to dependent children of deceased servicemen should be viewed as including illegitimate children where the relationship is properly established, so that an illegitimate minor child who was

acknowledged in writing by a Navy enlisted man, now deceased, as his child and designated as beneficiary to receive his 6 months' death gratuity may be regarded as the child of the decedent for death gratuity payments to beneficiaries of deceased members of the Navy. 30 Comp. Gen. 277 (1951).

Illegitimate child born after member's death-The right of an illegitimate child to the 6 months' death gratuity is not defeated by the fact that the child was unborn on the date of notification of the death of a Marine Corps enlisted man who had acknowledged in writing the paternity of the child before his death; therefore, as the decedent was not survived by a widow, the child takes precedence over any other relative previously designated as beneficiary. 34 Comp. Gen. 415 (1955).

Child adopted by third party--A deceased naval officer's minor child who was legally adopted by others prior to the officer's death may not be paid the 6 months' death gratuity. 34 Comp. Gen. 601 (1955).

Stepchildren - relationship terminated by member's death--Where the relationship by affinity between an officer or enlisted man and a stepchild or other relative by affinity was created by a marriage which has terminated by death--as distinguished from divorce--subsequent to the officer's or enlisted man's designation of such a relative as his beneficiary to receive the 6 months' death gratuity, the relationship, in absence of any evidence to the contrary, may be considered as continuing, insofar as payment of the gratuity is concerned. 24 Comp. Gen. 320 (1944).

Stepchildren - relationship terminated by divorce prior to member's death--Where the relationship by affinity between an officer or enlisted man and a stepchild or other relative by affinity was created by a marriage which has been terminated by divorce--as distinguished from death--subsequent to the officer's or enlisted man's designation of such a relative as his beneficiary to receive the 6 months' death gratuity, the relationship may be considered as ended, insofar as payment of the gratuity is concerned, unless clear and convincing affirmative evidence is furnished to establish the maintenance of close family ties and an intention to continue the prior relationship. 24 Comp. Gen. 320 (1944).

Stepchildren - residence in member's household at time of death--The death gratuity claimed by the mother of a deceased member of the Air Force, designated as beneficiary in the event no spouse or child survived, and on behalf of three stepchildren, members of the decedent's household at the time of their mother's death shortly before that of the

member, who traveled as his dependents to the home of their maternal grandmother, located close to the permanent duty station to which the member had been reassigned for humanitarian reasons, is payable in equal shares to the stepchildren upon proof of a guardian relationship by the persons claiming for them. The airman's status as a "householder"--one who as head of a household gives life, support, and guidance to the family unit--not having terminated upon the death of his wife, as evidenced by his endeavor to maintain a household for the children with their grandmother near his new duty station, and the stepchildren considered members of the decedent's household at the time of his death meet the qualifications in 10 U.S.C. 1475. 45 Comp. Gen. 413 (1966).

Conflicting claims by different guardians--Where different guardians appointed by courts of different jurisdictions each claims 6 months' death due the minor child of deceased enlisted man, the guardian in actual control of the person and property of the minor child, who was appointed by the court whose jurisdiction to appoint a guardian has been tested between the two contending guardians, may be recognized to receive the 6 months' death gratuity, notwithstanding the lack of final determination between the contending guardians as to the right to receive the 6 months' death gratuity, since such a final determination under these circumstances is not necessary to protect the interests of the United States or of the minor child. 39 Comp. Gen. 123 (1959).

Entitlement of designated relatives

Beneficiary must be one listed under statute--In case a member of the uniformed services designates, for the purposes of death gratuity payment, a beneficiary who is ineligible because he does not have the relationship to the member prescribed for that class by statute, such ineligible designee may not receive the death gratuity payment. 36 Comp. Gen. 741 (1957).

Changes in beneficiary designations--Changes in beneficiary designations for payment of the 6 months death gratuity must comply with the formalities prescribed by regulations, and any departure from the established procedure must be entirely free from doubt, fraud, or mistake. 34 Comp. Gen. 616 (1955).

Effect of misnomer in designation--A misnomer or an inaccuracy in the name of a beneficiary designated to receive the 6 months' death gratuity pay does not render the designation instrument inoperative provided the person whom the decedent intended as the beneficiary can be identified with clearness and certainty by the description in the designation instrument. 32 Comp. Gen. 249 (1952).

Nondesignated parent vs. designated person standing in loco parentis--The 6 months' death gratuity authorized in 10 U.S.C. 1477 that is payable incident to the death of an enlisted member of the uniformed services and which is claimed by the decedent's natural father and a cousin designated to receive the gratuity who is claiming a loco parentis relationship may not be paid to either claimant, absent more conclusive evidence or a judicial determination of entitlement. The evidence presented by both claimants is in conflict, as are the numerous court decisions respecting the determination of the term "in loco parentis," and although a close relationship existed between the decedent and the family of the person alleging the loco parentis relationship, the member prior to enlistment was self-supporting and lived where he chose. 49 Comp. Gen. 167 (1969).

Member must be on active duty or have been separated from active service within 120 days

National guard officer - not in duty status at time of death - absence of advance orders--A National guard officer who stated he planned to perform military duty on the day he died, but who had not been ordered in advance to perform such duty, may not properly be placed in a duty status retroactively after his death, notwithstanding that on other occasions he had received credit for military duty performed without advance authorization, since the regulations requiring advance orders may not be disregarded as a matter of routine, and retroactive orders are permissible only to correct an apparent error or to confirm previously issued verbal orders. B-194189, January 7, 1980.

Date of death unknown following separation from active duty--Where the exact hour or date of death of a retired officer of the uniformed service cannot be determined and the official record reflects that the body of the officer was found 121 days after his release from active duty, the death gratuity authorized by 10 U.S.C. 1476(a) to be paid to the widow of an officer dying within a 120-day period after release from active duty may not be paid. As neither the statement of the doctor signing the death certificate that death could have occurred on the 120th day nor any other document rebuts the official record that the death of the officer occurred more than 120 days after release from active duty, the matter is too doubtful to warrant payment of the death gratuity. 46 Comp. Gen. 409 (1966).

Death in confinement after expiration of enlistment--An enlisted member of the uniformed services who dies subsequent to the expiration of his enlistment and while a prisoner in confinement pending appellate review of an unexecuted court-martial sentence is regarded as having his enlistment expire by operation of law rather than as the

result of the imposition of the courtmartial sentence then pending appellate review, so that the issuance after the member's death of a court-martial order by the Secretary of the Army to restore the rights, benefits, privileges and property of which the deceased may have been deprived by virtue of the findings of guilty and sentence could not have the effect of placing the member in a pay status after the expiration of the enlistment to permit payment of arrears of pay for the following period of confinement or of the death gratuity. 40 Comp. Gen. 202 (1960).

Fraudulent enlistment undiscovered at time of death--A fraudulent enlistment is voidable at the option of the Government. Where the fraudulent character of an enlistment did not become known and the deceased was actually carried on the rolls as an enlisted man of the Army at date of death, he was an enlisted man "on the active list of the Regular Army," and his widow is entitled to the death gratuity. 9 Comp. Gen. 26 (1929).

AWOL but not in desertion status at time of death--A member of the Armed Forces who died by suicide during a period of absence without leave occurring after the effective date of section 4(b) of the Armed Forces Leave Act of 1946 is to be regarded as continuing in a pay status during such absence for the purpose of computing the 6 months' death gratuity at the rate of pay received at the date of death and such gratuity, not being a part of the pay and allowances forfeited by section 4(b) for absence without leave, may be paid upon administrative determination that death was not due to misconduct. 29 Comp. Gen. 294 (1950). See also 31 Comp. Gen. 645 (1952).

Effect of desertion status at time of death-An enlisted member of the uniformed services who died after he had breached a restricted status and left for Mexico with the intention of remaining there permanently was in fact in a desertion status even though formal action to declare the member a deserter was delayed until after his death, and, therefore, since the member was in a desertion status at the time of his death which effected a termination of his pay status, the 6 months' death gratuity authorized for survivors of members in a pay status at time of death is not payable to the enlisted man's survivors. 42 Comp. Gen. 143 (1962). See also 27 Comp. Gen. 269 (1947); and 31 Comp. Gen. 645 (1952).

Correction of records to remove desertion--The correction of a Navy seaman's records to remove the mark of desertion following a determination of presumed death at the end of an unexplained absence of more than 7 years does not establish a presumption as to the date of death, but the records may be corrected again to show a date of death for the purpose of computing the 6 months' death gratuity. 35 Comp. Gen. 643 (1956).

Pay and allowances included in computation

Combat pay--Inasmuch as combat pay authorized the Combat Duty Pay Act of 1952, is considered monthly compensation within the meaning of the act of June 30, 1906, as amended, it may be included in the 6 months' death gratuity payable upon the death of the member of the uniformed services who is entitled to such pay during the month of death. 32 Comp. Gen. 55 (1952).

Flight pay--A naval reservist who, while on authorized leave from duty requiring frequent and regular participation in aerial flights, was admitted to a civilian hospital for treatment for poliomyelitis, which subsequently caused his death, may not be regarded as having his flight status automatically suspended by reason of the hospitalization and, therefore, the member's widow is entitled to have the additional flight pay included in the 6 months' death gratuity. 36 Comp. Gen. 57 (1956).

Reserve and National Guard members

Death en route from physical examination site--An inactive naval reservist who was killed in an automobile accident returning home from a physical examination pursuant to orders which did not place the member in an active duty status but merely required him to report for examination to determine his physical qualifications for active duty at a later date in the Aviation Officer Candidate Program may not be regarded as having been in an active duty status or any other status for expenses incident to the member's death and death gratuity benefits in 10 U.S.C. 1475-1480, 1482, or 6148, and, therefore, death benefits are not payable in the absence of a correction of record to show that the member had been ordered to temporary active duty for a physical examination incident to orders to active duty. 44 Comp. Gen. 701 (1965).

Death en route home after inactive duty training drill--The 6 months' death gratuity prescribed in 32 U.S.C. 321(a)(3) for payment to the beneficiary of a member of the National Guard who dies from an injury incurred while traveling directly to or from inactive training is not payable incident to the death of a member who when dismissed from a regularly scheduled drill proceeded to a truck stop in a direction away from his residence where he stayed approximately 1 hour, and then while en route to his home was involved in the accident that resulted in his death. The member is not considered to have been traveling directly from the training place to his home, either in point of time or route, when the accident occurred and, therefore, the case does not fall within the meaning of section 321(a)(3) and implementing regulations. 48 Comp. Gen. 762 (1969).

Death after arrival at Reserve Center but prior to reporting for duty--A member of the United States Army Reserve who was struck and killed by an automobile before reporting for inactive duty training but subsequent to arriving at the Reserve Center, with the knowledge and consent of his commanding officer to prepare for a drill class he was to instruct, leaving to cross the street to a dairy bar, was in a status that entitles his eligible survivors to the death gratuity payment prescribed by 10 U.S.C. 1475(a)(3) when a member dies from injuries received "while traveling directly" to inactive duty training. The member having completed travel to his inactive duty training station at the Reserve Center earlier than was necessary to report for scheduled duties was free to go to the dairy bar across the street from the Center; therefore, it cannot be concluded as a matter of law that he was not "traveling directly" to his inactive duty training station within the meaning of section 1475(a)(3) when he recrossed the street to return to the Center. 45 Comp. Gen. 740 (1966).

Death while member under military control--Claims for death gratuity and medical expenses by beneficiaries of National Guard member who was to attend inactive duty training on September 8-9, 1973, and then report for full-time training duty on September 9-10, 1973, but who suffered heart attack and died during early morning of September 9, may be allowed since member was under military control in his training area at time of heart attack and death and was, therefore, on inactive duty training at such time, which is basis for payment of such benefits 32 U.S.C. 321(a)(1) and 32 U.S.C. 320. 54 Comp. Gen. 523 (1974).

Death while performing duty without pay--The provision in 10 U.S.C. 1478(a)(7) that reservists who perform active duty or inactive duty training, without pay, are considered to be entitled to basic pay while performing such duty for death gratuity payments to their survivors is not to be construed as limiting the amount of the death gratuity to basic pay but rather as placing the reservists performing military duty without pay in a pay status; therefore, in the computation of a death gratuity payment due a beneficiary of a reservist who was killed in an aviation accident while engaged in flight training duty under orders which authorized special inactive duty training without pay, aviation duty pay is for inclusion. 39 Comp. Gen. 858 (1960).

Effect of erroneous death gratuity payments

Member missing and declared dead, later found alive--Payment of 6 months' death gratuities and payment of arrears of pay and allowances made to the beneficiaries or heirs of missing members of the Armed Forces pursuant to

administrative determinations of death under the Missing Persons Act were legal and valid when made and, therefore, are not reguired to be refunded by the payees when the members return to military control, and the death determinations are cancelled. 34 Comp. Gen. 494 (1955).

Member contrives disappearance--Upon discovery that a member of the uniformed services had contrived his disappearance in a manner that suggested accidental drowning, the 6 months' death gratuity paid to his father as the designated survivor is for recovery from the son perpetrating the fraud and not the father whose receipt of the death gratuity was bona fide. Therefore, the determination pursuant to 37 U.S.C. 556 that the member had died having been proper when made, payment of the gratuity to the father was legal and valid and he may retain the payment. 46 Comp. Gen. 687 (1967).

False information given by member--A death gratuity which is paid to a person determined by the appropriate commander to be entitled thereto, based upon representations of record made by the deceased serviceman as to his marital and dependency status and, in the absence of information which would give rise to doubt as to the status, constitutes a good acquittance even though it subsequently develops that the payee is not the proper statutory payee, and payment would neither impose pecuniary liability on the disbursing officer nor warrant a second payment to the proper person, regardless of whether the misrepresentations were wilful or erroneous. 37 Comp. Gen. 131 (1957).

B. Deceased Member's Pay and Allowances

Order of precedent in payment

Primary right of designated beneficiary--Where claimant obtained Mexican divorce from prior spouse, subsequently married member in California and claims death gratuity as his surviving spouse, legality of marital status of deceased and claimant is too doubtful for payment of death gratuity in absence of declaratory validity of Mexican divorce so that any impediment to the validity of claimant's marriage to member arising out of divorce proceedings may be removed. However, claimant was properly paid deceased member's accrued pay and allowances, since she was the member's designated beneficiary for such payment and as such had primary entitlement under 10 U.S.C. 2771 regardless of marital status. 55 Comp. Gen. 533 (1975).

Spouse designated as beneficiary--When the record shows that a service member, who was missing in action in April 1969, was determined to have died in February 1978, and that he specifically designated his spouse as beneficiary to receive his unpaid pay and allowances, the member's

parents are not entitled to this amount under 10 U.S.C. § 2771 as a designated beneficiary is always the preferred recipient, that designation being the highest on the list of eligible beneficiaries. B-193503, March 8, 1979.

Designated beneficiary's precedence over widow--The claim of the widow to any pay or allowances due a retired member of the Army at the time of his death may not be paid since the Record of Emergency Data on file, although altered apparently because of space limitations on the form, shows clearly that the member intended to designate his children to share these funds equally. The fact that the widow may have been beneficiary of other funds due upon the member's death does not entitle her to the funds in question in view of the the specific provisions of 10 U.S.C. 2771 regarding the disposition of such amounts. B-189235, January 10, 1978.

Designated beneficiary's precedence over legatee named in will--Savings deposits with interest thereon due a deceased member of the uniformed services are considered as part of "the amount found due" in the settlement of a deceased member's account, and therefore payment to the member's designated beneficiary as provided by statute is proper, notwithstanding that the member had executed a will bequeathing the deposits to a relative--not the designated beneficiary--in trust for the minor daughter. 37 Comp. Gen. 832 (1958).

Continuing validity of designation after discharge-The designations of beneficiaries prior to discharge by enlisted men of the uniformed service under the act of July 12, 1955, 37 U.S.C. 361-365 (1952 ed., Supp. III), relating to the final settlement of the accounts of deceased members of the uniformed services, continue to be valid designations subsequent to discharge for purposes of settlement of unpaid pay and allowances, the interpretation of the derivative act of June 30, 1906, that the act is sufficiently broad in scope to encompass the accounts of former officers and enlisted persons being for application to the act of September 2, 1958, which reenacted and codified the 1955 act without substantiative change (10 U.S.C. 2771). Therefore, upon the death of a member, the pay and allowances due on date of discharge and remaining unpaid at the time of the member's death may be administratively settled pursuant to 10 U.S.C. 2771 and payment made to the designated beneficiaries. 42 Comp. Gen. 215 (1962).

Claim based on common-law remarriage--After entry of a final decree of divorce on November 6, 1975, the wife alleges that she and the husband immediately resumed marital status and were husband and wife under the common law of Colorado when husband died on November 21, 1975. Wife, therefore, claims entitlement to survivor benefits including arrears of retired pay of the deceased husband

which the Navy declined to pay on the basis she was not the surviving spouse. While common-law remarriage after divorce is possible in Colorado, on the record presented the existence of a common-law marriage is too doubtful to authorize payment. B-194457, May 9, 1979.

Designated beneficiary predeceases member--Where the brother named by a member of the uniformed services to share with a sister the retired pay due him at time of death predeceases the member and only the sister and two other brothers survive the member, the sister does not take the undistributed one-half share since the beneficiary designations made pursuant to 10 U.S.C. 2772(a)(1) became effective upon the member's death and, therefore, the order of precedence prescribed by section 2771(a) applies to the undistributed share of retired pay due. As the member was not survived by a widow, child, grandchild, or parent, and no legal representative was appointed, distribution in accordance with section 2771(a)(6) should be made to the persons, including a corporate entity, entitled to take under the law of the domicile of the deceased, which accords preference to creditors, or persons paying creditors, for funeral and last illness expenses. 52 Comp. Gen. 113 (1972).

Designated beneficiary kills member--Claim of widow of deceased service member for unpaid pay and allowances as member's designated beneficiary (10 U.S.C. 2771), where she admitted killing him and was indicted for murder, is denied, even though she claimed self-defense and nolle prosequi was entered on indictment, since due to certain information of record, the lack of felonious intent cannot be established. 55 Comp. Gen. 1033 (1976). See also B-208101, April 22, 1983, concerning claims arising under other statutes in like circumstances.

Spouse accessory to member's murder--Murdered Navy member's wife, who was found guilty of being an accessory after the fact to his murder, is not entitled to receive arrears of pay due the member in the absence of evidence that she was not involved in the murder or that she did not participate in the murder with felonious or wrongful intent, since it is a fundamental rule of law that no person shall be permitted to profit by his own wrongful act. B-187743, July 7, 1977.

Legal entity as designated beneficiary--The word "person" as used in 10 U.S.C. 2771(a) should be construed similarly to that word as used in 5 U.S.C. § 5582(b) and, thus, may include a legal entity other than a natural person. Therefore, an Army member's designation as beneficiary of his unpaid retired pay upon his death of the United States Soldiers' Home, a Government instrumentality with the power to accept donations of money or property, was a valid designation under 10 U.S.C. 2771(a)(1) and the Home's claim may be allowed. B-187037, October 22, 1976.

including arrears of retired pay of the deceased husband which the Navy declined to pay on the basis she was not the surviving spouse. While common-law remarriage after divorce is possible in Colorado, on the record presented the existence of a common-law marriage is too doubtful to authorize payment. B-194457, May 9, 1979.

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When law of domicile governs payment--Settlement of accounts of deceased members of the armed forces is provided for by 10 U.S.C. § 2771 (1970). In the absence of a designated beneficiary, a surviving spouse, child, or parent, or a legal representative of the estate, the person entitled under the law of the domicile of the deceased member is entitled to payment. B-191818, November 21, 1978. See also B-199455, September 29, 1980.

Where law of domicile of deceased member of armed forces is made controlling by 10 U.S.C. § 2771(a)(6) (1970), and where stepdaughter-in-law of marriage dissolved by final decree of divorce in 1950 has no legally recognizable status under the domicile's law, claim for amounts due deceased member of armed forces, asserted by stepdaughter-in-law, was properly denied. B-191818, November 21, 1978.

Proper settlement under law of domicile - payment bars recovery by later claimant--A settlement was made under 10 U.S.C. 2771(a)(6) to those properly qualified under the laws of succession of that state based on their assertion of being the deceased member's sole next of kin, and there was no indication of the existence of any other qualified persons. Where another claim was thereafter presented, the Government has obtained a good acquittance by the settlement and under 10 U.S.C. 2771(d) such payment bars recovery by the later claimant of any portion of the settlement. B-199455, September 29, 1980.

Member in missing status subsequently determined to be dead

Pay increases--The widow and designated beneficiary of an Air Force captain held to be in a missing in action status from March 28, 1969, until that status was terminated on March 19, 1970, on the basis of evidence establishing his death, may be paid the increase in basic pay provided by the Federal Employees Salary Act of 1970, and implemented by Executive Order No. 11525, for the period January 1, 1970, the retroactive effective date of the act, through March 19, 1970, absent a contrary determination under 37 U.S.C. 556(c) by the Secretary of the Air Force. While the Department of Defense Memorandum implementing the Executive order permits a retroactive increase in pay for any active service performed in the case of a person "who died" after December 31, 1969, but before April 15, 1970, such authority together with section 5 of the salary act on which it is based is considered to have reference to a termination of pay because of death. 50 Comp. Gen. 148 (1970).

Distribution of amount accruing to member's account including deposits in Uniformed Services Savings Deposit Program--The father of a member in a missing status is not entitled to the accrued pay and allowances, including amounts deposited in the Uniformed Services Savings Deposit Program (USSDP), when the member is determined to have been killed in action, even though he was designated to receive an allotment of 100 percent of the member's pay and allowances if he went in a missing status, since the Secretary concerned has the authority under 37 U.S.C. 551-558 to discontinue such an allotment. The amounts accruing to member's account, including accordance with 10 U.S.C. 2771, in this case to the designated beneficiaries, his sisters. B-196808, July 17, 1980.

Designated beneficiary (spouse) remarries while member missing--Any amounts due a member of the Marine Corps who when he entered a missing status on April 30, 1967, was a private first class E-2, and who by September 10, 1971, the date his death was established as April 30, 1967, had been promoted successively to sergeant E-5, are payable at the rates in effect on September 10, 1971, for pursuant to Public Law 92-169, the promotion of a member while in a missing status is "fully effective for all purposes," and the member's former spouse as designated beneficiary is entitled to the payment of the arrears of pay due notwithstanding she had remarried before he was officially determined to be dead. 51 Comp. Gen. 759 (1972).

Retired members

Accounts to be settled pursuant to 10 U.S.C. 2771--The term "member" in 10 U.S.C. 2771 relating to the settlement of accounts of deceased members of the Armed Forces includes former members of the Army of the United States and former members of Reserve components who have been retired, there being no evidence of a congressional intent in the enactment of 10 U.S.C. 2771 and in the derivative laws to distinguish cases of former members who have been retired from those of Regular and Reserve retired members; therefore, accounts of such deceased former members may be administratively settled in accordance with established procedures. 40 Comp. Gen. 632 (1961).

Requirement that retired member's death and date of death be established--The retired pay of a retired member of the armed services accrues only during his lifetime. Payment of such pay is generally authorized to be made only to the retired member, except that upon his death the amount accrued but unpaid may be paid to his beneficiary as provided by 10 U.S.C. 2771 (1976). Therefore, the fact of the member's death and date of death must be established before payment may be made on such claim. B-1740478, December 28, 1978.

Where the only basis presented for payment of a claim for retired pay of a missing person is a State court decree entered on the basis of presumptive evidence in a proceeding in which the United States is not a party, the United States is not necessarily bound by such a decree. In the absence of further proof that the member was alive after the date of disappearance, the claim of the member's son as beneficiary of unpaid retired pay accrued after the date of disappearance is too doubtful to allow. Id.A claim by a retired Navy member's wife for the member's retired pay accruing during the 7-year period from the date of his disappearance to the date he was declared dead by a State court may not be allowed since retired pay is payable only during the member's life and there is no showing that he was alive after his dissappearance or when he actually died, and the State court determination appears to be presumptive only and does not establish that the member lived for 7 years. 58 Comp. Gen. 131 (1978).

Incompetent member dies while in Veterans' Administration facility--Under the ruling in Berkey v. United States, 176 Ct. Cl. 1, that the retired pay withheld pursuant to 38 U.S.C. 3202(a)(1) from a retired member of the uniformed services adjudged incompetent who died while receiving care in a Veterans' hospital is payable to members of the immediate family of a decedent as the forfeiture provisions of 3203(b)(1) are inapplicable to withheld retired pay, considered earned compensation and not a gratuity, retired pay is for distribution under 10 U.S.C. 2771, as there is no basis for distinguishing between cases involving a competent or an incompetent retired member. Therefore distribution of the withheld retired pay in both categories--competent and incompetent--should be on the same basis, and claims similar to the Berkey case handled as indicated in 40 Comp. Gen. 666, and 41 Comp. Gen. 218 is reversed. 47 Comp. Gen. 25 (1967).

Claim by sole creditor and "only friend"--Under the act of June 30, 1906, as amended, which governs distribution of amounts due estates of deceased military personnel, no provision is made for payment to a general creditor of the decedent's estate, and therefore the sole creditor of a deceased member of the uniformed services, who was decedent's "only friend," is not entitled to payment of claim from arrears of pay due decedent unless claim is presented by a duly appointed legal representative of the estate. 33 Comp. Gen. 346 (1954). See also 52 Comp. Gen. 113 (1972).

C. Wrongful Death

Claim for interest based on negligent delay in payment

The widow of a retired military member seeks payment of an amount equal to investment interest she states was lost on

the balance of a settlement payment to which she was entitled under the Military Claims Act. She claims that the check that was initially sent to her in payment was improperly drawn due to negligence, and claims the interest she lost from the date she received the first check until the date she received a second check which she was able to negotiate. The claim is denied since there is no authority for such a payment. B-214361, May 22, 1984.

CHAPTER 7

RETIRED PAY

I. DISABILITY RETIREMENT

A. Eligibility

Disability incurred while member entitled to basic pay

Preexisting disability--A member of the uniformed services who at the time of induction into the military service did not meet procurement or retention medical fitness standards and who incurred no aggravation of a preexisting medical condition during his active service has not met the requirement in 10 U.S.C. 1201 and 1203 that a physical disability must be incurred while entitled to basic pay and he, therefore, is not entitled to disability severance or retired pay on separation from the service. 48 Comp. Gen. 377 (1968).

Member AWOL when disability incurred--A member who at the time of conviction for a crime by civil authorities was found sane but who subsequently was committed to a State hospital for the criminally insane followed by placement on the Temporary Disability Retired List, pursuant to 10 U.S.C. 1202, has forfeited entitlement to pay and allowances under 37 U.S.C. 503(a) for the period from date of apprehension by the civil authorities until his placement on the Temporary Disability Retired List, the member's commanding officer properly declining to excuse his absence from duty as unavoidable, and the disability of the member having been incurred during a period of unauthorized absence he was not in a pay status on the day preceding the date of his retirement, a prerequisite to physical disability retirement and, therefore, the member also is not entitled to retired pay. 47 Comp. Gen. 214 (1967).

Member on excess leave--A member of the Regular Army who incurrred a permanent and total physical disability while in an excess leave status is not eligible for disability retired pay. Under 10 U.S. § 1201 for the member must have incurred his disability while entitled to receive basic pay in order to be eilgible for disability retirement and 37 U.S.C. § 502(b) (1976) and applicabale regulations specifically prohibit entitlement to pay and allowances to members during excess leave. Since the member did not incur his disability while he was entitled to receive basic pay, disability retirement is precluded. B-205953, June 18, 1982.

De facto member--When an officer under a temporary appointment held no commission from April 1, 1953, the date his

appointment in the Officers' Reserve Corps, was terminated and January 28, 1954, the date he accepted an indefinite appointment as an Army reservist, no legal basis existed for his placement on the temporary disability retired list on August 31, 1953, and subsequent permanent retirement with entitlement to retired paybenefits and the payments made are for recovery, the CareerCompensation Act of 1949, only authorizing placement on the temporary disability list "while entitled to receive basic pay." Officer retained through oversight after his commission expired is a de facto officer and is not within the purview of the Armed Forces Reserve Act of 1952, providing pay and allowances for reservists continued on active duty after the expiration of their term of office. 44 Comp. Gen. 83 (1964). Compare 44 Comp. Gen. 277 (1964).

Disability determination made after his release--Member of Coast Guard Reserve was placed on the Temporary Disability Retired List under 10 U.S.C. 1205, based on a finding of physicaldisability as a result of a service connected injury whichoccurred 10-12 years previously while serving on a 2-week period of active duty for training. For purpose of computing retired pay under Formula 2 of 10 U.S.C. 1401, fact that member was not in basic pay status at time of disability determination orplacement on that list, is not a computation requisite, since Formula 2 merely calls for use of the pay rate for the "grade" to which member was entitled on that date. 47 Comp. Gen. 716 (1968) distinguished. 56 Comp. Gen. 807 (1977).

Change in administrative interpretation of law
Where overview by Army Board for the Correction of Military Records found a member entitled to disability retired pay under a new administrative interpretation of application of applicable law but made no correction in the member's records so that no new rights accrued, the member's claim to retired pay first accrued on the date he was retired for disability in 1944. Therefore, the barring act of October 9, 1940, as amended (31 U.S.C. 71a, 237 (Supp. V, 1975)) bars payment of that portion of the claim for retired pay which accrued more than 6 years before the claim was received in the GAO. B-191650, May 18, 1978. See also B-205111, February 19, 1982.

Distinction between injury and disease active duty for 30 days or less

A determination made while an Army Reserve member was on a 2-week period of active duty for training that the disease which made him unfit for military service had been aggravated by a prior 2-year period of military service meets the requirements of 10 U.S.C. 1201 and 1202 members called to active duty for more than 30 days, the reference in those sections to the period of service of more than 30

days having application to the duty being performed at the time the physical disability is incurred rather than to the duration of the duty during which the physical disability determination is made; therefore, the determination of disability having been made while the member was receiving basic pay permits placement of his name on the temporary disability retired list under 10 U.S.C. 1202 and entitlement to retired pay. Distinction made between 10 U.S.C. 1204, which provides for disability retirement for members on active duty for 30 days or less only for injury, and not for disease. 43 Comp. Gen. 155 (1963).

Active duty for 30 days or less extended due to hospitalization for injury

A member of the Army National Guard or Army Reserve, ordered to active duty or a period of 30 days or less under self-terminating orders who is hospitalized due to an in line of duty injury is not placed in a status of being on active duty for 30 days or more though the period of hospitalization is covered by an amendment to his orders or new orders issued to extend his period of active duty solely for the purpose of such hospitalization. Thus, the orders would not carry him beyond 30 days for active duty purposes and his rights to be retired for physical disability would remain determinable under 10 U.S.C. 1204. 57 Comp. Gen. 305 (1978).

Requirement that disability be established

No showing of continuing disability--An enlisted man released from active duty for training on April 22, 1966, as not fit for full duty due to an ankle injury incurred on April 15 in line of duty who failed to report for follow-up medical treatment and performed regular inactive duty training drills prior to placement on the Temporary Disability Retired List on December 15, 1967, under 10 U.S.C. 1202, may not be paid disability retired pay under 10 U.S.C. chapter 61, the right of the non-Regular member to pay and allowances not having been established by a showing of the continued existence of adisability, the requisite of a basic pay status was absent at the time the disability determination was made. 47 Comp. Gen. 716 (1968). See also 56 Comp. Gen. 807 (1977).

Administrative determination--Determination as to whether disability incurred by member of Arizona Army National Guard is or is not proximate result of performing active duty or inactive duty training within meaning of 10 U.S.C. 1204(a) (1976) is committed by that statute to sound discretion of Secretary concerned. B-201191, March 17, 1981.

Member on temporary disability retired list - failure to report for periodic examination--Upon restoration to amember of the retired pay terminated prior to the automatic expiration of the 5 years on the temporary disability retired list, provided by 10 U.S.C. 1210(h),the failure to report for periodic physical examination required by section 1210(a) having been adminstratively determined to be for just cause, the retroactive period for which payment of retired pay is authorized, limited to not more than 1 year, should be computed from and including the date the member's 5 years on the temporary disability retired list expired, notwithstanding the administrative action directing the reinstatement of the retired pay, such automatic termination date not restricting the basic authority to provide retroactive payments of retired pay; therefore, although the appropriate determination to reinstate the disability retired pay was made after the expiration of the 5-year maximum period of entitlement, the period of retroactivity begins with the last day of the 5-year period. 42 Comp. Gen. 50 (1962).

B. Retired Grade

Disability retirement and promotion simultaneously effective

Disability discovered as a result of a physical examination for promotion--An officer whose physical disability was not considered disqualifying prior to a physical evaluation board, upon his subsequent simultaneous transfer as a second lieutenant to the temporary disability retired list under 10 U.S.C. 1202 and advancement to the grade of first lieutenant under clause (4) of 10 U.S.C. 1372, is entitled to retired pay and disability severance pay computed on the basis of the higher grade; and, since the firstdetermination of physical disability did not disqualify the officer for service, the disqualifying disability for which he was retired may be considered as having been discovered as a result of a physical examination for promotion within the purview of clause (4) of 10 U.S.C. 1372. 50 Comp. Gen. 156 (1970). See also 42 Comp. Gen. 685 (1963); 41 Comp. Gen. 658 (1962); 41 Comp. Gen. 803 (1962); and 40 Comp. Gen. 256 (1960).

Disability discovered in connection with voluntary retirement examination--A major in the Air Force Reserves, who before his recommended promotion to the grade of lieutenant colonel could take effect was retired under 10 U.S.C. 1201, effective July 9, 1970, with 80 percent disability, and who had undergone two physical examinations, one in connection with his "projected voluntary retirement," the other incident to his sability retirement, is not entitled to retired pay computed at the higher grade, as the disability for which the officer was retired was not

found to exist as a result of a physical examination for promotion within the meaning of 10 U.S.C. 1372(3), nor are the examinations within purview of Brandt v. United States, 155 Ct. Cl. 345, holding that where physical examinations in connection with , promotion and retirement are given close together, the physical disability can be said to be the result of an examination for promotion, 50 Comp. Gen. 508 (1971). See also 50 Comp. Gen. 314 (1970); 42 Comp. Gen. 314 (1962); 41 Comp. Gen. 749 (1962); and 40 Comp. Gen. 240 (1960).

A service member passed a promotion physical examination and was ordered promoted to the grade of major effective at a later date. In a later physical examination prior to the promotion effective date a disability was found and he was retired for physical disability under 10 U.S.C. 1201, in the grade of captain, as determined under 10 U.S.C. 1372(1). His claim that he should be retired as a major under 10 U.S.C. 1372(3) for retired pay purposes may not be allowed since that provision permits the higher grade only where the disability is found to exist as a result of a promotion physical, which was not the case. B-195483, November 14, 1979.

A service member (captain) passed a promotion physical examination and was ordered promoted to the grade of major effective at a later date. In a later physical examination prior to the promotion effective date a disability was found and he was ordered retired. His claim that his retired pay should be based on the grade of major because the medical evaluation board finding that he was medically unfit was improper because subsequent service examinations found him fit may not be allowed. Under 10 U.S.C. 1216, the Secretary of the service concerned is vested with the powers, functions and duties incident to determining fitness for duty of any member of that service and percentage of disability, and not the GAO. B-195483, November 14, 1979.

Member returned to active duty from permanent disability retired list in higher grade

A Regular Army enlisted member serving in grade E-5 was retired in 1971 due to permanent physical disability. While on the retired list he acquired civilian training as an anesthetist. In 1977 he was commissioned an officer in the Army Reserve and returned to active duty in the Medical Corps. He then became entitled to active duty pay of the officer grade he served in, and his entitlement to E-5 disability retired pay automatically terminated. He did not remain on active duty long enough to become eligible for retirement based on longevity of service, nor did he incur additonal disabilities to establish a "new" disability retirement. His original retirement orders were still

in effect, and he simply reverted to his original disability retirement status under those orders when released from active duty. B-204055, May 17, 1982. Compare 48 Comp. Gen. 99 (1968).

Member called to active duty from temporary disability retired list in higher grade

An officer who was placed on the temporary disability retired list in the grade of major effective June 1, 1968, recalled under 10 U.S.C. 1211 to active duty in the temporary grade of lieutenant colonel for 1 day, June 30, 1970, with date of rank from July 19, 1968, and then retired for years of service under 10 U.S.C. 8911 in the grade of lieutenant colonel effective July 1, 1970, is entitled to payment of the difference in retired pay between the grades of lieutenant colonel and major for the months of June and July 1970, since prior to July 1, 1970, the officer satisfied the requirements of 10 U.S.C. 1211(a)(1). The officer's entitlement to retired pay at the higher grade for the 2 months involved is not under 10 U.S.C. U.S.C. 8963(a), as he only "served" 1 day in the temporary grade, but under 10 U.S.C. 8961, which authorizes an officer to retire in the grade he "holds" not the grade in which he "served" on date of retirement. 50 Comp. Gen. 677 (1971).

Advancement on retired list to highest permanent or temporary grade satisfactorily held

In general--The rule in Friestedt v. United States, 173 Ct. Cl. 447, that a member retired for physical disability, or whose name is placed on the temporary disability list, should be advanced to the highest grade or rank in which the member previously served satisfactorily, whether the grade or rank was temporary or permanent, is applicable retroactively not only to the disability severance pay cases under 10 U.S.C. 1212(a)(2)(B)(ii), but also to the cases within the purview of 10 U.S.C. 1372(2), notwithstanding the section limits the advancement of a member retired for disability to the highest temporary grade or rank in which it is determined he served satisfactorily. 46 Comp. Gen. 727 (1967).

Grade in branch of service other than that from which retired--A payment of retired pay computed at the pay of the higher grade in which a member or former member had served satisfactorily, without regard to whether the higher grade was of a temporary or permanent status, may be authorized, or credit passed in the accounts of disbursing officers for payments made, in view of the judicial rulings so holding, even though the armed force in which the individual held the higher grade is not the service from which he retired, subject to administrative

approval that the service at the higher grade was satisfactorily performed, if such a determination is required by statute. 49 Comp. Gen. 618 (1970). See also 50 Comp. Gen. 607 (1971).

Determination of "satisfactory service" in higher grade--Although no minimum amount of service is specified in 10 U.S.C. 1372 before a determination may be made by the Secretary of the armed force concerned that a member has served satisfactorily in a higher grade or rank under a temporary appointment to be entitled to retired pay based on the higher grade, the statute must be construed as contemplating that the determinations will be made on the basis of sufficient actual service in the temporary grade to permit a genuine appraisal of the quality of the service of the member in that grade, for unless active duty is actually performed in the temporary grade under conditions requiring duty comparable to that encountered during a normal tour of duty, there would be no evidence upon which a determination of satisfactory service could be made. 41 Comp. Gen. 110 (1961).

C. Temporary Disability Retired List

Five-year limitation

In the computation of the 5-year period the name of a member was carried on the temporary disability retired list for the purpose of terminating disability retired pay, in accordance with 10 U.S.C. 1210(h), the date the name of the member was placed on the list is for inclusion in the 5-year period, the limitation on the payment of disability retired pay for 5 years being an absolute one that was established in section 402(d) of the Career Compensation Act of 1949 from which section 1210(h) derives, and the rule in 5 Comp. Dec. 362 that when an act is required to be done within a limited period from or after a particular time or event, the day designated should be excluded and the last day included in the computation, is not for application, 10 U.S.C. 1210(h) limiting payment of temporary disability retired pay to a period not in excess of 5 years. 42 Comp. Gen. 52 (1962). Compare 44 Comp. Gen. 249 (1964).

Failure to report for examination

Upon restoration to a member of the retired pay terminated prior to the automatic expiration of the 5 years on the temporary disability retired list, provided by 10 U.S.C. 1210(h), the failure to report for periodic physical examination required by section 1210(a) having been administratively deteremined to be for just cause, the retroactive period for which payment of retired pay is authorized, limited to not more than 1 year, should be computed from

and including the date the member's 5 years on the temporary disability retired list expired, notwithstanding the administrative action directing the reinstatement of the retired pay was taken subsequent to the automatic termination date of the retired pay, such automatic termination date not restricting the basic authority to provide retroactive payments of retired pay; therefore, although the appropriate determination to reinstate the disability retired pay was made after the expiration of the 5-year maximum period of entitlement, the period of retroactivity begins with the last day of the 5-year period. 42 Comp. Gen. 50 (1962).

Erroneous payments

Former enlisted member who continued to receive retired pay after he received orders informing him of his removal from the temporary disability retired list and of his discharge from the Army should have been aware that he was receiving erroneous payments. Conflicting information he received from the Veterans Administration should not have been sufficient to justify his failure to inquire concerning his military pay status. Since he did not question the continued payments and made no effort to obtain a proper determinatnion concerning his entitlements, he is not without fault in the matter of his overpayment and waiver of his resulting debt under 10 U.S.C. § 2774 is not authorized. B-208454, October 4, 1982.

Service credit for retired pay purposes

The restriction in the military pay increase act of May 20, 1958, which changed the formula for computaton of retired pay to prevent the accumulation after May 31, 1958, of further credit for inactive service (10 U.S.C. 1405) should be applied prospectively only so that a Regular Army officer who, after 3 years on the temporary disability retired list from 1957 to 1960, is recalled to active duty and subsequently makes application for retirement on length of service under 10 U.S.C. 3911, is not precluded from having the inactive service on the temporary disability retired list earned through May 31, 1958, included for percentage multiplier purposes in the computation of his retired pay. 42 Comp. Gen. 116 (1962).

D. Retirement Date

Application of uniform retirement date act

When a member is retired for disability without the Secretary concerned having designated an earlier date of retirement under the provisions of 10 U.S.C. 1221, such retirement is subject to the provisions of the Uniform Retirement Date Act, 5 U.S.C. 8301. Those provisions

require that such retirements take effect on the first day of the month following the month in which the retirement would otherwise be effective, but that the rate of retired pay must be computed as of the date retirement would have occurred had that act not been enacted. 43 Comp. Gen. 425 (1963).

Where member is also eligible to retire voluntarily

A member who is eligible to retire July 1, 1968, the effective date of a basic pay increase, either for disability retirement under 10 U.S.C. chapter 61, by virtue of the Uniform Retirement Date Act, or voluntarily for years of service under 10 U.S.C. 6323, is entitled to retired pay computed at the higher rates of active duty pay not on the basis of disability retirement--as the rate applicable to the disability retirement would be the rate in effect as if the retirement had not occurred under the act--but on the basis that the section 6323 retirement, which is neither subject to the Uniform Retirement Date Act nor Formula 4 of 10 U.S.C. 1401, that requires computation of retired pay at the rate in effect the day before retirement, is the "other provision of law" most favorable to the member prescribed by section 1401, and he, therefore, is entitled to retired pay computed at the higher rate of active duty basic pay in effect July 1, 1968. 49 Comp. Gen. 80 (1969).

Delivery of retirement orders is delayed beyond retirement date

Member retired for disability who has notice of such retirement on or before the designated retirement date, is considered retired on the designated date even though delivery of retirement orders is delayed beyond the retirement date. This is so even if he performs additional days of active duty subsequent to retirement date and received payment therefor. Such delay does not in anyway add to member's retirement rights in absence of specific active duty order covering the additional period of service. 56 Comp. Gen. 98 (1976). Compare 49 Comp. Gen. 429 (1970).

E. Computation of Retired Pay

Options based on retirement date

Most favorable formula - election--A procedure to accelerate the establishment of disability retired pay accounts by assuming a retired member, whether placed on a temporary or permanent disability list or transferred from a temporary to a permanent disability list, would elect under 10 U.S.C. 1401, the formula resulting in the greater amount of retired pay without considering taxable income is approved. However, the phrase "as member elects" in formulas 1 and 2 contemplating an

election between a years-of-service computation or a computation based on percentage of disability, a member should be apprised by registered mail, delivery restricted to him, of his right to elect, and the law contemplating only one election, that his failure to object to the election made for him within a specified time would constitute an election, and the requested return receipt placed in the member's military pay record or other appropriate place. 46 Comp. Gen. 820 (1967).

Methods of computation--Member, voluntarily retireable, but who is retired for disability with retired pay computed under 10 U.S.C. 1401, has three retired pay computation methods available, two methods of which, in absence of Secretarial action under 10 U.S.C. 1221, designating earlier retirement date, are subject to Uniform Retirement Date Act, 5 U.S.C. 8301, which requires use of basic pay rates in effect on date member was retire. Third method authorizes computation as though member's retirement was voluntary (not subject to 5 U.S.C. 8301), therebypermitting use of increased basic pay rates, if in effect on date member's name is placed on retired rolls. 56 Comp. Gen. 98 (1976).

Use of hypothetical bases of computation

The provisions of 10 U.S.C. 1401a(f), authorize a retired member to recompute his retired pay on a hypothetical basis at the pay rate and years of service applicable to him at an earlier date when he could have otherwise retired, as though he had retired then. In view of the purpose of that statute and the hypothetical nature of computations under it, a member may use a date when he was on the temporary disability retired list as a hypothetical retirement date in computing his retired pay under that provision. B-188344, October 13, 1977.

Restrictions on pay computation method--A Regular chief warrant officer, W-4, relieved from active duty and retired as an Air Force reservist in the grade of lieutenant colonel under 10 U.S.C. 1201 by reason of permanent physical disability who was also eligible to be retired under 10 U.S.C. 1293, having had more than 20 years' active service, properly is being paid retired pay computed under formula 1 of 10 U.S.C. 1401, the formula "most favorable to him," and his retired pay may not be computed under formula 4, based on his higher Reserve commissioned grade, to establish the "most favorable formula" for him under 10 U.S.C. 1401, formula 4 pertaining exclusively to persons retired as warrant officers, and the member having been retired as a commissioned officer, formulas 1 and 4 may not be combined to provide a greater amount of retired pay, and the computation of the member's retired pay is restricted to formula 1, 10 U.S.C. 1401. 47 Comp. Gen. 206 (1967).

Effect of disability retirement before earliest date authorized for voluntary retirement

A Navy or Marine Corps officer who completes minimum service time requirements for voluntary retirement under 10 U.S.C. 6323(a) in a given month and who is subsequently retired for permanent disability (10 U.S.C. 1201 and 1204) in the same month which date is set by Secretarial action under 10 U.S.C. 1221, may not compute his retired pay under 10 U.S.C. 6323(e) as an "any other provision of law" alternate method of computing retired pay authorized by 10 U.S.C. 1401. Since he was retired for disability before the earliest date authorized by 10 U.S.C. 6323(a) for voluntary retirement, he was not entitled to retired pay computed under 10 U.S.C. 6323(e) at the time he retired. B-164842, June 26, 1978.

Enlisted member retired for disability extraordinary heroism award--Enlisted member of Army who is eligible for voluntary retirement for over 20 years of service, and who would be entitled to 10 percent increase for act of extraordinary heroism in computation of retired pay, is entitled to such increase if he is retired for disability, since retired pay computation statute applicable to disability retirements authorizes computation of retired pay on basis of formula most favorable to member if he is otherwise entitled to compute retired pay under another provision of law. 55 Comp. Gen. 701 (1976). Compare 52 Comp. Gen. 599 (1973); and 47 Comp. Gen. 397 (1968).

Use of constructive retirement date

To avoid "retired pay inversion"--Where a Navy or Marine Corps enlisted member is eligible for retired pay by reason of disability, his pay may be computed on the retainer pay formula pursuant to 10 U.S.C. 6330 (1970), adjusted to reflect any applicable changes authorized by 10 U.S.C. 1401a (1970), if he was qualified for transfer to the Fleet Reserve or Fleet Marine Corps Reserve on a date earlier than his disability retirement the terms, "retired pay" and "retainer pay" being interchangeable for purposes of the computation authorized by 10 U.S.C. 1401a(f) (Supp. V, 1975). 56 Comp. Gen. 740 (1977).

Income tax consequences--Proper pay rate to be used in computing the amount of retired pay which, as compensation for injury or sickness, is not includable in gross income for tax purposes under 26 U.S.C. 104(a)(4) (1970) when a member is retired for disability but is entitled to compute retired pay on a nondisability formula pursuant to 10 U.S.C. 1401a(f) (Supp. V, 1975) is a matter for consideration by the Internal Revenue Service. However, it is the Comptroller General's view that although a disability retired member may compute his retired pay on some other

formula pursuant to 10 U.S.C. 1401a(f), he still receives his retired pay by virtue of his disability retirement. 56 Comp. Gen. 740 (1977).

Recall after retirement for years of service recomputation for disability

A member who when retired for length of service was found to be physically fit for military duty despite residual muscle damage from war wounds and who suffered a myocardial infarction when he voluntarily returned to active duty is entitled to combine the percentages of both disabilities in the recomputation of his retired pay under 10 U.S.C. 1402(b), even though the section only provides for the member's return to his earlier retired pay must be based upon the highest percentage of disability attained while on active duty after retirment and, therefore, the member's disability from war wounds continuing to exist upon his return to retired status is for inclusion in the "highest percentage" determination, notwithstanding the wounds did not render him unfit for active military service. 51 Comp. Gen. 178 (1971). See also 48 Comp. Gen. 204 (1968); and 47 Comp. Gen. 397 (1968).

F. Finality of Disability Determinations - Correction of Records

In general - finality of findings

A naval officer who, due to physical disability, is placed on the permanent retired list as a result of the findings and recommendations of a Physical Evaluation Board and the approval of such findings and recommendations by the Assistant Secretary for Air is legally retired and his status cannot thereafter be changed retrospectively because of a mistake of fact or poor judgment on the part of the retiring authorities. 31 Comp. Gen. 296 (1952). See also 55 Comp. Gen. 961 (1976), concerning finality of correction board action.

Effect of member's placement on temporary disability retired list

The placement of a member's name on the Temporary Disability Retired List (TDRL) is not an act which can be chosen by the member and this status is not final until under the provisions of 10 U.S.C. 1201 the Secretary concerned takes additional action to finalize the affected individual's status as a member of the service. Thus, considering the legislative purpose of 10 U.S.C. 1401a(f) retired pay received by a member because of placement in a TDRL status is not retired pay as contemplated by 10 U.S.C. 1401a(f). B-188344, October 13, 1977.

Finality of discharge

The discharge of a Marine Corps officer under 10 U.S.C. 1203 by direction of the Secretary of the Navy because of a physical disability of less than 20 percent, subsequently determined to have been 30 percent, may not--under the well-established principle in Palen v. United States, 19 Ct. Cl. 389 (1884) that an executed discharge by competent authority may not be revoked even though it is subsequently determined that such discharge should not have been issued--be considered as having been based on a mistake of law or manifest error; therefore, the officer having been discharged is regarded as a civilian and there is no authority for placement of the individual on the temporary disability retired list under 10 U.S.C. 1202. 40 Comp. Gen. 249 (1960).

Substantial new evidence - revocation of orders

The use of the "substantial new evidence" rule which is available to revoke the retirement orders of the members in the absence of fraud, mistake of law, or mathematical miscalculation should be confined to actions taken either contemporaneously or a short period of time following the effective date of a member's retirement, the correction of military records remedy in 10 U.S.C. 1552 being more appropriate to remove an injustice than extending the substantial new evidence rule. Therefore, the revocation of orders releasing members from active duty and placing them on the permanent retired list may not be approved either where knowledge of a member's hospitalization was known prior to the effective date of his retirement orders but action was delayed for 15 months, or where hospitalization information was not furnished until 6 months after the retirement of a member and within 1 month of his death. 46 Comp. Gen. 671 (1967). See also 52 Comp. Gen. 797 (1973); and 40 Comp. Gen. 419 (1961).

Disability determinaton subsequent to release - record correction action

The retired pay of an Air Force officer retired effective April 1, 1963, who by a correction of military records is placed on the temporary disability retired list as of March 31, 1963, with entitlement to disability retired pay effective April 1, 1963, from which list he is removed on March 11, 1968, properly was for computation under section 5(a)(1) and not 5(a)(2) of the Uniformed Services Pay Act of 1963, the officer's entitlement to retired pay on April 1, 1963, not having occurred by force of the Uniform Retirement Date Act, but by the action of the Secretary, and the officer, therefore, was not overpaid retired pay commencing October 1, 1963, computed at 75 percent of the monthly basic pay of his grade fixed by the 1963 pay act.

48 Comp. Gen. 329 (1968). See also 42 Comp. Gen. 317 (1962); and 41 Comp. Gen. 597 (1962).

Tax consequences of record correction action

A correction of military records under 10 U.S.C. 1552 to show that a deceased officer had been been retired for disability and not years of service pursuant to 10 U.S.C. 8911, created entitlement to a refund of the income taxes withheld since section 104(a)(4) of the Internal Revenue Code of 1954, as amended, provides that disability retired pay is not subject to Federal income tax. The claim of the officer's widow for refund of taxes for the years denied by the Internal Revenue Service as barred by the applicable statute of limitations may be allowed as being a claim within the meaning of 10 U.S.C. 1552(c) in view of Clyde A. Ray v. United States, decided January 21, 1972 (197 Ct. Cl. 1), in which the court held the plaintiff's claim was not for the refund of taxes but to effectuate the administrative remedy allowed under 10 U.S.C. 1552, and that shelter of income from taxation is a "pecuniary benefit" flowing from the record correction. 52 Comp. Gen. 420 (1973).

Court order restraining discharge

A certificate purporting to discharge a member of the Naval Reserve on December 5, 1961, which was not delivered because of a court restraining order did not effect the member's discharge, the mere preparation of the instrument of discharge without delivery not terminating the military status of the member who had been placed on the temporary disability retired list on January 1, 1957, and paid retired pay until December 1, 1961, when the payments were suspended; therefore, upon transfer under orders dated January 8, 1964, from the temporary disability retired list to the permanent disability retired list with 40 percent disability, effective November 7, 1961, the discontinuance of retired pay as of November 30, 1961, not having terminated the member's status on the temporary disability retired list and his transfer to the permanent disability retired list being valid, he is entitled to disability retired pay on and after November 7, 1961, based on the disability rating of 40 percent. 43 Comp. Gen. 731 (1964).

II. RETIREMENT FOR YEARS OF SERVICE

A. Retired Grade

Grade at time of retirement

Time in-grade restrictions inapplicable in selecting retirement date--Where an Army or Air Force Officer is

retired in the grade of lieutenant general or general under 10 U.S.C. 3962 or 8962, the time-ingrade restrictions in 10 U.S.C. 3963 or 8963 do not apply in selecting an earlier hypothetical retirement date for retired pay computation pursuant to 10 U.S.C. 1401a(f). B-189029, September 9, 1980.

Mandatory retirement and advancement on active list on same day--Several rear admirals, both upper and lower half, are to be mandatorily retired under provisions of 10 U.S.C. 6394 on July 1, 1975, and as a result of retirement of rear admirals (upper half) on that date, some retiring rear admirals (lower half) would be entitled to basic pay as a rear admiral (upper half) in accordance with 37 U.S.C. 202, if considered to be serving on active list subsequent to the retirement of the rear admirals (upper half). These rear admirals are not entitled to compute retired pay on basis of rear admiral (upper half) since they also are to be mandatorily retired on July 1, 1975, and as a result will not be serving in that grade on the active list on that date. 54 Comp. Gen. 1090 (1975).

Member reduced after becoming eligible for retirement--Under 10 U.S.C. 1401a(f) (Supp. V, 1975) the retainer pay of a former Navy or Marine Corps member who initially became entitled to that pay on or after January 1, 1971, may not be less than the retainer pay to which he would be entitled if transferred to the Fleet Reserve or Fleet Marine Corps Reserve at an earlier date, adjusted to reflect applicable increases in such pay under that section even though transferred to Fleet Reserve or Fleet Marine Corps Reserve at a lower pay grade because of unsatisfactory performance of duty or as result of disciplinary action. 56 Comp. Gen. 740 (1977).

Grade prior to terminal leave or at time of retirement--The retired pay of a member who was Chief Master Sergeant of the Air Force prior to entering terminal leave status, at which time his status reverted to chief master sergeant, and who retired under 10 U.S.C. § 8917 effective November 1, 1981, may be computed based on the special rate for Chief Master Sergeant of the Air Force in effect prior to his commencing terminal leave or on the basis of the grade in which he was serving at the time of his retirement as a chief master sergeant. B-210789, July 6, 1983.

Advancement on retired list to highest grade satisfactorily held

In general--Where an existing statute authorizes computation of the retired pay of a member or former member on the basis of the pay of the grade in which the individual had served satisfactorily and which is higher than the pay of the grade on which he otherwise is entitled to compute his

retired pay, we will authorize payment, or pass to credit in the disbursing officer's accounts, a payment of retired pay computed on the pay of the higher grade, without regard to whether that grade was a temporary or permanent grade, even though the armed service in which the individual held that higher grade is not the service in which he retired. However, such action in any particular case will depend upon an appropriate administrative determination as to satisfactory service where such determination is required by applicable statutes. 49 Comp. Gen. 618 (1970). See also 50 Comp. Gen. 607 (1971); 50 Comp. Gen. 586 (1971); 49

Comp. Gen. 113 (1969); and 48 Comp. Gen. 163 (1968).

Determination of "satisfactory service" in higher grade--While no amount of service is specified in 10 U.S.C. 6151 before the Secretary of the Navy can determine that a member has served satisfactorily in a higher grade or rank under a temporary appointment to be entitled to retired pay based on the higher grade, unless active service is actually performed in the temporary grade under conditions requiring duty comparable to that encountered during a normal tour of active duty, there would be no evidence upon which a determination of satisfactory service could be made; therefore, 10 U.S.C. 6151 must be construed as contemplating that the determinations will be made on the basis of sufficient actual service in the temporary grade to permit a genuine appraisal of the quality of the service of the member in that grade. 41 Comp. Gen. 11 (1961).

Promotions while in missing status do not require 6-month in-grade requirements--Survivor Benefit Plan annuity for the surviving spouse of member who dies while on active duty when otherwise eligible to retire, is computed on grade and years of service as though member retired on the day he died. Computation includes limitations on grade for retirement purposes such as the 6-month in grade requirement. However, where a member who was missing in action is determined to have been killed in action, the 6-month in grade requirement does not apply since promotions received while in a missing status are "fully effective for all purposes," under 37 U.S.C. 552(a). B-195625, February 28, 1980.

Retired pay for extraordinary heroism award - effect of advancement to officer grade--A master sergeant who when retired under 10 U.S.C. 3914 is awarded a 10 percent increase in retired pay by reason of extraordinary heroism performed in the line of duty, upon advancement to the officer rank of captain on the retired list pursuant to 10 U.S.C. 3964, is not eligible to continue receiving the 10 percent additional retired pay authorized only for enlisted members, the entitlement to the increase not attaching by reason of his retirement, and 10 U.S.C. 3992, which prescribes the formula for the recomputation of retired pay for members advanced on the retired list, not providing a 10 percent increase in retired pay for extrarodinary heroism, the member's recomputed retired pay may not be increased from the date of his advancement on the retired list to the rank of captain by 10 percent. 47 Comp. Gen. 397 (1968).

Advancement on retired list produces reduction of retired pay--When a member receives a lesser rate of retired pay in the recomputation of his retired pay, in accordance with

10 U.S.C. 3992, upon advancement to warrant officer, W-1, on the retired list after completion of 30 years of service, pursuant to 10 U.S.C. 3964, than that established under 10 U.S.C. 3991 when originally retired under the authority of 10 U.S.C. 3914 and 3961 in the grade of sergeant E-9, a higher enlisted pay grade prescribed by the act of May 20, 1958, than that of warrant officer, W-1, the member should have been consulted before advanced on the retired list, section 3964 not imposing an absolute requirement for advancement, and neither the most favorable payment formula authorized by section 3991, nor any other provision of law saving to the member the right to continue receiving retired pay under his original entitlement; therefore, the action of advancement may be rescinded on the basis of a statement by the member that it was contrary to his wishes. 44 Comp. Gen. 510 (1965).

Correction of records to show retirement subsequent advancement to officer grade--Upon correction of military records, to show retirement as a private E-1 with over 20 years of service, in lieu of discharge from the Regular Army, and advancement on the retired list to first lieutenant, the retired pay of the member for the period from date of initial retirement to date of record correction is not subject to recomputation under 10 U.S.C. 3992 at the rate "applicable on date of retirement," but at the rates prescribed in section 511 of the Career Compensation Act of 1949. 49 Comp. Gen. 440 (1970). See also 41 Comp. Gen. 399 (1961), concerning effect of court-martial sentence.

Correction of records causing retired pay to be decreased--In 1974 Army Board for Correction of Military Records changed retired officer's records in manner which required the Army Finance and Accounting Center to recompute his retired pay at lower rate retroactively reducing his retired pay entitlements and placing him in debt for overpayments received prior to 1974 board action. His 1978 application for waiver of that debt cannot be considered since it was not timely filed within 3-year period prescribed by waiver law, 10 U.S.C. 2774(b). B-197511, April 7, 1980.

B. Service Credits - Years of Creditable Active Service

Lost time

Time lost due to misconduct--Time lost by an enlisted member by reason of sickness due to misconduct (SKMC time) which was required to be made good and which is not creditable for basic pay purposes, may not be regarded as service "while on the active list or on active duty" under section 511 of the Career Compensation Act of 1949,

for credit in determining the percentage multiple factor for computation of retainer and retired pay under method (b) of section 511 of the act. 39 Comp. Gen. 844 (1960).

Excused absence without leave - erroneous retirement due to miscalculation of active service--An Army enlisted member who, incident to revocation of retirement orders due to a miscalculation of active service for retirement, had a year of retirement excused as an unavoidable absence when returned to active duty to qualify for retirement may not have the excused period regarded as "absence without" or "over" leave under 37 U.S.C. 503(a), which are terms describing a situation in which the absent member is obligated to return to active duty but is prevented by a circumstance beyond his control or control of the Government and the member's ineligibility for retirement does not change the fact that he was not obligated to perform any active duty so that the excuse of absence could make the absence "active duty," and, therefore, the legality of crediting the excused period as active duty for retirement qualification is too doubtful to permit payment of retired pay. 44 Comp. Gen. 667 (1965). See also 44 Comp. Gen. 258 (1964), concerning de facto retired status resulting from miscalculation of active service and retention of retired pay.

Types of service creditable

Underage or minority enlistments--A minor's legal capacity to enter into a contract of enlistment must be determined on the basis of the law in effect at the time of his enlistment or attempted enlistment in the uniformed services, and a military status once validly attained is not affected by a change in the minimum age for enlistment; accordingly, if an enlistment contract was void due to enlistment while under the minimum age and that age was lowered or abolished before the member reached such age, the time served after the member reached the new minimum age or from the effective date of the statute effecting the change, if the member was over the new age on such date, may be counted for retirement purposes, provided that no action was taken by the Government to avoid the enlistment contract if entered into without the written consent of the member's parent or guardian. 40 Comp. Gen. 531 (1961). See also 43 Comp. Gen. 516 (1964); 41 Comp. Gen. 238 (1961); and 38 Comp. Gen. 110 (1958).

Active service as cadet or midshipman--Active service as a "non-Naval Accademy" midshipman in the Regular Navy, by an officer retired under 10 U.S.C. 6323, may be credited to establish the percentage multiple for computing the officer's retired pay. Section 1405 prescribing but not defining "years of service," the definitions in 10 U.S.C.

101(22) and (24) are for application, the paragraphs containing no restriction as to status in which active service must have been performed in order to be creditable. 45 Comp. Gen. 363 (1965). Compare 50 Comp. Gen. 308 (1970), concerning inactive service.

Section 971 of title 10, U.S. Code, provides that cadet or midshipman service at a service academy may not be included in the computation of length of service for any purpose of an officer. 10 U.S.C. 971. However, this does not preclude the crediting of such service for the purposes of determining the eligibility of an enlisted member to retire under 10 U.S.C. 8914. Service as a cadet or midshipman at one of the academies is service in the Navy, Army or Air Force since the academies are integral parts of those services. B-195488, April 3, 1980.

Service as cadet--Court judgment on merits is res judicata--The doctrine of res judicata is that a final court judgment on the merits of a claim constitutes an absolute bar to a subsequent action by the claimant on the same issues. The Comptroller General adheres to this doctrine and will therefore not consider the claim of a Coast Guard officer for an additional 4 years' credit in the computation of his retired pay based on his 4 years spent as an academy cadet, since he previously asserted this same claim before the Federal courts and received an adverse final judgment on the merits. B-215253, October 30, 1984.

Active service as participant in uniformed services University of Health Sciences--A member participating in the program at the Uniformed Services University of Health Sciences whose enrollment is terminated prior to graduation but who continues on active duty in another capacity is entitled to credit for that service in determining years of service for retired pay multiplier under 10 U.S.C. § 1405. B-195855, April 1, 1980.

Active duty after termination of military status--The active military duty performed in good faith in a de facto status that is not prohibited by law is creditable service for basic and retired pay purposes and for determining retirement eligibility in all cases similar to that of an Air Force officer who, having been inadvertently retained on active duty for approximately 6 months after he should have been released from the temporary appointment he held when the underlying Reserve appointment on which his temporary appointment was based was terminated, is considered to have rendered service not prohibited by law in good faith and in a de facto status. 44 Comp. Gen. 277 (1964). Compare 44 Comp. Gen. 83 (1964).

Inactive Reserve service--Navy officer retired under 10 U.S.C. 6323 may receive credit in the multiplier used in computing his retired pay for the full 57 inactive service points he earned in a year in which he also served on active duty. While on active duty he was in an active status, not an inactive status, and regulations governing the maximum number of points which may be earned require prorating of maximum allowable only on the basis of excluding periods of inactive status. 60 Comp. Gen. 537 (1981).

Fractional year

Less than six months - day of retirement-- An officer retired effective September 1 1963, with a combined total of 21 years, 5 months and 20 days creditable service under 10 U.S.C. 1405, in the computation of his retired pay, may not have the date his active service was terminated, August 31, 1963 included as a day of creditable service to increase his total service to 21 years and 6 months, thereby counting his service as 22 years in determining the applicable percentage multiple. 45 Comp. Gen. 69 (1965).

Exception to prohibition of "rounding up" of 6 months service--Section 772 of the 1982 Department of Defense Appropriations Act restricted funds appropriated by that Act so that 6 months or more of service would no longer be "rounded up" to a full year in computing retired pay. An exception was provided for those "applying for retirement" prior to January 1, 1982. An Air Force officer did not have enough officer service to retire as an officer. However, he had previous enlisted service and, under a procedure prescribed by Air Force regulations, he applied for separation as an officer, reenlistment, and then retirement as an enlisted member in April 1982. His filing of forms under that procedure on September 15, 1981, constituted an application for retirement within the meaning of the exception in section 772 of the 1982 act. B-212034, November 17, 1983.

Discrepancy in records--Discrepancies in a Navy officer's service records which make it unclear as to whether he is entitled to retirement credit for 11 days' additional active service is a matter for consideraton by the Chief of Naval Personnel or the Board for the Correction of Naval Records. 60 Comp. Gen. 537 (1981).

More than 6 months - constructive service--The constructive service credit for minority and short term enlistments prescribed by 10 U.S.C. 6330(d) may be counted for percentage multiple purposes in computing retired pay under 10 U.S.C. 6151(c) for members advanced on the retired list under 10 U.S.C. 6151(a) to the highest temporary officer grade satisfactorily held. 43 Comp. Gen. 826 (1964).

Awaiting call to active duty - constructive service--Member of the Commissioned Officer Corps of the Public Health Service (PHS) was appointed a Reserve officer of the PHS in 1957 and recruited by the PHS for civilian employment with the International Cooperation Administration in 1958 in contemplation of her eventual call to active duty for a long term career in the PHS Commissioned Corps. The call to active duty was delayed until 1964. In the particular circumstances presented, the last 5 years of employment prior to 1964 may be treated as "active service with the

PHS" for establishing retirement eligibility under 42 U.S.C. 212. B-191501, March 8, 1979, modified. B-191501, February 19, 1980.

C. Retirement Date

Uniform retirement date act

Voluntary retirement - in general--Since voluntary retirements are not subject to the limitations of the Uniform Retirement Date Act, 5 U.S.C. 8301, retired pay entitlements thereunder are based on the monthly pay rates in effect on the first day that a member is on the retired roll. 56 Comp. Gen. 98 (1976).

Since the Uniform Retirement Date Act, 5 U.S.C. 8301, generally provides for retirements to become effective on the first day of a month, language contained in certain provisions of law authorizing the voluntary retirement of Navy, Marine Corps, and Public Health Service officials also providing for retirement on the first day of a month may be regarded as a surplusage insofar as retired pay computations under 10 U.S.C. 1401a(f) in the same manner as other service members, i.e., on the basis of retirement eligibility on the date immediately preceding an active duty pay rate change. 59 Comp. Gen. 691 (1980).

Voluntary vs. mandatory retirement--Retired members of the Navy who if they had been involuntarily retired on July 1, 1968, would have been subject to the Uniform Retirement Date Act, but who were retired voluntarily effective that date are entitled to have their retired pay computed at the higher rates of active duty basic pay effective July 1, 1968. 48 Comp. Gen. 239 (1968). See also 44 Comp. Gen. 584 (1965); 45 Comp. Gen. 233 (1965). Compare 54 Comp. Gen. 941 (1975).

Member eligible for voluntary retirement but does not apply for it--The fact that a member had not requested voluntary retirement based on years of service when qualifying for retirement prior to July 1, 1968, does not defeat his right to retired pay computed under any "other provision of law" most favorable to him as prescribed by 10 U.S.C. 1401 when he retires on July 1, 1968. The member, therefore, is entitled to retired pay computed at the higher rate of pay made effective July 1, 1968. 49 Comp. Gen. 80 (1969).

Delivery of Orders

Late delivery--To permit payment of active duty pay and allowances to members of the uniformed services after the first of the month in which their retirement is effective until the retirement orders are actually delivered to the member, it must be shown that the member did not receive notice of his retirement orders until they were delivered; however, in cases where advance notice of retirement orders was given but such orders were not delivered and an attempt was made to revoke them--after they became effective--and replace them with orders which direct retirement at a later date, the member would have had no notice or knowledge of the lack of legal authority and his active service even after notice would be under color of authority for application of the de facto rule to permit repayment of pay and allowances collected for such period. 39 Comp. Gen. 312 (1959). Compare 56 Comp. Gen. 98 (1976); and 49 Comp. Gen. 429 (1970).

More than one application for retirement--A Marine Corps enlisted man whose third application for transfer to the

Fleet Marine Corps Reserve was approved October 27, 1965, authorizing transfer effective November 30, 1965, after the first authorization was revoked, and the second order directing reinstatement of the transfer effective August 31, 1965, failed because it was never received by the commanding officer or the member must be regarded as having been effectively transferred to the Fleet Marine Corps Reserve on November 30, 1965, and, therefore, the higher rates of pay prescribed in the pay increase act effective after September 1, 1965, are for use in the computation of the member's retainer pay rather than the lower rates which were in effect prior to September 1, 1965. 45 Comp. Gen. 548 (1966).

D. Retired Pay Computation

Methods of computation

Generally--Under 10 U.S.C. 1401a(e) (1970), a member's retired pay may be computed by two methods: (1) based on the active duty pay rate in effect at the time of his retirement, and (2) based on the immediately prior active duty pay rate, plus any appropriate Consumer Price Index increases which became effective subsequent to the active duty pay rate and before the actual date of the member's retirement; whichever method produces the greater amount of retired pay under the formulas applicable to the statute authorizing the member's retirement. 53 Comp. Gen. 698 and 701 (1974); B-179191, July 15, 1975.

Correction of retired pay inversion - consumer price index changes - "Tower Amendment"

Generally--Military retired pay is adjusted to reflect changes in the Consumer Price Index rather than changes in active duty pay rates, and as a result a "retired pay inversion" problem arose: service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10, United States Code, was adopted in 1975 to alleviate that problem, and it authorizes an alternative method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement. 56 Comp. Gen. 740 (1977); 59 Comp. Gen. 691 (1980); B-204120, March 25, 1982. See also 62 Comp. Gen. 406 (1983), concerning a retired officer's resignation and subsequent reinstatement.

Retirement date - general rule--In computing retired pay under 10 U.S.C. 1401a(f), the date immediately preceding an active duty basic pay rate change should generally be used as the earlier date of voluntary retirement eligibility, since this will normally result in a computation most favorable to the service member concerned. Under the

Uniform Retirement Date Act, 5 U.S.C. 8301, the hypothetical earlier retirement would have become effective on the first day of the following month, but retired pay could be computed on the basis of retirement eligibility on the date immediately preceding the active duty pay rate change. 59 Comp. Gen. 691 (1980).

Retirement date - specific cases--An Army officer promoted to the grade of lieutenant general on September 1, 1975, and retired April 1, 1977, may, under 10 U.S.C. 1401a(f), have his retired pay computed as if he had retired October 1, 1975; but if the active duty basic pay increase effective that day would adversely affect his retired pay, it may be computed on the premise that he retired during September as a lieutenant general. Under 5 U.S.C. 8301, October 1, 1975, would be the retirement date, but retired pay would be computed on the basis of retirement during September 1975. B-189029, November 2, 1977.

A Marine Corps colonel began serving in the position of Assistant Judge Advocate General of the Navy on August 1, 1978. Under 10 U.S.C. 5149(c) he thereby became eligible for immediate voluntary retirement in the higher commissioned grade of brigadier general, and he was ultimately retired in that grade in 1981. His retired pay is payable in accordance with the computation most favorable to him under 10 U.S.C. 1401a(f) based on his eligibility for retirement a a brigadier general on any date after August 1, 1978, up to the date he actually retired in that grade in 1981. B-204120, March 25, 1982.

Demotions--Under 10 U.S.C. 1401a(f) the retainer pay of a former Navy or Marine Corps member who initially became entitled to that pay on or after January 1, 1971, may not be less than the retainer pay to which he would be entitled if tranferred to the Fleet Reserve or FleetMarine Corps Reserve at an earlier date, adjusted to reflect applicable Consumer Price Index increases in such pay under that section even though transferred to Fleet Reserve of because of unsatisfactory performance of duty or as result of disciplinary action. 56 Comp. Gen. 740 (1977).

Retention beyond mandatory retirement date

Officers whose monthly basic pay increased while they were held on active duty beyond mandatory retirement for physical evaluation purposes are entitled to the computation of disability retired pay at the higher basic pay in effect on dates of retirement and to an adjustment for the underpayments that resulted because retired pay had been computed at the lower rates in effect on their mandatory retirement dates, and they also may have credit for the additional

active duty for longevity purposes. 53 Comp. Gen. 135 (1973). See also 53 Comp. Gen. 610 (1974); and 53 Comp. Gen. 94 (1973).

Retention of good conduct increases for Coast Guard members

The provision authorizing a 10 percent "good conduct" increase added to retired pay of enlisted members of the Coast Guard who retire from the Coast Guard after 20 years' service was repealed by Public Law 88-114 except that a saving provision retained the 10 percent increase for those on active duty with the Coast Guard on September 6, 1963. The saving provision is construed, in view of its purpose, to include members who were in another branch of the armed services on September 6, 1963, or who were not in any armed service on that date, as long as they were on active duty with the Coast Guard prior to September 6, 1963, or who were not in any armed service on that date, as long as they were on active duty with the Coast Guard prior to September 6, 1963, subsequently obtained elgibility for retirement from the Coast Guard as enlisted members and retired with the requisite good conduct marks. B-193199, April 11, 1979.

III. RETIREMENT FOR NONREGULAR SERVICE

A. Eligibility

Qualifying service

Last 8 years of qualifying service not in Reserve component--The notice to a reservist under 10 U.S.C. 1331(d) of his eligibility to retire pursuant to chapter 67 of title 10, U.S. Code, upon discovery that although the member meets the 20 years' service requirement of1331(a)(2), he does not satisfy section 1331(a)(3) to the effect the last 8 years of qualifying service must have been as a member of a Reserve component or the war service requirement of section 1331(c), and that he is excluded from the chapter by section 1331(a)(4) because he is entitled to retired pay under "another provision of law," serves to validate only the service eligibility requirements of clauses (2) and (3) of 10 U.S.C. 1331(a) since for the purpose of 10 U.S.C. 1406, limiting the revocation of retired pay because of error in determining years of service under section 1331(a)(2), both clauses must be read together, whereas section 1406 does not affect the prohibitions in sections 1331(a)(4) and 1331(c). 51 Comp. Gen. 91 (1971).

Service in Regular component after completion of qualifying 20 years' service--For members of the Regular components who have 20 years of satisfactory Federal service as

defined in 10 U.S.C. 1332 and would otherwise be qualified for retirement for physical disability except that their disability was less than 30 percent, to be eligible under 10 U.S.C. 1209 for transfer to the inactive status list and to receive retired pay computed under Chapter 71 of title 10 of the U.S. Code upon becoming 60 years of age, such members must have met all the requirements, except age, imposed under the voluntary retirement provisions in Chapter 67, including completion of 20 years of satisfactory service as defined in 10 U.S.C. 1332, the last 8 years of which were in a Reserve component, as required under 10 U.S.C. 1331; however, Regular Army service which follows completion of all of the service requirements in 10 U.S.C. 1331 would not deprive a Regular member of eligibility for Chapter 71 retirement benefits. 39 Comp. Gen. 801 (1960).

Not qualified for retirement under other law

Member eligible for disability retirement--An officer who prior to reaching 60 years of age and qualifying for retirement under 10 U.S.C. 1331 was transferred to the Retired Reserve with over 30 years of service under 10 U.S.C. 1333 and continued on active duty under a temporary appointment in the same grade until meeting the age requirement of section 1331, when he was retired for physical disability pursuant to sections 1201 and 1372, is not entitled to increased retired pay under Formula 3, 10 U.S.C. 1401, based on section 1333 service credits, notwithstanding the officer was credited with the active service he performed after transfer to the Retired Reserve in accordance with section 1208(b), section 1331(a)(4) imposing the additional requirement to age and service of not being entitled to retired pay "under any other provision of law," and the officer retired for physical disability is restricted to the computation of his retired pay to Formula 1 or 2 of section 1401, based on percentage of disability. 44 Comp. Gen. 124 (1964).

Member retired for years of service--In view of the evidence of a congressional intent that the retirement benefits in 10 U.S.C. 1331-1337 are applicable only to Reserve members and former members not covered by any other retirement law, a Retired Regular enlisted member of the Army in receipt of retired pay under 10 U.S.C. 3914, on the basis of at least 20 years of service but less than 30 years of service, may not upon his own application for discharge from the retired list qualify for retirement under 10 U.S.C. 1331, even though he may meet the age and service requirements of the statute and that by reason of the discharge from the retired list, upon his own application, he thereby loses his right to retired pay incident to military service. 41 Comp. Gen. 458 (1962). See also B-201424, March 19, 1982.

B. Retired Grade

Highest grade held

An Air Force master sergeant retired effective October 1, 1966, pursuant to 10 U.S.C. 1331 and 1401, in the grade of major, the equivalent grade in the Air Force to that of lieutenant commander, the highest grade he satisfactorily held in the Naval Reserve where he served for 20 years, and who then on the basis of retirement under section 1331 is placed on the Air Force Reserve retired list as a major effective August 9, 1967, is entitled to have his retired pay computed on the basis of his lietuenant commander grade provided the Secretary of the Navy or his designee determines the officer satisfactorily held that grade. The member having qualified for retired pay under 10 U.S.C. 1331 became entitled to retired pay computed under formula 3, section 1401, which prescribes the computation of retired pay on the basis of the highest grade satisfactorily held "at any time in the Armed Forces." 48 Comp. Gen. 532 (1969). See also 30 Comp. Gen. 262 (1951).

Record correction - service at lower grade provides member more retired pay

The correction under 10 U.S.C. 1552 of the records of a member of the Army of the United States who had attained the grade of chief warrant officer, W-4, prior to placement on the retired list in the grade of second lieutenant pursuant to formula 3 of 10 U.S.C. 1401, to place him on the retired list in the grade of chief warrant officer, W-4, under 10 U.S.C. 1331 in order to provide him with the greatest amount of retired pay, governs the rights of the member, even though there is lack of evidence of duty performance by the member in the chief warrant officer, W-4, grade. Therefore, on the basis that the record correction amounts to a recision of the earlier finding of satisfactory service in the grade of second lieutenant and the substitution of the finding that highest grade held satisfactorily by the member was chief warrant officer, W-4, the member is entitled to an adjustment payment in retired pay. 46 Comp. Gen. 437.

C. Service Credits and Retired Pay Computation

Yearly point system

The omission of the language "other than active Federal service" for Reserve membership credit in 10 U.S. Code 1332(a)(2)(C), when title 10 of the United States Code was enacted into positive law, represents a substantive change of phraseology from the derivative statute, and, in view of the clear intent as shown in the legislative history to adopt the views of the Judge Advocate General of the Army

with respect to the creditable points for Reserve membership, it will no longer be necessary to make a deduction for periods of active Federal service during the year in determining entitlement to military retired pay for non-Regular service. 36 Comp. Gen. 498 (1957). Compare 34 Comp. Gen. 520 (1955).

Necessity of Secretary's approval

Air Force Reserve major generals who have not been eliminated for years of service under 10 U.S.C. 8852, prior to reaching age 60 may receive retirement point credit for service performed after they have attained retirement eligibility under Chapter 67 of title 10, United States Code, only if their retention in active status thereafter is approved by the Secretary under 10 U.S.C. 676. 58 Comp. Gen. 674 (1979).

Multiple drills in one day

Members of Reserve components of the uniformed services who are entitled to pay and allowances for two paid drills or equivalent periods of instruction performed in one calendar day of at least 8 hours' duration, are entitled for retirement purposes to credit of one point for each drill under 10 U.S.C. 1332 and 1333 which authorize a one point credit for each drill and 1 day credit for each point. 37 Comp. Gen. 618 (1958).

Hospitalization during 2-week training period

Although a reservist who, during a 2-week active duty training period, is injured and hospitalized may receive retirement point credit under 10 U.S.C. 1332 for each day of active duty covered by the orders, even though he was hospitalizad for a portion of the period, retirement point credit may not be given for a period of hospitalization subsequent to the duty period prescribed in the orders. 37 Comp. Gen. 403 (1957).

Service as cadet or midshipman

In the computation of retired pay authorized in 10 U.S.C. 1331-1337 for non-Regular service, the fulltime nonacademy service of a midshipman appointed under section 3 of the act of August 13, 1946, 60 Stat. 1058, may be used to increase the multiplier factor in formula 3, 10 U.S.C. 1401--2-1/2 percent of years of service credited under section 1333-absent a restriction as to the status in which active service must have been performed in order to be creditable service. However, in establishing the multiplier factor, credit for inactive midshipman service in a Naval Reserve prior to July 1, 1949, may only be included

pursuant to that part of clause (4), section 1333, that does not refer to service covered by section 1332(a)(1), the inactive service constituting "service (other than active service) in a Reserve component of an armed force" only within the meaning of that phrase in clause (4), section 1333. 47 Comp. Gen. 221 (1967). See also 54 Comp. Gen. 603 (1975); and 50 Comp. Gen. 308 (1970).

Dual benefits for the same service

A Reserve officer with more than 20 years of active service in the National Guard and the Army Reserve discharged to accept a commission with the Public Health Service (PHS), who when 60 years of age was granted military retired pay concurrently with active duty pay and allowances from the PHS, upon mandatory retirement from the PHS under 42 U.S.C. 212(a)(1) was not entitled to credit for his Reserve duty in the computation of his PHS retired pay in the absence of a statute authorizing dual benefits for the same service. Since the officer is entitled to a greater benefit if his Reserve duty is used to increase his PHS retired pay, he is considered to have surrendered his Army Reserve retired status and he is indebted for the Army retired pay received concurrently with the PHS retired pay, notwithstanding the payments were made in error and received in good faith. 51 Comp. Gen. 298 (1971). See also 47 Comp. Gen. 7 (1968).

Retention beyond age 60

The retention beyond age 60 of an Air Force sergeant to permit him to complete 26 years of military service for pay purposes in recognition of "long and distinguished military service" would not satisfy the requirement that the Secretary concerned order a retention in service for the purpose of acquiring additional service credits only if the services are a military requirement; and, the sergeant retired under 10 U.S.C. 1331 and 1401, and authorized retired pay on the basis of "with over 22 but less than 26 years" of non-Regular service, therefore, is not eligible for retired pay computed at the pay rate of over 26 years of military service. 50 Comp. Gen 428 (1970).

Member retained through administrative oversight

The effect of the mandatory elimination provisions in the Reserve Officer Personnel Act of 1954, which requires that each Reserve officer upon reaching the age or length of service stipulated shall be transferred to the Retired Reserve if he is qualified and applies therefor, or be discharged from the Reserve appointment if he is not qualified or does not apply therefor, is to preclude service credits for retired pay after the date the officer is

required to be transferred or discharged; hence, service performed by a Reserve officer who is retained, through administrative oversight, in an active Reserve status beyond the time he should have been removed for age for length of service, may not be credited in determining the member's retirement eligibility under 10 U.S.C. 1332; however, if the officer is retained under a specific statutory provision exempting officers from the mandatory elimination provisions of the 1954 act, credit is not precluded. 41 Comp. Gen. 375 (1961).

Member retired through administrative oversight

When erroneous notice of completed service is binding--The written communication required by 10 U.S.C. 1331(d) to a member of Reserve component of armed force advising that he has completed the years of service requirement for retired pay at age 60, need not be in any specific format. If the notice is from an authorized official of his military service and advises him that he has completed the service requirements for such retired pay at age 60, the notice satisfies the requirement of 10 U.S.C. 1331(d) so as to invoke 10 U.S.C. 1406, thereby preventing denial of retired pay due to administrative denial of retired pay due to administrative error. The exceptions to 10 U.S.C. 1406 preventing denial of retired pay entitlement due to erroneous written notice of entitlement, are limited to cases of direct fraud or misrepresentation on the part of the person to whom the notice is sent. 58 Comp. Gen. 390 (1979).

When erroneous notice is ineffective--At various times between 1940 and 1959 an individual served on full-time active duty, and participated satisfactorily in part-time Reserve programs, with both the Army and the Navy. However, he completed a total of only 7 of the 20 years' creditable service required to establish entitlement to Reserve retired pay at age 60. Years later in 1979 and Army personnel officer informally and erroneoulsy advised the individual that he would be eligible for retired pay when he reach age 60. The individual is not entitled to retired pay on the basis of the erroneous advice, notwithstanding that by statute the Armed Forces are required to notify reservists when they have completed 20 years' creditable service and that such notification is irrevocable, since the informal erroneous advice plainly did not constitute an official statutory notice of completed service. B-211778, December 5, 1983; 63 Comp. Gen._____.

De facto service

A lieutenant colonel of the Air Force who upon completion of 20 years of service and placement on the Reserve retired

list as eligible for retired pay under 10 U.S.C. 1331, except for attainment of 60 years of age, alleges and proves his correct date of birth as February 3, 1903, instead of 1907 as established in his records, is entitled on the basis of reaching the age of 60 on February 3, 1963, to receive retired pay beginning March 1, 1963, computed on the basic pay of his grade, including credit for all periods during which he held membership in a Reserve component, multiplied by the years of authorized active Reserve service as provided in section 1331, but excluding unauthorized service, regarded as de facto service, in the Ready Reserve, an assignment the officer received on the basis of his erroneous date of birth. AFR 45-5, dated April 21, 1955, prescribing 52 years of age, in the absence of a waiver, as the maximum age-in-grade for appointment of a lieutenant colonel under the Armed Forces Reserve Act of 1952; however, the officer may retain the pay benefits received in the de facto status. 44 Comp. Gen. 284 (1964).

Regular Army Reserve service

Service prior to July 1, 1949, in the Regular Army Reserve, which is not one of the organizations included nor excluded for creditable service purposes in subsections (c) or (e) of section 306 of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, as amended, for qualifying members of the uniformed services for retired pay under 10 U.S.C. 1331-1337, may be credited as Reserve service for eligibility for retirement pay under title III of the 1948 act in view of a congressional intent which indicates that the phrase "each year of service as a member of a Reserve component prior to July 1, 1949," in section 302(c) was not intended to be limited or restricted to the organizations listed in subsection 306(c). 44 Comp. Gen. 61 (1964).

Retention on active duty after transfer to Retired Reserve

A reservist who was not eligible for retired pay for non-Regular service because he had not attained the age of 60 was transferred to the Retired Reserve but retained on active duty under 10 U.S.C. 672(d) and 265 (1970). Upon his qualification for retired pay when he became 60, he was entitled to credit for the active service he performed after his transfer to the Retired Reserve, in the computation of his retired pay. 10 U.S.C. 1333(1) (1970). B-190830, February 13, 1978.

D. Receipt of Severance Pay and Subsequent Retirement for Non-Regular Service

Where certain provisions of law governing separation from the active list authorize severance pay, and require refund of such pay upon retirement, but where other provisions such as 10 U.S.C. 3786 and 8786 do not state such requirement, in the absence of such a limiting statutory provision or a clear indication of congressional intent to the contrary refund of severance pay is not required as a condition precedent to the receipt of retired pay under 10 U.S.C. 1331. 53 Comp. Gen. 921 (1974).

E. Date of Accrual for Retired Pay

Where a member who is otherwise entitled to retired pay under 10 U.S.C. 1331, but who does not file application for such pay until well after meeting age requirement such pay accrues from date of qualification or on first day of any subsequent month stipulated in application for such pay to begin, without regard to date such application is filed. 53 Comp. Gen. 921 (1974). See also 48 Comp. Gen. 652 (1969).

Claims accrue when service makes determination of required service--A service member filed an application for non-regular retired pay under 10 U.S.C. § 1331 almost 6 years after meeting the age requirement, but retired pay was not granted because records did not show he had sufficient years of service. Upon his submission of additional proof, it was determined that he had sufficient service. Although more than 6 years elapsed between his meeting the age requirement and the determination that he was eligible for retired pay none of his retroactive retired pay is barred by 31 U.S.C. § 71a, in view of Garcia v. United States, 617 F.2d 218 (Ct. Cl. 1980), since such claims will now be deemed to accrue only after the service's determination that the claiment has the required service. 62 Comp. Gen. 227 (1983).

IV. MILITARY SERVICE PERFORMED SUBSEQUENT TO RETIREMENT

A. General Rule

A fully executed retirement order, if regular and valid, is final and can be reopened only upon a showing of fraud, mistake of law, mathematical miscalculation, or substantial new evidence or error. Hence, a member generally may not have original retirement orders superseded by new "retirement" orders based on service performed subsequent to original retirement. Rather, if members are recalled to active duty after retirement they simply become eligible to elect recomputation of retired pay under the appropriate formula prescribed by 10 U.S.C. 1402, unless they acquire a new retired pay status specifically authorized by provision of law. 48 Comp. Gen. 99, 398 (1968); B-185138, December 6, 1976; B-204055, May 17, 1982.

B. Retired Grade

Active duty in higher grade after retirement

An Army sergeant retired in grade E-6 upon his own application under 10 U.S.C. 3914 who under orders recalling him to active duty in grade E-7, with his consent, serves only 7 months, 6 days of a 2-year period because of hardship is entitled to the recomputation of his retired pay on the basis of the higher grade, for had he been retired at grade E-7 rather than released from active duty, he would have been eligible under 10 U.S.C. 3961 to retire in that grade, and 10 U.S.C. 1402(a) prescribing the computation of retired pay on the monthly basic pay of the grade in which a member would be eligible to retire if retiring upon release from active duty performed subsequent to retirement, the sergeant's retired pay properly may be recomputed effective the day following release from active duty on the monthly basic pay of grade E-7. 47 Comp. Gen. 289 (1967). Compare 43 Comp. Gen. 442 (1963); B-204055, May 17, 1982.

Advancement on retired list - reduction in pay effect

The retired pay of enlisted members who serve on active duty after retirement under 10 U.S.C. 3914, which brings their retired pay recomputation within the purview of 10 U.S.C. 1402(a), and who then are advanced on the retired list pursuant to 10 U.S.C. 3964, is not required to be recomputed under 10 U.S.C. 3992 if a reduction of retired pay would result, unless the member consents to the advancement. Therefore, since a sergeant first class E-7 who is advanced on the retired list to the grade of warrant officer WO-1 would benefit by having his retired pay recomputed under section 1402(a) and not section 3992, his advancement may be rescinded on the basis the advancement was

contrary to his wishes. However, where it would be to the advantage of a member, also re-retired as a sergeant first class E-7, but advanced to the grade of major, to accept the advancement, the recomputation of his retired pay should be in accordance with section 3992. 51 Comp. Gen. 137 (1971).

C. Recomputation

Consumer price index changes

On active duty for 2 years after retirement--In recomputing retired pay under 10 U.S.C. 1401a and 1402(a) for a member who served on active duty for 2 years subsequent to retirement, the Consumer Price Index changes should be reflected by increasing retired pay by only the percent that the applicable base index exceeds the index for the calendar month immediately preceding the month in which the active duty pay rate upon which retired pay is based became effective. 50 Comp. Gen. 232 (1970). Compare 44 Comp. Gen. 74 (1964), concerning qualifying service.

Disabled while on active duty after retirement--The retired pay status of an Army sergeant disabled during a period of service which commenced May 25, 1966, subsequent to retirement on July 1, 1962, under 10 U.S.C. 3914 for length of service, who upon reversion to inactive status on the retired list effective March 15, 1968, elected retired pay pursuant to 10 U.S.C. 1402(d), based on 60 percent disability computed at rates prescribed in 37 U.S.C. 203(a), as amended by Public Law 90-207 (10 U.S.C. 1401a) to provide a cost-of-living increase effective October 1, 1967, comes within the purview of 10 U.S.C. 1401a(c) entitling the member to an increase in retired pay to reflect the increase of 3.9 percent in the Consumer Price Index effective April 1, 1968, adjusted pursuant to subsectionn (c) to the nearest one-tenth of 1 percent of the increase in the Consumer Price Index for January 1968 that exceeded the September 1967 Index, or a 1.3 percent increase. 48 Comp. Gen. 204 (1968). See also 51 Comp. Gen. 178 (1971).

Extraordinary heroism award

An enlisted member of the uniformed services who subsequent to retirement under 10 U.S.C. 3914 is recalled to active duty, incurs a 60 percent disability, is awarded a 10 percent increase in retired pay based on the award of the Soldier's Medal, and is entitled to recompute his retired pay under 10 U.S.C. 1402, may not be paid the 10 percent increase upon re-retirement, even though under 10 U.S.C. 3914 he would have been entitled pursuant to Formula C, 10 U.S.C. 3991, to an increase for extraordinary heroism in line of duty prior to retirement, as the member's

entitlement to retired pay upon re-retirement is under 10 U.S.C. 1402, which permits him to elect the most favorable formula for computing his retired pay (subsection (d)), but makes no provision whereby a member's recomputed retired pay may be increased for an act of heroism performed during a post-retirement period of active duty. 52 Comp. Gen. 599 (1973). Compare 55 Comp. Gen. 701 (1976); 47 Comp. Gen. 397 (1968).

D. Inactive Military Service Performed Subsequent to Retirement

Inactive service in another branch of armed forces

The holding of a dual status as a retired member of the Regular Marine Corps and as a member of a State Air National Guard is incompatible in view of the conflicting responsibilities of the two statuses, and an Air National Guard regulation which prohibits the enlistment in that organization of persons receiving retirement pay from any branch of the Armed Forces constitutes a complete bar to the valid Air National Guard enlistment of a retired Regular Marine Corps enlisted member; therefore, the member's retired status was not terminated upon his purported enlistment in the Air National Guard, and he is entitled to retired pay except for those intervals when he received greater amounts in connection with the Air National Guard service which may be considered as having been rendered in a de facto status. 40 Comp. Gen. 51 (1960).

Resignation from retired status to qualify for non-Regular retirement

In view of the evidence of a congressional intent that the retirement benefits in 10 U.S.C. 1331-1337 are applicable only to Reserve members and former members not covered by any other retirement law, a retired Regular enlisted member of the Army in receip of retired pay under 10 U.S.C. 3914, on the basis of at least 20 years of service but less than 30 years of service, may not upon his own application for discharge from the retired list qualify for retirement under 10 U.S.C. 1331, even though he may meet the age and service requirements of the statute and that by reason of the discharge from the retired list, upon his own application, he thereby loses his right to retired pay incident to military service. 41 Comp. Gen. 458 (1962).

Regular Army officer service in higher grade with Army National Guard

To transfer retired Regular Army officers who have completed service as State Adjutants General or Assistant Adjutants General, and are federally recognized in their

Reserve general officer grades, to the Retired Reserve would create the anomalous situation of having the officers on two separate retired lists, namely the Regular Army retired list and the Retired Reserve list, a situation not within the contemplation of 10 U.S.C. 1374(b), 3352(a), and 3375. Therefore, absent statutory authority to transfer and fix the rights of the transferred officers so as to make one retired status compatible with the other, the officers may not hold two retired statuses simultaneously. 47 Comp. Gen. 654 (1968). See also 41 Comp. Gen. 118 (1961); B-163446, March 8, 1977.

V. CHARACTERISTICS OF RETIRED PAY

Advance Payment of Retired Pay

Retired pay is included within the definition of pay in 37 U.S.C. 101(21). Therefore, authority in 37 U.S.C. 1006(h) to make payments up to 3 days in advance of a regular payday, of pay and allowances to individuals under the jurisdiction of the Secretaries of the military departments includes payments of retired pay. B-193772, January 22, 1980.

Waiver of Retired Pay

Writ of garnishment of member's retired pay, issued pursuant to 42 U.S.C. § 659, must be honored even though member has renounced his retired pay and it is not being sent to him by the Government since he may not waive his right to such pay which continues to accrue even though it is not being sent to him by the Government. B-196839, April 24, 1980.

A retired Air Force flight officer waived receipt of retired pay in 1950 in order to receive VA compensation, which was at that time greater than his retired pay. Through administrative error his retired pay account was never adjusted when statutory increases in retired pay caused it to be greater than VA compensation. On question as to whether waiver is a forfeiture of the right to further retired pay, 38 U.S.C. 26c (1946 ed.) authorized a person to waive a portion of retired pay equal to the VA payment. That statute applied to this member. Thus, regardless of the language of the waiver, conditional waiver is not authorized and member may not be denied portion of retired pay which exceeds VA entitlement. 28 Comp. Gen. 484 (1949) and B-197603, August 21, 1980.

Retroactive Payments

Payment of retired pay entitlements retroactively is subject to the 6-year statutory period from the date a claim for such pay bearing the claimant's, or his authorized agent's or attorney's signature, is received in the General

Accounting Office. 31 U.S.C. 71a. A voucher submitted to the General Accounting Office by an Air Force Finance Officer without the appropriate signature of the claimant or his knowledge is not a claim for the purposes of 31 U.S.C. 71a. Payment may be made only for the period of 6 years before the date of payment. B-197603, August 21, 1980.

Member's Death

A retired service member who disappeared and is believed drowned accrued no retired pay after the date he disappeared. Although his designated beneficiaries obtained a court decree declaring him dead, the decree did not establish the date of death. Since retired pay accrues only while the service member lives and the facts here indicate he drowned on or about the day he disappeared, the beneficiaries' claims for retired pay accrued subsequent to the date of his disappearance may not be allowed. B-207841, July 20, 1982. See also 62 Comp. Gen. 211 (1983).

VI. PERSONS WHO WERE NOT MEMBERS BEFORE SEPTEMBER 1980.

Statutory Amendments

In 1980 Public Law 96-342 added section 1407 to title 10 of the United Stated Code, and amended several other retirment statutes, to authorize a new method of computing retired pay for persons who first became members of the uniformed services after September 7, 1980. The retired pay of those members is to be based on a percentage of a "retired pay base," which is the average monthly basic pay received by the member over 36 months, or in certain cases a lesser period of time. B-206107, February 1, 1983.

Erroneous payments of basic pay not included

Erroneous payments of basic pay should not be included in the computation of a service member's retired pay base for purposes of computing his retired pay entitlement under 10 U.S.C. § 1407. Although that statute provides that retired pay base will be computed on basic pay "received" over a period of months of active duty, that is construed to mean only basic pay the member was legally entitled to receive. 62 Comp. Gen. 157 (1983).

Period of unauthorized absence

A period of unauthorized absence, for which a service member forfeits pay, generally should not be included in computing the member's retired pay base unless such period may also be included in the member's years of service and thus the percentage multiplier (2-1/2 percent per year) used in computing retired pay. 62 Comp. Gen. 157 (1983).

Demotions

A service member's retired pay base, upon which his retired pay is computed, is an average of basic pay he "received" on active duty over a period of months. Reductions in the basic pay received because of forfeitures and demotions must be included in computing the pay "received" to determine the retired pay base.

Cost-of-living adjustments

Cost-of-living adjustments to military retired pay under 10 U.S.C. § 1401a(b) which are based on the periodic cost-of-living adjustments made in Civil Service annuities also apply to military retired pay computed on the new retired pay base system provided for by 10 U.S.C. 1407. 62 Comp. Gen. 157 (1983). Partial cost-of-living adjustments under 10 U.S.C. 1401a(c) and (d) made in military retired pay when the member first becomes entitled to retired pay should be applied to military retired pay based on averaging of pay received under 10 U.S.C. 1407 as long as it is reasonably possible to do so. The partial cost-of-living adjustment provisions were enacted to apply to retired pay computed under the old system in which reitred pay is based on a single specific rate of basic pay; however, there is no indication of legislative intent that they should not also be applied to retired pay computed under the new retired pay base system. 62 Comp. Gen. 157 (1983).

The provisions of 10 U.S.C. 1407a(e), applicable to computation of retired pay, allow the use of basic pay rates in effect on the day before the effective date of the rates of basic pay on which the member's retired pay would otherwise be based plus appropriate cost-of-living increases. This provision was enacted at a time when retired pay was computed only under the old system where it is based on a single specific rate of basic pay. However, there is no indication of legislative intent that it should not also apply to the new system of basing retired pay on average of pay received over a period of months. Therefore, as long as it may reasonably be applied under the new system, it should be applied when advantageous to the retired member. 62 Comp. Gen. 157 (1983).

CHAPTER 8

RETIRED PAY RECEIPT LIMITATIONS

I. DUAL COMPENSATION RESTRICTIONS

A. Retirement Status

Exempt status

Advanced to officer grade - pre-1964--Enlisted members of the uniformed services advanced on the retired list to an officer grade who did not hold an office within the meaning of the Dual Employment Act of 1894, upon repeal of that act by the Dual Compensation Act of 1964, do not become subject to the limitation of the 1964 act because they were retired as enlisted members. However, should they serve on active duty as officers after retirement and be re-retired as such they may not remain exempt from the limitation. 44 Comp. Gen. 297 (1964).

Retired pay on enlisted grade--A Navy enlisted man who was serving and retired in a cheif warrant officer grade, but who receives retired pay on the basis of his enlisted status, does not by reason of the warrant officer grade have his rights or benefits as an enlisted man adversely affected so in the Dual Employment Act of 1894 (5 U.S.C.62) and is entitled to hold a civilian position. 42 Comp. Gen. 556 (1963).

Enlisted status retention--Army and Air Force enlisted members who may not be given appointments as officers in the Regular service, upon retirement for disability in a higher temporary officers grade do not become retired officers of a Regular component and having retained their enlisted status, are not subject to the limitation in the Dual Compensation Act upon civilian employment in the Federal Government. 44 Comp. Gen. 297 (1964).

Warrant officer retired as enlisted--Temporary warrant officers retired with pay computed on basis of enlisted status are regarded as retaining their enlisted status and exempt from the dual compensation restrictions even though retired in a warrant officer grade. 42 Comp. Gen. 556 (1963).

Non-exempt status

Warrant officer service--Naval enlisted man who retired as warrant officer is a "retired officer" within meaning of 5 U.S.C. 5532(b), and subject to dual compensaton restrictions and his situation is different from that of an enlisted man who was retired and advances on retired list to highest rank in which he served satisfactorily. B-159466, August 8, 1966.

Temporary officer status--Navy and Marine Corps enlisted members given temporary appointments as officers of the Regular Navy and the Regular Marine Corps and retired for years of service or for non-combat incurred disability in their temporary officer status, are subject to the retired pay reduction provision of the Dual Compensation Act of 1964 while holding a civilian office in the Federal Government. 44 Comp. Gen. 297 (1964).

Temporary Coast Guard officer status--Coast Guard enlisted members who at the time of retirement are serving on active duty under temporary officer appointments in the Regular service and retired as such are regarded as retired officers of a Regular component and when employed in a civilian position under the Federal Government are subject to the reduction in retired pay prescribed by the Dual Compensation Act of 1964. 44 Comp. Gen. 297 (1964).

Service-connected disability retirement pre 1964--Regular officers retired for service connected, but non-combat or noninstrumentality of war disability and exempt under the Dual Employment Act of 1894, even though subject to the dual compensation retriction in the Economy Act of 1932, unless they are expressly exempt from the limitation in the Dual Compensation Act of 1964, are subject to a reduction in retired pay while employed by the Federal Government in a civilian positon. 44 Comp. Gen. 297 (1964).

Non-appropriated fund activity - pre-1964--Regular military officer who was in a terminal leave status until December 1, 1964, and holding a nonappropriated fund activity position on November 24, 1964, is considered to be in an active duty status through November 30, 1964, rather than in a retired status. Therefore, such officer is not entitled to the beneifts of the savings provisions of the Dual Compensation Act of 1964, which permits continuation of exemptions for members who were retired on the day prior to the effective date of the 1964 act. 45 Comp. Gen. 180 (1965).

Disability exemption

Legislative history of exemption--The conclusion that the exemption from reduction of the retired pay of a Regular officer when employed as a civilian by the Federal Government, applies only if the retirement was based on a disability incurred as a direct result of armed conflict or was caused by an instrumentality of war in wartime, is justified on the basis of the legislative history of the provision. 50 Comp. Gen. 480 (1971).

Conclusiveness of service medical determinations--For purposes of establishing exemption from reduction in retired pay in the case of a retired Regular officer, determinations as to whether his disability from injury or disease

incurred as a direct result of armed conflict or an instrumentality of war during war can only be made by the service from which retired and neither the employing agency nor his Office has the authority to change that determination. 55 Comp. Gen. 961 (1976).

Disease from combat conditions--To apply the exemption from reduction in retired pay of a Regular officer retired for disease as a direct result of armed conflict in Vietnam, due to the nature of combat operations in Vietnam and the difficulty of establishing that the inception of disease occurred while engaged in armed conflict, and affirmative administrative finding of a direct casual relationship between the disability and the armed conflict will be accepted unless unreasonable or insufficiently support by the record. 48 Comp. Gen. 219 (1968).

"0" percent disability ratings--Despite Court of Claims decision in Mross v. United States, 186 Ct. Cl. 165 (1968), it is the view of the Office that a combat-related disabilty which is of a type that would otherwise qualify a retired Regular officer for exemption, but was rated as 0 percent disabling, such disability does not qualify him for exemption from dual compensation retrictions since it was not a significant factor in officer's retirement. 50 Comp. Gen. 480 (1971). B-187230, October 19, 1976.

B. Non-Government Employment Not Covered

Court appointed attorneys

Private attorneys appointed by the courts to represent indigent defendants and who receive compensation for such service may not have such service regarded as establishing an employer-employee relationship with the Government so as to bring the individuals within the concept of holding a civilian office with the contemplation of the dual compensation restrictions. 44 Comp. Gen. 605 (1965).

USMC association

A Regular Marine Corps officer employed as business manager of the United States Marine Corps Association while on the TDRL is not subject to the reduction in retired pay prescribed by the Dual Compensation Act of 1964, the Association, a voluntary one obtaining revenue from dues, investments and publications of a periodical, is not under the jurisdiction of the Marine Corps nor is it a "non-appropriated fund instrumentality" of the United States notwithstanding that the positions of leadership and authority in the organization are held by Marine Corps officers. 45 Comp. Gen. 289 (1965).

State maritime academies

Since State maritime academies are established and organized under the laws of the individual States, the instructors and employees of the academies are neither appointed by, nor are their appointments approved by an Federal official, retired Regular officers so employed would not hold an "office or position" within the meaning of the dual compensation and dual office limitations even though Federal funds are allocated to the States for the operation of the academies, such funds when intermingled with State funds lose their identity as Federal funds. 42 Comp. Gen. 208 (1962).

Federal Credit Union

The employment of a retired Regular officer as manager, treaurer or loan processor in a Federal Credit Union, with a membership that need not be composed of Federal employees, would not hold an "office or position" under the United States and would not be subject to the dual office and the dual compensation retrictions, for while organized under Federal law and subject to Federal supervision, a Federal Credit Union is not a Government organization. 42 Comp. Gen. 208 (1962).

International organizations

Employment of retired military officers by the United Nations and the World Health Organization, or other international organizations whose expenses are assessed against member nations, including the United States, and from which funds the salaries of the positions are paid, would not contravene the dual office retrictions nor require reduction in their retired pay, their employment not constituting employement by the Federal Government. 42 Comp. Gen. 208 (1962).

Naval Academy Athletic Association

The retired pay of a Regular naval officer employed by the Naval Academy Athletic Association (NAAA) is not subject to reduction under the Dual Compensation Act of 1964, since it appears that NAAA is a private voluntary association not established pursuant to any Federal law or regulations and cannot be regarded as a nonappropriated fund instrumentality of the United States. 54 Comp. Gen. 518 (1974).

Retired senior volunteer program

Retired Regular Army officer who accepts employment by community college to administer local Retired Senior Volunteer Program, which is funded by Federal grant from ACTION, is not affected by dual compensation retrictions since such

employment would not be in a "position" within meaning of that secton. B-172318.19, Feb. 13, 1976.

Fee-basis physicians

A retired Regular Army officer placed on a roster of fee basis physicians to examine Armed Forces personnel does not occupy a "civilian" officer and his retired pay is not subject to reduction after the first 30-day period for which he received fees, such physicians serving under contract and not by appointment to a civilian office or position and the fact that a limitation is placed upon the total fees any physician may receive for any day does not change the contractual relationship to that or employer-employee. 45 Comp. Gen. 81 (1965).

Contract concessionaire

A retired Regular officer who is an active partner in enterprises which hold concession contracts with the Government is not, as a contract concessionaire, regarded as an officer of the United States or as holding a civilian position under the Government so as to be precluded by the 1894 dual office act, 5 U.S.C. 62, or the 1932 dual compensation law, 5 U.S.C. 59a, from receiving retired pay. 39 Comp. Gen. 751 (1960).

C. Government Employment

Full-time employment

Federal Reserve Board--The Board of Governors of the Federal Reserve System is authorized to appoint its employees and fix their compensation without regard to the civil service laws, and those employees are paid from sources other than appropriated funds. Nevertheless, the Board performs a governmental function and is an establishment of the Federal Government. Hence, a retired Army officer who obtained civilian employement with the Board was subject to reductions in his military retired pay under the dual compensation restrictions which are currently prescribed by statute and which apply to all military retirees who hold civilian positions in the Goverment. B-212226, December 16, 1983, 63 Comp. Gen.____.

"TAPER" appointment--A retired Regular officer who was given a "TAPER" appointment (temporary appointment pending establishment of a register) to a full-time civilian position without time limit, under which he was eligible for within-grade increases and could be reassigned to any position to which his original appointment could have been made, is not a temporary employee so as to entitle him to the 30-day exemption from reduction in retired pay applicable to temporary employment. 46 Comp. Gen. 366 (1966).

Director, CIA--The compensation provisions applicable to a retired Regular officer, appointed Director of the Central Intelligence Agency under 50 U.S.C. 403(b)(2), which permits the officer to receive both retired pay, and the provisions of 5 U.S.C. 5532(b) requiring reduction in retired pay are clearly inconsistent, therefore, under section 402(b) of the Dual Compensation Act, the provisions of 50 U.S.C. 403(b)(2) are no longer in effect and the retired pay benefits for the Director are subject to the dual compensation restrictions. 44 Comp. Gen. 708 (1965).

Referee in bankruptcy--The employment of a retired Reserve officer as a full-time referee in bankruptcy is not

prohibited by 11 U.S.C. 63(2), even though it provides that persons holding any office of profit or emolument under the laws of the United States or of any State shall be ineligible to serve as a full-time referee in bankruptcy, and the reservist so appointed may receive the civilian salary of that position and in addition the retired pay authorized by 10 U.S.C. 1331. 45 Comp. Gen. 405 (1966).

Leave-without-pay periods

No reduction of retired pay--When a retired Regular officer whose retired pay is subject to a reduction by reason of full-time civilian empoyment is in a leave-without-pay status from his civilian position, no reduction of his retired pay is required for any day he receives no pay. 44 Comp. Gen. 266 (1964).

Weekends within LWOP periods--A retired Regular officer employed as a civilian and subject to retired pay reduction, who is in a LWOP status is entitled to full military retired pay for the Saturday and Sunday occurring within the LWOP period. However, the officer's retired pay is subject to reduction for Saturdays and Sundays occurring before and after the LWOP period for while they do not involve any loss of civilian compensation, they do fall within "the full calendar period" of civilian employment prescribed by 5 U.S.C. 5532(b). 48 Comp. Gen. 152 (1968).

Several periods of LWOP--A retired Regular officer who is in a LWOP status on four separate occasions from the civilian position during a "full calendar period" within the phrase contained in 5 U.S.C. 5532(a), is only entitled to full retired pay for the Saturday and sunday that occurred within the LWOP periods, and no adjustment of retired pay is required before and after the other LWOP periods. 48 Comp. Gen. 152 (1968).

Part of day on LWOP--A retired Regular officer employed as a civilian for the "full calendar period" May 1966, to April 1967, during which time he is subject to a reduction in retired pay, who is in a LWOP status 1 hour on a Friday and all of the following Monday, is not entitled to full retired pay for the intervening Saturday and Sunday, the officer having received 7 hours civilian compensation for Friday is considered to have been in receipt of civilian compensation for the day and since his LWOP status commenced the following Monday, the Saturday and Sunday do not fall within a LWOP period. 48 Comp. Gen. 152 (1968).

31st day of month--A LWOP status on the 31st day of a month does not entitle a retired Regular officer, employed as a civilian and subject to a reduction in retired pay, to an additional amount of retired pay. Since military retired pay accrues on a monthly basis (computed as if each month had 30 days), no retired pay accrues on the 31st day of any

had 30 days), no retired pay accrues on the 31st day of any month; therefore, the officer accured a full month's retired pay for the month, whether or not he was in LWOP status on the 31st of the month. 48 Comp. Gen. 152 (1968).

Nonappropriated to appropriated fund activity

Appropriated v. office or position--The determination of the applicability of dual compensation restriction is not whether the compensation is paid from appropriated funds, per se, but whether the position is an office or position "under the United States Government." 42 Comp. Gen. 73 (1962). See also B-200240, May 5, 1981.

Termination of pre-1964 election--A retired Regular officer who is employed as a civilian in a nonappropriated fund activity and who elected to remain in the status he occupied on November 30, 1964, that of an employee of a nonappropriated fund instrumentality entitled to full retired pay, upon change of employer designation from a nonappropriated to an appropriated fund activity, the election ceased to operate on the date the civilian salary of the officer became payable from appropriated funds. 45 Comp. Gen. 194 (1965).

Pre-1964 noncommissioned warrant officer election--Retired noncommissioned warrant officer advanced to lieutenant or retired list, but paid as warrant officer since Oct. 1, 1963, who was employed by nonappropriated fund activity and who filed timely election under Dual Compensation Act of 1964, to remain in prior exemption status, although his employer's designation was later changed and conversion of member's civilian salary from nonappropriated funds nullified his "nonappropriated fund exemption," member remains free of dual compensation retriction so long as he continues to be paid as a warrant officer. B-161277, July 7 1967.

JROTC instructors

Exemption--The employment of retired military members as administrators or instructors in a JROTC program under 10 U.S.C. 2031, by a secondary school that is an instrumentality of the unincorporated territory of the Government of Guam, is not prohibited employment under the dual pay and dual employment provision; 10 U.S.C. 2031(d) prescribing the basis for payment to the members as being an exception to the dual compensation restriction. 48 Comp. Gen. 796 (1969).

General schedule appointment limitation--Retired Regular officers employed as administrators and instructors in a JROTC program at an Indian high school funded by the Federal Government are required to be paid under 10 U.S.C. 2031(d)(1); however, if employment in that capacity is

under a General Schedule appointment with Civil Service approval, any payments made thereunder are subject to dual compensation reduction. 53 Comp. Gen. 377 (1973).

Intermittent employment

Intermittent defined--The term "intermittent employment" refers to occasional employment as distinguished from regular continuous employment. 35 Comp. Gen. 90 (1955).

Intermittent v. regular--Intermittent employment vs regular employment is not dependent on whether the employee's job description is classified as part time. For purposes of 30-day exemption, intermittent employment ends when empoyee begins to perform a regular tour of duty. B-162225, September 18, 1967.

Exempt status - pre 1964--A retired Regular Coast Guard commissioned warrant officer who on the day preceding the effective date of the Dual Compensation Act of 1964, held an intermittent civilian position that did not contravene the dual employment provisions of the 1894 act, nor subject him to the compensation limitations of the 1932 act, and who under the Dual Compensation Act elects to remain subject to the prior exemptions, does not lose his exempt status upon acceptance of a full-time position without a break in service, notwithstanding the 1964 act defines "a civilian office" to include "intermittent position." 45 Comp. Gen. 846 (1966).

Two Government agencies - excepted appointments--A retired Regular officer employed by two Government agencies as a civilian consultant under excepted appointment--intermittent, a 1-year appointment in fiscal year 1969, which was extended for a year, and another appointment in fiscal year 1970 with no time limitation, would, if only one appointment were involved, be entitled to exempt from reduction of retired pay for no more than the first 30-day period for which he received compensation regardless of the fiscal year in which the appointment was made or the services performed. 51 Comp. Gen. 189 (1971).

Two or more intermittent appointments--Where two or more intermittent appointments are involved, the exemption applies to the first 30 days of work in eaoh fiscal year during which the retired Regular officer received civilian pay, but an officer who worked less than 30 days under both appointments in each fiscal year is not subject to a reduction of retired pay. 51 Comp. Gen. 189 (1971).

Reappointment to same position--Where a retired Regular officer consultant receives a second intermittent appointment, even though an entire fiscal year has intervened since the expiration of the consultant's previous intermittent appointment, he is not entitled to an additional 30-

day exemption from reduction in retired pay if the second appointment appears to be ony a renewal of the initial appointment. 55 Comp. Gen. 1305 (1976).

Excepted appointment conversion--Where a consultant appointment conversion for retired Regular officer is merely a continuation or an extension of a previous excepted appointment, it is not a "new appointment" for purposes of applying the multiple appointment rule of 5 U.S.C. 5532(c)(2) (ii), but is, instead, a routine personnel action and he is not entitled to an additional 30-day exemption. 55 Comp. Gen. 1305 (1976).

Temporary employment

Pre-1964 employment - 30-day exemption inception--When a retired Regular officer is employed temporarily before December 1, 1964, the effective date of the Dual Compensation Act of 1964, and the employment extends beyond that date, the beginning date for the computation of the first 30-day exemption period of employment provided under section 201(c) of the act from reduction in retired or retirement pay applies to the first 30 days for which the employee receives salary after November 30, 1964. 44 Comp. Gen. 266 (1964).

Two temporary appointments - 30 day exemption--A retired Regular officer is employed by a Member of Congress under two temporary appointments not in same fiscal year is entitled to an exemption from a reduction in retired pay for the first 30-day period for which he receives a salary under each temporary, part-time, or intermittent appointment, when the appointments are not made during the same fiscal year. 45 Comp. Gen. 559 (1966).

D. Pay Reduction and Refunds

Pre-1964 law

Economy Act Repeal - dollar limitation--A retired Regular officer who earns a combination of annual civilian and retired pay in excess of the $10,000 limitation prescribed in the Economy Act of 1932, prior to the effective date of the Dual Compensation Act of 1964, is subject to an appropriate reduction in his retired pay for the period January 1 to November 30, 1964. Since it is impossible to give literal effect to the rule in several Court of Claims cases establishing that a calendar year is the proper period for applying the required reduction, it is appropriate to reduce the civilian employment income received through November 30, 1964, plus retired pay entitlement based on eleven-twelfths of the $10,000 limitation authorized. 44 Comp. Gen. 266 (1964).

Refund of compensation--A Regular member of the uniformed services retired as a temporary warrant officer and employed as a civilian who at the time of filing notice of election under the Dual Compensation Act of 1964, is discovered to have been appointed in contravention of the prohibition in section 2 of the dual office act of 1894, is not entitled to retain the compensation received for services performed under the illegal civilian appointment prior to December 1, 1964, the effective date of the repeal of section 2 of the 1894 act by the 1964 act. 45 Comp. Gen. 330 (1965).

Pre-1964 limitation of refund--When the civilian appointment of a retired officer is found to have violated the prohibition in section 2 of the dual office act of 1894, the appointment having been made prior to the repeal of the section by the Dual Compensation Act of 1964, the compensation received prior to December 1, 1964, is required to be refunded. 45 Comp. Gen. 330 (1965).

Retroactive exemption by Private Relief Bill--Legislation enacted to relieve an employee of liability to repay compensation received prior to December 1, 1964, under an appointment that contravened the prohibition in section 2 of the dual office act of 1894, repealed by the Dual Compensation Act, would not have the effect of retroactively exempting the employee from the restriction in section 2, or otherwise validating the appointment. 45 Comp. Gen. 330 (1965).

Dual Compensation Act of 1964

CPI Base Figure--Section 5532(b) of title 5, United States Code, which prescribes that the percentage increases to reflect changes in the Consumer Price Index shall apply to the $2,000 of retired pay not subject to reduction contemplates only one base figure for any given period to which cost of living percentage increases will apply cumulatively, thus, the 3.7 percent increase effective December 1, 1966, establishes the new basic figure of $2,074 as the amount of retired pay exempted from reduction. Therefore, 45 Comp. Gen. 164, is overruled. 46 Comp. Gen. 549 (1966).

VA compensation - pay reduction adjustment--A member whose retired pay is reduced while he is employed in a civilian Government capacity, and who later becomes entitled to Veterans' Administration compensation because of service- connected disability waives that portion of retired pay necessary to qualify for VA compensation since veterans' benefits are not subject to the dual compensation law. Adjustments must also be made in amounts computed for reduction purposes during the period between the date of waiver submission and the determination to allow the member the full monetary benefit of the waiver. 55 Comp. Gen. 1402 (1976). See also B-212226, December 16, 1983, 63 Comp. Gen. _____.

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CHAPTER 9

SURVIVOR BENEFIT PLAN (SBP)

I. LAW GENERALLY

The Survivor Benefit Plan, 10 U.S.C. 1447-1455, was established by Public Law 92-425, approved September 21, 1972, 86 Stat. 706. The Plan has been modified from time to time since then by amending legislation.

II. COVERAGE GENERALLY

A. Beneficiaries

Children coverage

Election requirement--When an eligible widow with dependent children is receiving an annuity under 10 U.S.C. 1448(a) which is reduced under 10 U.S.C. 1450(c) because of DIC entitlement and the widow loses eligibility because of death or remarriage dependent child is not entitled to an annuity unless coverage is elected and the additional costs for such coverage assessed. 54 Comp. Gen. 709 (1975).

Effect of election--The Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the surviving dependents of deceased service members. If a member elects to have dependent child annuity coverage when he becomes a participant in the Plan, that coverage is not limited to children he has at the time of the election, but extends automatically and involuntarily to any child he thereafter acquires. Hence, annuity coverage automatically extended to the son acquired by birth in 1981 following a remarriage by a retired Army officer who had elected to have dependent child coverage when he became a Plan participant in 1973. 62 Comp. Gen. 553 (1983).

Irrevocability of election--The election made by a retired service member who is married and has dependent children to participate in the Survivor Benefit Plan with full spouse and dependent child annuity coverage is binding and may not be unilaterally revoked by him, so that a retired Army officer who elected to have such coverage in 1973 could not, after divorce and remarriage, withhold dependent child annuity coverage from a son he acquired in 1981 even though by that time the only dependent child he had in 1973 was no longer eligible for an annuity. 62 Comp. Gen. 553 (1983).

Dependency and Indemnity Compensation (DIC) effect--Where children coverage is elected, the dependent children are entitled to the full annuity selected even though the annuity of the surviving spouse had been permanently reduced by the amount of DIC received. 55 Comp. Gen. 1409 (1976).

VA compensation - retroactive entitlement--A retired Regular Air Force officer employed in a Federal civilian position whose retired pay was subject to reduction under the Dual Compensation Act, 5 U.S.C. 5532, was advised by the VA on February 23, 1978, that he was entitled to VA disability compensation retroactive to June 26, 1977, filed a waiver of retired pay with the service department, pursuant to 38 U.S.C. 3105, on March 3, 1978. Waiver of retired pay upon notification of entitlement to VA compensation if effective from the earliest date of entitlement to VA compensation; but the additional amount due is payable as VA compensation, and not retired pay. 55 Comp. Gen. 1402 (1976), modified. 58 Comp. Gen. 622 (1979).

Civilian annual leave credit--A retired Regular officer subject to a retired pay reduction under 5 U.S.C. 5532, and ineligible for the military leave granted reservists and National Guard members when ordered to 2 weeks of active duty, is entitled to receive a lump-sum payment for civilian annual leave or to elect to have the leave remain to his credit until his return from active duty since 5 U.S.C. 5532, authorizes active duty in the Armed Forces for civilian employees without separation. 49 Comp. Gen. 444 (1970).

Leave credit limitation--If the retired officer elects a lump-sum leave payment, should he return to his civilian position prior to the expiration of the period covered by the payment, he will be subject to the same adjustment required in the case of reemployment following a separation--the refund of an amount equal to the unexpired period. 49 Comp. Gen. 444 (1970).

Retired pay reduction - 1 hour civilian pay--Notwithstanding that a retired Regular officer is employed by a nonappropriated fund instrumentality only intermittently as a flight instructor on an hourly basis with no guaranteed minimum, he is subject to 5 U.S.C. 5532, requiring the reduction of a full day's retired pay if the officer receives any compensation for that day, even as little as pay for 1 hour as a flight instructor, for absent recognition of fractional parts of a day's retired pay, such pay may not be equated with hours of work in a position for which an officer is paid a salary for less than a full day. 47 Comp. Gen. 185 (1967).

Retired pay reduction - State community property law--The Dual Compensation Provisions in 5 U.S.C. 5532, reduce the retired pay entitlements of retired officers of Regular components who are employed in civilian positions with the Federal Government. The fact that under a State community property law the spouse of the retiree is considered to be entitled to part of the retired pay does not permit that part of the member's retired pay to be excluded from dual

compensation reduction since Federal law controls payment of such pay. 59 Comp. Gen. 470 (1980).

Reduction not required--Although the civilian posistion held by a retired Regular officer in a nonappropriated fund activity is a position subject to the reduction of retired pay prescribed by 5 U.S.C. 5532(b), a reduction is not required in the officer's retired pay where the reduction would exceed the amount the officer receives from his civilian employment. 50 Comp. Gen. 604 (1971).

Civil Service Reform Act of 1978

Relation to 1964 Act--The provision of 5 U.S.C. 5532(a) and (b), prescribing a formula for the reduction of the military retired pay of retired Regular officers employed in a civilian capacity with the Government, are derived from the Dual Compensation Act of 1964. The provisions of 5 U.S.C. 5532(c), on the other hand, are derived from the Civil Service Reform Act of 1978, and impose a pay limitation on all retired military personnel, both Regular and Reserve, making them subject to an absolute maximum rate of combined civilian salary and military retired pay equal to the rate payable for Level V of the Executive Schedule. B-206699, September 20, 1982, 61 Comp. Gen. _____.

Computation of reduction--The reduction of military retired pay required under the dual compensation restriction imposed by 5, U.S.C. 5532(c) involves a determination of the amount by which the combined rate of retired pay plus Federal civilian salary exceeds the rate of basic pay prescribed for level V of the Executive Schedule. The retired pay is reduced by that amount, subject to a provision that the remainder must at least be equal to the cost of the retiree's participation in any survivor's benefits program or veterans insurance program. B-204119, January 27, 1982, 61 Comp. Gen._____.

No refunds--5 U.S.C. 5532(c) requires that combined military retired pay plus Federal civilian salary not exceed the rate of pay for level V of the Executive Schedule for any "pay period." Hence, the amount of the retired pay reduction required for any given pay period may not be refunded to a retiree even though the retiree's combined retired pay and civilian salary for the entire year may be less than the annual pay prescribed for level V of the Executive Schedule. B-204119, January 27, 1982, 61 Comp. Gen._____.

Intermittent employment--Subsection 5532(c) of title 5, United States Code, requires that combined military retired pay plus Federal civilian salary not exceed the rate of basic pay for Level V of the Executive Schedule for

any "pay period." The term "pay period" means the biweekly pay period fixed under title 5 for civilian employees, whether employed full time or intermittently. Hence, the military retired pay of a retired Army officer employed intermittently as a civilian consultant is subject to reduction each beweekly pay period in which the amount of his combined retired pay and civilian salary exceeds the biweekly rate of pay prescribed for Level V of the Executive Schedule. B-206699, September 20, 1982, 61 Comp. Gen.____.

II. CONSTITUTIONAL PROHIBITION

A. Foreign Employment

Direct Government employment

Salary as an emolument--The payment of a salary for employment by a foreign government is an "emolument" from a "foreign state," the acceptance of which by one who holds an office of profit or trust under the United States is prohibited under the Constitution without the consent of Congress. B-154213, December 28, 1964.

"Emoluments" given broad interpretation--The prohibition against receipt of emoluments "of any kind whatsoever" from a foreign government by a retired member of the uniformed services includes forms of compensation other than salary, such as free tranportation, household goods shipments, housing allowance, etc., which should be fairly valied considering the actual value of the employment received. 58 Comp. Gen. 487 (1979).

Public Law 95-105 granting consent of Congress to foreign employment--Consent of Congress to acceptance of foreign civil employment by officers of the United States required by the Constitution cannot be retroactively applied to the retirement pay withheld from an officer for a period he was employed by a foreign state without such consent which occurred prior to the effective date of the Act. Such consent conditioned upon the approval of the Secretary of State and the Secretary of the service concerned is only effective prospectively from the date granted and may not be made retroactively to authorize employment and compensation received before the approval is granted. 58 Comp. Gen. 487 (1979). See also B-175166, April 7, 1978; and B-198557, March 25, 1982, 61 Comp. Gen.___.

Amount of retired pay to be withheld--When approval of the employment is obtained from both of the Secretaries concerned as provided by Public Law 95-105, future employment and earnings are authorized and further collecton of amounts due for unauthorized employment is not required. However, to the extent that retired pay was paid during the period of unauthorized employment it must be collected

from the individual. The reason for that rule is that retired pay should not be paid during a period of unauthorized employment except to the extent that pay from employment by a foreign government is less than retired pay. If retired pay was erroneously paid during this period, it must be collected even though the foreign employment is subsequently approved because approval generally may not be retroactive. B-198557, March 25, 1982, 61 Comp. Gen.___. See also B-178538, October 13, 1977.

Reserve members--The authority for Armed Forces Reserve members, active or retired, to be employed by foreign governments and instrumentalities of foreign governments when approved by the Secretary concerned is 10 U.S.C. 1032, enacted to overcome the constitutional prohibition against acceptance of foreign emoluments by persons holding offices under the United States. 41 Comp. Gen. 715 (1962).

Regular vs. Reserve status--A Regular Air Force enlisted member, retired for years of service and who becomes a member of the United States Air Force Reserve (inactive) on retirement, does not lose his "Regular" status, since it is the law under which retired which determines a member's status on the retired list, therefore, he holds an "Office" within the meaning of the constitutional prohibition against employment by a foreign government. B-159945, January 30, 1967.

Foreign Government subdivision--A retired Regular enlisted member of the Coast Guard employed as a teacher by the State of Tasmania, Australia, is regarded as holding an "office of profit and trust" after retirement as those terms are used in the United States Constitution, so that the acceptance of salary for employment with the State of Tasmania, which is considered a "foreign state" comes within the constitutional prohibition. 44 Comp. Gen. 130 (1964).

Fleet Reserve--Since an enlisted member of the Navy who is transferred to the Fleet Reserve and receives retainer pay continues to be subject to call to active duty, a Fleet reservist who accepts employment with a foreign government, without the consent of Congress, must be regarded as holding an "office" within the meaning of Article I, section 9, clause 8 of the United States Constitution, prohibiting the acceptance of emoluments from a foreign state. 44 Como. Gen. 227 (1964).

Indirect Government employment

Instrumentality of foreign government--A retired Regular officer who claims to be employed by an American-based firm and receives a civilian salary from that firm, but where record shows that such firm is merely a conduit whereby he

is detailed by that firm to work for an instrumentality of a foreign government, the acceptance of salary for such employment comes within the constitutional prohibition, and, while lacking penalty, such provision will be given effect by withholding from member's retired pay an amount equal to the foreign salary received in violation of the Constitution. 53 Comp. Gen. 753 (1974).

Instrumentality vs. autonomy--Employment of a retired Regular officer as a professor of engineering in the Engineering School of the University of Sao Paulo in Brazil, would not be prohibited under the Constitution if his rights and benefits under a contract of employment would accrue solely by virtue of that contract and would not be subject to review or question by or on behalf of any Brazilian Government official and the autonomy of the university was not terminated. B-152844, December 12, 1963.

Employer-employee test--In determining the existence of an employer-employee relationship between a retired member and a foreign government or instrumentality thereof, the common law rules of agency will be applied in order to determine whether such instrumentality has the right to control and direct the employee in performance of his work and manner in which work is to be done. 53 Comp. Gen. 753 (1974).

B. Nonemployment Payments from Foreign Governments

Damages for injuries

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 former citizen and public official of Germany does not violate Article I, section 9, clause 8 of the United States Constitution prohibiting the acceptance by Government employees of any present, emolument, etc., from a foreign state. 34 Comp. Gen. 331 (1955).

Rewards

The reward monies paid for contraband articles seized by the Republic of Colombia acting upon information furnished by an Air Force officer while temporarily attached to the Colombian Air Force are payable not to the officer but to the United States pursuant to the principle of law that the earnings of an employee in excess of his regular compensation gained in the course of, or in connection with, his service belong to the employer. Even if the United States were not entitled to the reward, its acceptance by the officer is precluded, absent congressional consent, by Article I, section 9, clause 8 of the United States Constitution, which prohibits acceptance by public officers of presents, Emoluments, Office, or Title "of any kind whatever,"

from a foreign State, and the reward constitutes an "Emolument." 49 Comp. Gen. 819 (1970).

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 a person holding an office of profit or trust within the meaning of Article I, section 9, clause 8 of the United States Constitution, so as to preclude the payment of compensation concurrently with the receipt of an emolument from the British Government without the consent of Congress. 37 Comp. Gen. 138 (1957).

III. FOREIGN CITIZENSHIP AND RESIDENCE

A. Foreign Citizenship

Fleet reservist

A member of the Fleet Reserve who becomes a citizen of a foreign country, either after transfer to the Fleet Reserve or transfer to the retired list, is regarded as having taken a voluntary action inconsistent with his oath of allegiance to the United States so as to warrant termination of retainer or retired pay. 44 Comp. Gen. 227 (1964).

Regular enlisted

A retired Regular enlisted member who loses his United States citizenship when he acquires citizenship in a foreign country has taken a voluntary action so inconsistent with his oath of allegiance to the United States and status as a member of the Armed Forces to warrant termination of his retired pay. 44 Comp. Gen. 51 (1964).

Renunciation of United States citizenship

A retired member of the Armed Forces who becomes a citizen of a foreign country by naturalization and who voluntarily renounces his United States citizenship loses the right to retired pay since entitlement to retired pay depends upon the continuation of the individual's status as a retired member of the military service available for service as required and that status is incompatible with renunciation of United States citizenship. However, such a person who elected to participate in the Survivor Benefit Plan and from whose retired pay the required deductions were being made for coverage under the Plan when he renounced his U.S. citizenship, may continue coverage under the Plan by making the required payments into the Treasury. B-212481, February 2, 1984.

Reserve officer

A retired Reserve officer who is receiving retired pay for years of service ordinarily would be liable for involuntary recall to active duty in times of war or national emergency. Since the acquisition of foreign citizenship is inconsistent with the prescribed oath to support and defend the Constitution of the United States, in the absence of any law authorizing continuation of an officer's membership in a Reserve after he becomes a citizen of a foreign country, payment of retired pay may not be approved. 41 Comp. Gen. 715 (1962).

Public Health Service officer

A retired member of the Regular component of the Commissioned Corps of the Public Health Service (PHS) who notified the service of his intent to accept employment with the Canadian Department of Agriculture and inquired whether his retired pay would be affected if he became a Canadian citizen would not be eligible to receive retired pay unless his employment is approved by Congress by virtue of Article I, section 9, clause 8 of the United States Constitution and Executive Order No. 5221. B-151184, August 2, 1945, overruled. 51 Comp. Gen. 780 (1972).

Non-Regular retirees - 10 U.S.C. 1331

The retired pay benefits authorized for nonregular members under 10 U.S.C. 1331 is viewed as a pension, and is not dependent on the continuation of a military stutus. Therefore, such a person eligible to retired pay at age 60 who prior to attaining age 60 acquires foreign citizenship and/or status in a foreign military service does not lose his entitlement to retired pay at age 60, nor is such a person required to forfeit retired pay if he becomes a citizen of and/or enters the Armed Forces of the foreign country, thereafter, provided the foreign country is not one that is engaged in hostile military operations against the United States. 48 Comp. Gen. 699 (1969).

Dual citizenship - service in foreign armed force

Dual Israeli/United States citizenship alone does not require loss of entitlement to retired pay. But service in the Israel Defense Forces of a retired Regular Army officer residing in Israel would make his status so doubtful that retired pay may not be paid to him without authorizing legislation. 58 Comp. Gen. 566 (1979).

B. Foreign Residence Effect

Retention of foreign citizenship

A retired Regular enlisted member who retained his Canadian citizenship and returned to Canada to reside when he retired, is entitled to retired pay, the member, permitted to enlist as an alien and to be sworn in without restriction became a "regular enlisted member of the Air Force." Therefore, so long as his formal allegiance status remains unchanged, his Canadian residency does not constitute a bar to receipt of retired pay. 50 Comp. Gen. 269 (1970) and 44 Comp. Gen. 51 (1964).

Naturalized citizens

A retired Regular service member, who is a naturalized citizen of the United States and who resides overseas in

the country of his birth following retirement has not lost his United States citizenship because of such residence and, therefore, the member is entitled to continue to receive retired pay. 43 Comp. Gen. 821 (1964); 44 Comp. Gen. 51 (1964).

IV. SELLING TO THE GOVERNMENT

A. Prohibited Activities

Sales activities

What constitutes selling--A retired Regular officer whose business activities included making calls on DOD agencies, as well as a National Oceanic Atmospheric Administration installation, to render technical assistance, update catalogue materials, providing information on the companies he represented determine future markets, and contacting Government purchasing agents, is considered as actively participating in the procurement business for his employer in violation of 37 U.S.C. 801(c) and DOD Directive 5500.7, August 8, 1967. 53 Comp. Gen. 616 (1974).

Signing and submitting bids--Where retired Regular officer of the uniformed services signs and submits bids as part of employment with contractor doing business with Department of Defense agencies, the officer is "selling" within the meaning of 37 U.S.C. 801(c) which prohibits such activity for 3 years after his name is placed on the retired list and is subject to loss of retired pay while so engaged. Ignorance of the law does not provide a legal basis for retention of retired pay during a period of employment prohibited by the statute. B-198751, February 19, 1981, and January 8, 1982.

Social functions sponsored by contractor--Where contractor doing business with Department of Defense agency sponsors and pays for social function at which retired Regular officers to the uniformed services employed by the contractor make contact with departmental personnel who are in a position to influence procurements by the Department, such contacts will be viewed as establishing a prima facie case that such officers are "selling" within the meaning of 37 U.S.C. 801(C) and they will be subject to forfeiture or retired pay. 56 Comp. Gen. 898 (1977).

Frequent v. infrequent contacts--A retired commissioned warrant officer employed by a chemical firm as a demonstrator of laundry chemicals to naval installations and later was operations manager, in which capacity he devoted most of his time to commercial sales activities sales activities, but continued to contact naval vessles for the ultimate purpose of sellig his employer's products, must be

regarded as selling supplies to the Navy Department within the meaning of 10 U.S.C. 6112(b) which (now see 37 U.S.C. 801(c)) does not differentiate between cases involving frequent and infrequent contracts with the military department. 41 Comp. Gen. 642 (1962).

Precontract contacts--A retired Regular officer who, makes percontract contacts with contracting officials of the Marine Corps in his capacity a a representative of a firm selling to the Marine Corps may be presumed to be engaged in selling within the meaning of 37 U.S.C. 801(c) (1970) and DOD Direcive 5500.7, B-181056, February 10, 1975.

Demonstrations and Seminars regarding Products for sale--Visits by retired Regular officers to Army and Air Force Exchange Service stores for purposes of demonstrating employer's product and conducting seminars to induce procurement by the government are in violation of 37 U.S.C. 801(c). However, stocking stores with employer's sales literaturee, taking sales inventory and conducting product demonstrations and seminars to explain the use of previously procured products or to influence sales to store custromers do not violate the statute, since these activities do not directly influence Government procurement. B-203079, March 22, 1982.

Integral part of agency--A sale to an integral part of the Navy would constitute a sale to an "agency of the Department of Defense" within the meaning and prohibition contained in 5 U.S.C. 801(c)) and would also include sales to post exchanges or ships' stores and other organizations and clubs which are operated as integral parts of service. 38 Comp. Gen. 470 (1959).

Tangible property--In the absence of a limitation with respect to the phrase "any supplies or war materials" and "naval supplies or war materials" used in 5 U.S.C. 59(c) and 10 U.S.C. 6112(b) (now 37 U.S.C. 801(c)), those phrases are construed to include any article of tangible property purchased by the military departments. 38 Comp. Gen. 470 (1959).

Construction contracts--Although the terms "supplies" and "materials" ordinarily may be contrued as having reference to tangible personal property, to construe the term "naval supplies or war materials" in the prohibition in 10 U.S.C. 6112(b), as including only personal property would create a disparity and frustrate the purposes of the prohibition in evey case involving other kinds of property; therefore, sales activities of a retired Regular officer in connection with contracts for constructing airport improvements come within the prohibition in 10 U.S.C. 6112(b). 39 Comp. Gen. 366 (1959).

Non-appropriated fund activities--Retired Regular officer employed as salesman by jewelry firm to sell to military exchanges, notwithstanding fact that he did not deliver the merchandise for sale, all sales being made to exchange patrons through exchange special order departments and delivery made direct from factory, since "selling" includes all activcities surrounding selling process, Defense definition includes "any other liaison activity" with view toward ultimate sale, claimat was engaged in selling to the Government in contravention of 37 U.S.C. 801(c). B-168735, February 26, 1970.

Liaison activities

Small business representatives--The activities of a retired Regular officer a a self-employed small business representative to secure information concerning the needs to the aerospace industry for companies manufacturing components used by the industry, are liaison activities with the view toward the ultimate consummation of a sale, which activities coupled with contacts for the purpose of negotiating or discussing changes in specifications, prices, cost allowances, or other terms of a contract, and possibly settling disputes concerning the performance of a contract, constitute "selling" within the contemplation of Defense Department Directive 5500.7, dates August 8, 1967, and 37 U.S.C. 801(c). 49 Comp. Gen. 85 (1969).

Precontract contacts - limitations--While, in determining whether a retired officer of the uniformed services comes within the provisions in 5 U.S.C. 59c (now 37 U.S.C. 801(c)) as amended by the act of October 9, 1962, Public Law 87-777, 76 Stat. 777, which requires forfeiture of retired pay of members engaged in selling and contracting activities with the military and other designated agencies, not every precontract contact with Government personnel is viewed as a sales activity, such contacts generally, either direct or indirect, by retired officers representing companies that sell supplies of war materials to the agencies should be considered within the prohibition, unless it is clearly and adequately shown tht the contact was for another purpose. 42 Comp. Gen. 236 (1962).

Public relations activities--Although public relations duties performed by retired Regular officers for corporations doing business with the Navy Department which duties result in the sale of the employer's products to the Navy are "selling" activities within the prohibition in 10 U.S.C. 6112(b), there may be public relations duties which do not constitute selling; therefore, in the determination of whether public relations duties are prescribed by the statute each case must be considered on an individual basis. 42 Comp. Gen. 87 (1962).

Good will--A retired officer whose private employment requires that he contact the trade to promote good will, which would result in sales to the Department of Defense, to be effected by other employees or agents of his employer is considered as "selling, contracting or negotiating to sell" as the term is used in 5 U.S.C. 59c and 10 U.S.C. 6112(b) (now 37 U.S.C. 801(c)), even though the actual purchasing officers are different from those with whom the retired officer deals. 38 Comp. Gen. 470 (1959).

Preliminary liaison activities--The contacts initiated by a retired Regular officer on behalf of his company with procurement and budget personnel of the Government to discuss general trends in the military environment that do not contemplate the selling activities from which retired officers are restricted 37 U.S.C. 801(c), nevertheless is considered employment within the prohibitory statutes, paragraph I.C 2(d) of the Defense Department Directive 5500.7, May 17, 1963, defining selling as "any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract is subsequently negotiated by another person." 43 Comp. Gen. 408 (1963).

Official v. other contacts--Contacts by retired officers of the uniformed services at places other than Government facilities, including social gatherings, which are made for the purpose of selling to one of the agencies designated in 5 U.S.C. 59c (now 37 U.S.C. 801(c)) are contacts for which retired pay to the member is required to be forfeited. 42 Comp. Gen. 236 (1962).

Prohibition Period

Prohibition to be broadly construed

The prohibition in 5 U.S.C. 59c and 10 U.S.C. 6112(b) (now 37 U.S.C. 801(c)) is directed toward the elimination of favoritism or undue influence in connection with selling to the Government which is a possibility existing throughout an employment period; therefore, the phrases "is engaged" and "while so engaged" may not be accorded a narrow construction which would limit the forfeiture of retired pay to only those days or parts thereof in which the officer actually engages in sales, but must be construed as precluding payments during the entire employment period. 38 Comp. Gen. 470 (1959); B-168735, February 26, 1970.

Commencement date of prohibition

The phrase "for a period of two years after retirement" in 5 U.S.C. 59c (now three years under 37 U.S.C. 801(c)) limits the period of prohibition as to retired officers to the two years commencing on the effective date of retirement except as to Navy and Marine Corps officers who

come within the prohibition in 10 U.S.C. 6112(b) which does not contain any time limit. 38 Comp. Gen. 470 (1959).

Active duty after retirement effect

A Navy officer transferred to the retired list effective July 1, 1967, but retained on active duty and released July 1, 1967, at which time he was employed by a subsidiary of a boat building company and involved in all aspects of Government procurement, is subject to the prohibition in 37 U.S.C. 801(c); however, the commencement of the 3-year limitation began to run from the date he was released from active duty, the retired pay forfeiture period terminating June 30, 1970, and since the officer was not involved in any serious procurement discussion prior to July 1, 1970, he is not prohibited from receiving retired pay subsequent to July 1, 1969. 52 Comp. Gen. 3 (1972).

Prohibition affecting entire employment

Prohibition covers period of contract--A retired officer who, upon being alerted to the fact that his activities as assistant manager of a retail concern in signing bids, negotiating and discussing terms of contracts with the Navy Department would subject him to the sales activity prohibition in 10 U.S.C. 6112(b) (now see 37 U.S.C. 801(c)), removed himself from any connection with a bid which was then being considered by the Navy Department, is still regarded as having engaged in sales activities so as to be precluded from receiving retired pay from the date of the contract until the date of final payment on a contract awarded prior to his separation from the Navy contract activities, even though during such period not all of his time was devoted to Navy sales activities and in some cases he had only infrequent contacts with the Navy. 42 Comp. Gen. 32 (1962).

Period of engagement in prohibited activity--When the activities of a retired Regular military officer in the employ of a corporation which does business with the military agencies are considered to be within the provisions of 5 U.S.C. 59c and 10 U.S.C. 6112(b) (now 37 U.S.C. 801(c)), the prohibition against payment of retired pay continues during the entire period of the officer's engagement in such activities and thereafter during the period covered by any contract resulting from such activities. 42 Comp. Gen. 87 (1962).

Individual acts have continuing effect--Retired Navy officer who as vice president of construction firm signed bid proposals and contracts in effect with Department of Defense during prohibited period is not entitled to retired pay since he was engaged in "selling" supplies or war materials within contemplation of 37 U.S.C. 801(c) and

Department of Defense Directive 5500.7. B-160236, December 2, 1966.

Good faith

The fact that the member acted in good faith, or was ignorant of the law, or that financial hardship will result, does not provide a legal basis for permitting retention of retired pay received during a period of prohibited employment and which may be recovered by deduction from future retired pay. 41 Comp. Gen. 642 (1962).

C. Nonprohibited Activities

Types of employment interest

Marketing vice president--Retired Regular officer's action in contacting two Defense Department official in his capacity as marketing vice president of technical services firm did not constitute liaison activities for sales purposes so as to require retired pay forfeiture under 37 U.S.C. 801(c), because officer's firm never sold or attempted to sell anything to Government, and officer had no authority from any firm to sell supplies to Defense Department. Further, neither of the officials he contacted were authorized to purchase anything for the Government, and officer did not attempt to sell anything to Defense Department. B-169200, July 2, 1970.

President of company--A retired Army officer who, as president of an electronics firm which sells supplies to the military departments, will have overall responsibility for sales but will not engage in any sales activities or initiate any contracts involving any of the contracting activities enumerated in Department of Defense Directive No. 5500.7, would not, solely by virtue of his position, be considered as engaged in sales activities, within the purview of 5 U.S.C. 59c (now 37 U.S.C. 801(c)). 41 Comp. Gen. 784 (1962).

Management of sales department, etc.--Retired Regular officers who have administrative, supervisory or management responsibility over the sales department or salesmen of firms doing business with the Government but who do not have any duties or any contacts in person, by correspondence or otherwise, involving the signing of bids, proposals or contract with the military service are not engaged in selling activities within the meaning of 5 U.S.C. 59c and 10 U.S.C. 6112(b) (now 37 U.S.C. 801(c)). 42 Comp. Gen. 87 (1962).

Assistance to Government visitors--Duties performed by a retired Regular officer in the employ of a corporation that does business with the Government, but whose duties consist

of arranging for lodging and travel reservations, appointments, and general assistance to visitors to and from the corporation home office and Washington, D.C., are not sales activities within 10 U.S.C. 6112(b). 42 Comp. Gen. 87 (1962).

Administrative assistant to president--A retired Regular officer employed by a private company as administrative assistant to president and vice president, made five visits to Army and Air Force Exchange Service, one to New York Navy Ship's Stores Office during the year immediately following retirement, and personally wrote friends advising them of his employment, no sales activities are shown within 2-year retirement period requiring forfeiture of retired pay under 37 U.S.C. 801(c) and Department of Defense Directive 5500.7. Statute does not encompass social contacts and responses to requests for assistance, information and advice, even though requests may be step toward procurement of some supply or material. B-165965, May 21, 1969.

Financial interest in corporation--Employment of retired officers in nonsales executive and administrative positions is outside purview of statute, officer's continued financial interest in firm subsequent to resignation as vice president would not bring him within scope of statute in absence of showing he engaged in sales activities. B-160236, December 2, 1966.

Liaison activities

Consultation with operational and tactical Government personnel--Retired AF officer under consideration by aerospace company for employment as technical consultant with noncontracting operational and tactical personnel of Armed Forces would not by such employment be engaged in selling within scope of 37 U.S.C. 801(c) and Department of Defense Directive 5500.7. B-159825, September 7, 1966.

Advising contractor v. contacting Government personnel--A contract for the employment of a retired Regular Marine Corps officer as a consultant to advise his employer--a military supply company--concerning Government needs and to assist in designing and manufacturing products for which the military departments have a current or future need would not itself bring the consultant activities within the restriction in the former 10 U.S.C. 6112(b so long as the officer does not contact the Navy or allow his name to be used for contracts resulting in sales; however, a provision in the contract which requires the officer to visit military installations and officials brings into existence the appearance of a requirement for possible sales activities within the conflict-of-interest statute and should be eliminated or modified to exclude contacts with installations

and officials under the Department of the Navy. 40 Comp. Gen. 511 (1961).

Technical discussions v. contract discussions-Contacts by retired officers of the uniformed services as technical consultants with noncontracting Defense Department personnel for the purposes of acquiring technical information rather than for any purpose involving a sales activity or attendance of retired officers as technical advisers at meetings in performance or purposes under awarded contracts are not contacts which would bring the officers within 5 U.S.C. 59c (now 37 U.S.C. 801(c)), however, meetings for the purpose of discussing any supply procurement proposals or negotiating or discussing changes in existing contracts are contracts under the definition of selling in Department of Defense Directive 5500.7 and would require termination of retired pay. 42 Comp. Gen. 236 (1962).

Advice to Government on request--A retired Regular officer who performs analytical services for a manufacturing firm selling equipment to agencies of the Department of Defense and who as an invitee or a member of technical, advisory or social organizations furnishes the Department of Navy assistance, information and advice, but does not engage in any activities to induce the Navy Department to purchase the manufacturing firm's products, is not required to have such liaison activities viewed as sales activities to subject him to the prohibition in 10 U.S.C. 6112(b). 41 Comp. Gen. 799 (1962).

Assistance on request--The management by a retired Regular officer of a local office of a company which does business with the Navy, while a form of liaison activity, would not of itself constitute selling activities as contemplated by 10 U.S.C. 6112(b) (now see 37 U.S.C. 801(c)), however, should the officer engage in any activity as defined as selling in Department of Defense Directive 5500.7 issued in implementation of 10 U.S.C. 6112(b), or which otherwise may be viewed as sales activities, he would be subject to the statute, but merely replying to inquiries or to request of Navy officials for assistance, information or advice is not regarded as engaging in sales activities under the statute. 42 Comp. Gen. 87 (1962).

Prohibited v. other contacts--Retired Regular officers who are employees of corporations which do business with the Department of the Navy, maintain lines of communication between the corporations and the Navy but have no authority to negotiate or exercise sales contracts are not engaged in sales activities for the purpose of 10 U.S.C. 6112(b) (now see 37 U.S.C. 801(c)); however, should such officers initiate any contacts with the Navy for any of the sales activities enumerated in Department of Defense Directive 5500.7,

implementing 10 U.S.C. 6112(b), they would be subject to the statute. 42 Comp. Gen. 87 (1962).

Foreign Government representation--Liaison activities of a retired Regular officer with representatives of foreign governments are not, in the absence of something further, selling activities within the prohibition in 10 U.S.C. 6112(b) (now see 37 U.S.C. 801(c)), so as to preclude receipt of retired pay. 42 Comp. Gen. 87 (1962).

Goods v. services

Moving and hauling--A retired Regular officer who contracts to perform packing, crating, drayage, storage, unpacking and transportation of household effects of Department of Defense personnel which does not involve transfer of the ownership of the property to the Government is not a contract of sale but is a contract for the performance of services only so that such a retired officer is not engaged in selling or the sale of supplies or materials to be precluded from receiving retired pay by 5 U.S.C. 59c and 10 U.S.C. 6112(b) (now 37 U.S.C. 801(c)). 41 Comp. Gen. 667 (1962).

Warranty Repairs--Regular officers, employed by conpanies which sell supplies and war materials to the Department of Defense or its agencies, who visit Army and Air Force Exchange Service stores to perform warranty repairs on their employer's products purchased from store, perform their duties as noncontracting technical specialist and are not in violation of 37 U.S.C. 801(c). B-203079, March 22, 1982.

Preparation of manuscript--Contracts between retired Regular Army officer and War Department Historical Fund for preparation of manuscript based on analysis of volumes in U.S. Army in World War II historical series would not subject officer to prohibition of 5 U.S.C. 59c (now 37 U.S.C. 801(c)) since contract is for procurement of specialized services rather than for procurement of supplies or war materials, sale in usual sense being transfer of property for fixing sum of money or other valuable consideration. B-158148, February 9, 1966.

Personal service--A retired military officer who is employed under a contract for personal services with a person who manufactures and/or sells supplies or war materials to military departments, but who has no personal connection with sales or the promotion of sales, is not engaged in selling, contracting or negotiating to sell to such agencies within the terms of 5 U.S.C. 801(c)). 38 Comp. Gen. 470 (1959).

Services v. sales--Retired Regular officers of the uniformed services who are employed by, represent, manage,

or have an owner's interest in business involving the repair of television sets, sale of public utilities and sale of meals in restaurants, are regarded as engaged in activities of a service nature which do not constitute selling as contemplated by 5 U.S.C. 59c and 10 U.S.C. 6112(b) (now 37 U.S.C. 801(c)). 42 Comp. Gen. 87 (1962).

Services for previously procured products--Visits by retired Regular officers to Army and Air Force Exchange Service stores for purposes of demonstrating employer's product and conducting seminars to induce procurement by the Government are in violation of 37 U.S.C. 801(c). However, stocking stores with employer's sales literature, taking sales inventory and conducting product demonstrations and seminars to explain the use of previously procured products or to influence sales to store customers do not violate the statute, since these activities do not directly influence Government procurement. B-203079, March 22, 1982.

Over-the-counter sales--Over-the-counter sales transactions to purchase items needed in the Conduct of the Government's business and which do not involve any bid, proposals or contract, or any contract negotiations, by representative of a military agency with a business concern operated or represented by a retired Regular officer of the uniformed services as owner or employee do not constitute selling within the meaning of the proscription in 5 U.S.C. 59c and 10 U.S.C. 6112(b) (now 37 U.S.C. 801(c)). 42 Comp. Gen. 87 (1962).

Sales by the Government--In the absence of any prohibition against retired officers engaged in activities incident to sales by the Government, a retired Regular officer who is an active partner in enterprises engaged in obtaining concessionaire privileges from the Government does not come within the prohibition in 10 U.S.C. 6112(b) (now 37 U.S.C. 801(c)). 39 Comp. Gen. 751 (1960).

CHAPTER 9

SURVIVOR BENEFIT PLAN (SBP)

I. LAW GENERALLY

The Survivor Benefit Plan, 10 U.S.C. 1447-1455, was established by Public Law 92-425, approved September 21, 1972, 86 Stat. 706. The Plan has been modified from time to time since then by amending legislation.

II. COVERAGE GENERALLY

A. Beneficiaries

Children coverage

Election requirement--When an eligible widow with dependent children is receiving an annuity under 10 U.S.C. 1448(a) which is reduced under 10 U.S.C. 1450(c) because of DIC entitlement and the widow loses eligibility because of death or remarriage dependent child is not entitled to an annuity unless coverage is elected and the additional costs for such coverage assessed. 54 Comp. Gen. 709 (1975).

Effect of election--The Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the surviving dependents of deceased service members. If a member elects to have dependent child annuity coverage when he becomes a participant in the Plan, that coverage is not limited to children he has at the time of the election, but extends automatically and involuntarily to any child he thereafter acquires. Hence, annuity coverage automatically extended to the son acquired by birth in 1981 following a remarriage by a retired Army officer who had elected to have dependent child coverage when he became a Plan participant in 1973. 62 Comp. Gen. 553 (1983).

Irrevocability of election--The election made by a retired service member who is married and has dependent children to participate in the Survivor Benefit Plan with full spouse and dependent child annuity coverage is binding and may not be unilaterally revoked by him, so that a retired Army officer who elected to have such coverage in 1973 could not, after divorce and remarriage, withhold dependent child annuity coverage from a son he acquired in 1981 even though by that time the only dependent child he had in 1973 was no longer eligible for an annuity. 62 Comp. Gen. 553 (1983).

Dependency and Indemnity Compensation (DIC) effect--Where children coverage is elected, the dependent children are entitled to the full annuity selected even though the annuity of the surviving spouse had been permanently reduced by the amount of DIC received. 55 Comp. Gen. 1409 (1976).

Children of prior marriage--A service member who elected spouse and children coverage under the Survivor Benefit Plan at retirement was thereafter divorced and remarried but died prior to the first anniversary of the remarriage. While his surviving spouse did not qualify for annuity purposes as his eligible widow at his death, she was pregnant. In view of the 10 U.S.C. 1450(a) provision that payment of the annuity will begin "the first day after the death", an annuity may be paid to his surviving dependent children of the prior marriage but must terminate on the date that the surviving spouse qualifies under 10 U.S.C. 1447(3)(B) for an annuity by the birth of his posthumous child. 60 Comp. Gen. 240 (1981).

Posthumous children--A service member who was married and had children, elected spouse and children coverage under the Survivor Benefit Plan at retirement. He was thereafter divorced and remarried, but died prior to the first anniversary of the remarriage. His surviving spouse who was pregnant when he died, later gave birth to his posthumous child. Not only does the birth of a posthumous child qualify the surviving spouse as the eligible widow for annuity purposes, but such child immediately joins his other

children the class stipulated in 10 U.S.C. 1450(a)(2) as potential eligible beneficiaries to share the annuity should the eligible widow thereafter lose eligibility by remarriage before age 60 or death. 60 Comp. Gen. 240 (1981).

Foster child--A minor grandchild of a service member can qualify as a foster child, subject to support requirement and limitations on dependency contained in 10 U.S.C. 1447(5) (A) and (B). 53 Comp. Gen. 461 (1974).

Military personnel-status--A child under 18 years of age and serving on active duty, or under 22 and attending a service academy, or enrolled in an institute of higher learning under a military subsistence scholarship program, is considered an eligible dependent within the meaning of 10 U.S.C. 1447(5), even though he is provided quarters and subsistence by the Government. 53 Comp. Gen. 420 (1973).

Disabled adult child-when disability arises--Under the Survivor Benefit Plan, 10 U.S.C. 1447 et seq., eligible beneficiaries include a deceased service member's "dependent child," a term defined by statute as including one who is incapable of supporting himself because of mental or physical incapacity incurred before his twenty-second birthday while pursuing a full-time course of study. Given this definition, a military officer's daughter who suffered a mental breakdown at the age of 19 during the summer vacation following the successful completion of her first year of college, and who was thus rendered incapable of self-support, may properly be considered a "dependent child" eligible for an annuity under the Plan. 62 Comp. Gen. 302 (1983).

Same-child secures employment--The adult daughter of a deceased Navy officer received a Survivor Benefit Plan annuity under 10 U.S.C. 1447(5)(B)(iii) based on a determination that she was incapable of self-support because of physical incapacity. She was quadraplegic as the result of childhood polio. Despite this disability, she later secured full-time Government employment in a grade GS-5 position. This does not warrant suspension of the annuity on the basis that she is no longer incapable of self-support, even though a grade GS-5 salary would normally be sufficient to cover the living expenses of a physically fit person, since that salary is not sufficient for her own personal needs. 62 Comp. Gen. 193 (1983).

Same-recurring loss of self-sufficiency--A deceased military officer's daughter, considered eligible for a Survivor Benefit Plan annuity on the basis of mental illness making her incapable of self-support, then recovered from her illness to the extent that she was able to support herself for 6 months through gainful employment. She subsequently suffered a relapse

requiring rehospitalization. The annuity may properly be suspended during the 6-month period of employment. It may be reinstated during the following period when she was again incapable of self-support because of the original disabling condition, since the applicable laws governing military syrvivor annuity plans do not preclude reinstatement in appropriate circumstances. 44 Comp. Gen. 302 (1983).

Same-mental patient's power of attorney--Under the rules of agency, a known mental incapacity of the principal may operate to vitiate the agent's authority even in the absence of a formal adjudication of incompetency. Hence, Survivor Benefit Plan annuity payments may not be made to an agent designated in a power of attorney which was signed by an annuitant known to be suffering from mental illness but not adjudged incompetent, since in the circumstances the validity of the power of attorney is too doubtful to serve as a proper basis for a payment from appropriated funds. 62 Comp. Gen. 302 (1983).

Same-payments to mental patient--Survivor Benefit Plan annuity payments in the case of an adult beneficiary known to be suffering from mental illness, but not adjudged incompetent, may be made directly to the beneficiary if by psychiatric opinion the beneficiary is considered sufficiently competent to manage the amounts due and to use the annuity properly for personal maintenance. Otherwise, the amounts due should remain unpaid and credited on account until a guardian authorized to receive payment is appointed by a court. 62 Comp. Gen. 302 (1983).

Spouse coverage

Eligible spouse beneficiary defined--The meaning of the phrase "eligible spouse beneficiary" as used in 10 U.S.C. 1452(a), as amended by section 1(5)(A)(ii) of Public Law 94-496, is to be defined in terms of the definition of "widow" or "widower" contained in 10 U.S.C. 1447; that is, in order for a widow or widower to receive a survivor annuity on the death of the member in retirement, they must be an eligible spouse beneficiary immediately before the death. 56 Comp. Gen. 1022 (1977).

Spouse as a potential beneficiary-Entitlement based on prior marriage--A retired naval officer seeks to have the deductions from his retired pay for the cost of spouse coverage under the Survivor Benefit Plan terminated. The basis of his request is that he has no eligible spouse beneficiary because his wife is entitled to a Survivor Benefit Plan annuity as a result of the military service of her previous husband who died while serving on active duty. The deductions from the officer's retired pay must continue because his wife is legally a potential beneficiary of an annuity provided by him and is, therefore, his eligible spouse beneficiary. B-213101, February 14, 1984.

Spouse caused death of retiree--acquittal of criminal charges--The wife of a deceased service member claims entitlement to an annuity under the Survivor Benefit Plan, where, in connection with his death, she was tried by jury and acquitted of all criminal charges. The claim may be allowed because the acquittal is sufficient indication of lack of felonious intent, absent further judicial proceedings or unusual circumstances tending to show that the claimant acted with felonious intent. B-215304, July 23, 1984.

Undissolved First Marriage-Status--Where member marries a second wife without dissolving his first marriage, second wife is not legally married to him and does not qualify as the beneficiary of his SBP annuity. Since the first wife was legally married to him at the time of his death, she is his "widow" and is the proper beneficiary of the SBP annuity in spite of the second ceremonial marriage. B-194469, May 14, 1979. Compare B-195250, January 23, 1980, and B-207592, June 23, 1982.

Mexican Divorce--A member of the Reserve component of the Air Force was a participant in the Survivor Benefit Plan, 10 U.S.C. 1447-1455, as amended by Public Law 95-397. Two women claim the annuity as widow. The member's first marriage was allegedly terminated by a Mexican divorce which the first wife has challenged. Since such divorces are not generally recognized by State courts a ruling by a court of competent jurisdiction as to the validity of the relationships involved is usually required (55 Comp. Gen. 533 (1975)). Since the first wife's suit asserting the continued validity of the first marriage was dismissed with prejudice she cannot question the validity of the second marriage. Accordingly, the claim of the second wife may be allowed. B-202149, December 30, 1981.

Active duty marriages--When a member remarries while serving on active duty and elects coverage for his newly acquired spouse, upon his death while in reetirement, his spouse is fully qualified as an eligible widow under 10 U.S.C. 1450(a)(1) since the marriage limitation contained in 10 U.S.C. 1447(3)(A) applies only to post-retirement marriages. 53 Comp. Gen. 470 (1974).

Death on active duty--In the event a member dies while serving on active duty, under 10 U.S.C. 1448(d) his widow is automatically entitled to an annuity regardless of the length of the marriage prior to the member's death. 53 Comp. Gen. 470 (1974).

Length of marriage qualification--Where member marries his second wife prior to validly divorcing his first wife and his marriage to his first wife was not dissolved until 8 months before his death, his second wife did not qualify as his "widow" under 10 U.S.C. 1447(3(A) as she had not been legally married to him at the time he bacame eligible for retired pay and had not been married to him for at least 1 year immediately before his death. B-189133, September 21, 1977.

A person who is married to a retired Navy member for less than 1 year prior to his disappearance may not be considered his widow under the Survivor Benefit Plan, 10 U.S.C. 1447-1455, even though a State court determined that the date of death was later than 1 year from the date of marriage because the court's decision was not based upon a full presentation of the facts and because the United States was not a party to that action. Widow's claim is too doubtful to allow because there is no showing that husband was alive after the disappearance of the ship on which he was sailing less than 10 months after the marriage. B-203903, September 3, 1981.

Posthumous child qualifying widow--A service member elected spouse and children coverage under the Survivor Benefit Plan at retirement. He was thereafter divorced and remarried but died prior to the first anniversary of the remarriage. While his surviving spouse did not qualify under 10 U.S.C. 1447(3)(A) for any annuity at the time of his death because they had not been married at least 1 year, she was pregnant and later gave birth to his child. On that basis she qualifies as the eligible widow for annuity purposes effective the date of the child's birth. 60 Comp. Gen. 240 (1981).

"Issue of marriage" qualification--Where a married member has a child by a woman who is not his wife, and nearly 17 years later, after divorcing his first wife, is validly married to the child's mother, she may not be considered the member's widow under 10 U.S.C. 1447(3)(B) on the basis

that she is the mother of "issue by that marriage," since the child was born long before the marriage. B-189133, September 21, 1977.

Common-law remarriage after divorce--After entry of a final decree of divorce on November 6, 1975, the wife alleges that she and the member immediately resumed marital cohabitation and were husband and wife under the common law of Colorado when husband died on November 21, 1975. While common-law remarriage after divorce is possible in Colorado, for SBP annuity purposes the existence of a commonlaw marriage on present record is too doubtful to authorize payment. B-194497, May 1979.

Retirement eligibility--A spouse is not covered under 10 U.S.C. 1448(d) as an eligible spouse beneficiary unless the member at the time of death would have been eligible to retire. 55 Comp. Gen. 854 (1976).

Natural person coverage

Relationship limitation--An insurable interest is any pecuniary interest in the continued life of another, and no evidence of pecuniary interest is required of a near relative, however, an insurable interest based on a contract relationship would have to be proved. 52 Comp. Gen. 973 (1973).

Dependent child--Unmarried member at the time he becomes entitled to retired or retainer pay may elect an "insurable interest" annuity under SBP for child who is also dependent child, notwithstanding restriction that such election may be chosen only by member "without dependent child," since purpose of provision was to prevent exclusion of dependent child and not to preclude inclusion of such child under "insurable interest" provision. B-179465, July 19, 1974.

Limitation on numbers--Under 10 U.S.C. 1448(b) coverage, only one person with an insurable interest may be named. 52 Comp. Gen. 973 (1973).

B. Elections

Elections effect

Until a member is entitled to retired pay, any elections made are ambulatory and may be changed prior to that time and only the last election is binding as it is only then that the class of eligible annuitants is set. 53 Comp. Gen. 470 (1974).

Exceptions

A service member is bound by his last election prior to retirement unless he comes within the specific exceptions

provided in 10 U.S.C. 1450(f) governing after retirement remarriages or acquisition of dependent children. 53 Comp. Gen. 470 (1974).

Reservists

Under provisions added to the Survivor Benefit Plan by Pub. Law 95-397, members notified of their eligibility (except for not having reached age 60) for non-Regular retired pay under 10 U.S.C. chapter 67, may elect immediate coverage for dependents. If such a member becomes entitled to retired pay under another law the member loses eligibility for chapter 67 retired pay, but the Survivor Benefit Plan election remains effective until the member actually retires. He is then covered by other provisions of the Plan and may make a new election. B-205400, June 7, 1982, 61 Comp. Gen. ____.

Temporary Disability Retired List (TDRL) limitations

Where a service member made an election for the purpose of being placed on the TDRL and whose name is removed from that list for the purpose of resuming active duty or retirement for length of service, since 10 U.S.C. 1448(c) terminates his participation, an option exercised and election made prior to placement on that list is limited to that purpose and such member may not be bound thereafter. 53 Comp. Gen. 971 (1974).

Administrative error

Revocation of any election based upon "administrative error" is a secretarial prerogative under 10 U.S.C. 1454 and may be exercised to revoke or modify SBP coverage based upon a finding that the member received erroneous or insufficient information and that such information caused him to make an election he would not otherwise have made. 55 Comp. Gen. 158 (1975).

Guardian or committee election

Where a court of competent jurisdiction determined that a member was mentally or physically incapable of managing affairs under state law and such a guardian or committee was appointed to manage all his affairs, an SBP election made by such guardian or committee before the member's death was valid and became effective when received by the Secretary concerned. 54 Comp. Gen. 285 (1974).

C. Administrative Requirements

Detailed explanation

The legislative history of the SBP discloses that administrative officers are required to fully explain the de-

details and benefits of the Plan to retiring personnel and their spouses if full coverage not selected; a responsibility that implies the requirement to determine whether there is an eligible spouse or dependent child. 53 Comp. Gen. 192 (1973).

Records examination

Where a member states that he does not have a spouse or child eligible for an annuity, the service records of the member should be examined to verify that representation. If there is no contrary evidence, the member's election may be accepted. 53 Comp. Gen. 192 (1973).

Good acquittance

Where member's representations that he has no spouse or dependent child are supportable in service records and his election not to participate in SBP is accepted, the Government has a good acquittance should it be posthumously discovered that the member had an eligible spouse or child at the time of retirement. 53 Comp. Gen. 192 (1973).

TDRL removal

When a service member's name is removed from the TDRL and is returned to the active list for any purpose, he is to be treated thereafter as a new prospective SBP participant and given the opportunity to review his future participation prior to retirement with positive action taken administratively to insure that the details and costs are again fully understood by him. 53 Comp. Gen. 971 (1974),

Secretarial election - incompetents

An election on behalf of a mentally incompetent member for natural person may be made by the Secretary concerned standing in place of the incompetent and under 10 U.S.C. 1449, if, after careful consideration of the facts and circumstances, he believes that the retiree would give up a substantial amount of monthly pay, he is required to make the election. 52 Comp. Gen. 973 (1973).

D. Retired Pay Reductions

Inception

Non-Regular Retirees--Since 10 U.S.C. 1448(a) provides that coverage commences when individual becomes entitles to retired pay, persons retired under 10 U.S.C. 1331, who become entitled to retired pay when application for retired pay is filed with department concerned, receive coverage at that time and deductions from retired pay commence with the inception of coverage. 53 Comp. Gen. 832 (1974).

Fleet Marine Corps Reserve

If an active duty member is placed in retired or retainer pay status effective a day other than the first of a month and participates in the SBP, coverage charges begin on the first day of month following, unless regulations pursuant to 10 U.S.C. 1455 provide pro rata charges for part of month. B-196539, July 1, 1980.

Termination

Spouse coverage--Under the SBP, as amended by section 1(5)(A)(ii) of Public Law 94-496, effective October 1, 1976, where a member had elected spouse coverage but reduction of retired pay for spouse coverage is terminated because the member no longer has an eligible spouse beneficiary, so long as he had an eligible spouse beneficiary on the first day of the month, full reduction of retired pay for spouse coverage is required since charges are made on an indivisible monthly basis. 57 Comp. Gen. 847 (1977). See also B-195349, January 10, 1980. Cf. B-196539, July 1, 1980.

Foreign Service Survivor Annuity Elections--A retired service member who validly elects into the SBP may not voluntarily withdraw and shall continue to have his retired pay reduced (10 U.S.C. 1452(a)) or make deposits for coverage (10 U.S.C. 1451(d)), if not entitled to retired pay, notwithstanding fact that member was subsequently employed in the Foreign Service, retired therefrom and elected a survivor annuity under that system. B-188932, December 22, 1977.

Civil Service Survivor Annuity Elections--A retired member, having elected coverage under the SBP, and thereafter retired from the Civil Service, waived receipt of military retired pay for Civil Service retirement purposes and did not decline survivor coverage under the Civil Service Retirement system. Under 10 U.S.C. 1452(e), SBP coverage charges are suspended so long as that waiver is in effect. B-192490, January 3, 1978.

Effect of Renunciation of United States citizenship--A retired member of the Armed Forces who becomes a citizen of a foreign country by naturalization and who voluntarily renounces his United States citizenship loses the right to retired pay since entitlement to retired pay depends upon the continuation of the individual's status as a retired member of the military service available for service as required and that status is incompatible with renunciation of United States citizenship. However, such a person who elected to participate in the Survivor Benefit Plan and from who retired pay the required deductions were being made for coverage under the Plan when he renounced his U.S. citizenship, may continue coverage under the Plan by making the required payments into the Treasury. B-212481, February 2, 1984.

Resumption

Post-election remarriages--Since section 1(5(A) of Public Law 94-496 authorizes that reduction in retired pay for spouse coverage purposes is no longe required for any month in which there is no eligible spouse beneficiary, resumption of such reduction for spouse coverage in the case of post-election remarriages would not occur until the spouse on remarriage qualifies as an eligible spouse beneficiary by the happening of the earlier of the two requirements stipulated in 1447(3)(A) and (B). 56 Comp. Gen. 1022 (1977). See also B-195349, January 10, 1980.

Spouse coverage - first month following eligibility attainment--Under the SBP, as amended by Public Law 94-496, effective October 1, 1976, after spouse coverage is terminated due to loss of eligible spouse beneficiary and the member remarries, since reduction in retired pay for spouse coverage purposes is charged on an indivisible monthly basis, such reduction in retired pay would not resume until the first month following the date such spouse attains eligible spouse beneficiary status, unless such date is on the first of a month, then appropriate charges are to be made for that month. 57 Comp. Gen. 847 (1978). See also B-195349, January 10, 1980.

Recomputation

Child coverage - loss of spouse beneficiary--Under the SBP, as amended by Public Law 94-496, effective October 1, 1976, where the member had elected both spouse and children coverage and there is termination of reduction of retired pay for spouse coverage because of loss of an eligible spouse beneficiary, the previously elected child coverage is to be recomputed since the law governing the SBP requires such coverage to be determined on an actuarial basis and the loss of the eligible spouse beneficiary has increased the probability that an annuity would be payable to an elected dependent child. 57 Comp. Gen. 847 (1978).

Member's and child's age--Under the SBP, as amended by Public Law 94-496, effective October 1, 1976, since dependent children coverage, either alone or in combination with spouse coverage is to be determined on actuarial basis, in order to maintain such basis, recomputation of children coverage is to be based on the member's age and that of the youngest child beneficiary as of the day following loss of an eligible spouse beneficiary. 57 Comp. Gen. 847 (1978).

New-born child beneficiary--Statutory provisions of the Survivor Benefit Plan direct that costs of dependent child annuity coverage be assessed "by an amount prescribed under regulations of the Secretary of Defense." Consistent with express Congressional intent, the regulations prescribe computation of those costs on an actuarial basis in which the ages of the Plan participant and his eligible dependents are used. When a Plan participant acquires a dependent child and he has no other children remaining who are eligible for an annuity, those costs are to be reinstated, computed under that prescribed method based on the age of the newly acquired child. 62 Comp. Gen. 553 (1983).

Eligible spouse beneficiary reacquisition--Under the SBP, as amended by Public Law 94-496, effective October 1, 1976, where the cost of children coverage had been recomputed and charged following the loss of eligible spouse beneficiary,

since children coverage is to remain on an actuarial basis, and since the gain of an eligible spouse beneficiary has reduced the probability that an annuity would be payable to an elected dependent child, the cost of such coverage should be further recomputed, based on the age of the youngest child and the ages of the member and remarriage spouse on the date the spouse qualified as an eligible spouse beneficiary. 57 Comp. Gen. 847 (1978). See also B-195349, January 10, 1980.

E. Record Correction

Persons whose military record is corrected on date subsequent to September 20, 1972, to show entitlement to

retired or retainer pay commencing subsequent to that date are automatically covered and may not be afforded a period of time thereafter to decline coverage or elect reduced coverage after awarad of retired pay, since their position cannot be distinguished from member becoming entitled to retired or retainer pay without correction of their record and do not receive opportunity to elect reduced coverage or decline coverage after they become entitled to that pay. 54 Comp. Gen. 116 (1974).

III. ANNUITIES

A. Member's Death on Active Duty

No break in service

Annuity payment limitation--Service member, retired after passage of SBP, is immediately recalled to active duty and then dies while on that duty. Entitlement to annuity accrues only under the provisions of 10 U.S.C. 1448(d), 53 Comp. Gen. 847 (1974), affirmed B-179018, August 6, 1976.

Spouse annuity--Where entitlement accrues under 10 U.S.C. 1448(d) as the only basis for coverage, only the otherwise eligible surviving spouse would be entitled to an annuity. 53 Comp. Gen. 847 (1974).

Child annuity--A dependent child is not entitled to an annuity under 10 U.S.C. 1448(d) since the legislative history of the SBP indicated such coverage was not intended. 54 Comp. Gen. 709 (1975).

Break in service

Alternative annuity--Where a retired member who has elected SBP spouse coverage, is recalled to active duty after a break in service and dies while serving on that duty, the surviving spouse is eligible to receive the elected annuity under 10 U.S.C. 1448(a) or the annuity authorized under 10 U.S.C. 1448(d), whichever provides the greater benefit. 53 Comp. Gen. 847 (1974).

Dependent child entitlement--Service member who elects coverage for spouse and children, is retired and recalled to active duty after a break in service and dies while serving on that duty, upon the death of the spouse who was receiving annuity under 10 U.S.C. 1448(d) the children would have a right under 10 U.S.C. 1448(a) to receive the annuity elected for the remainder of their dependency. 53 Comp. Gen. 847 (1974). See also B-205400, June 7, 1982, 61 Comp. Gen. ____.

B. Qualifying Service Time

Missing in action (MIA) status

Active duty personnel who enter an MIA status and are subsequently determined to have died in that status, since time in an MIA status is treated as active service for pay, allowances and other benefits, such time shall count towards retirement years of service for the purpose of establishing an annuity under 10 U.S.C. 1448(d). 53 Comp. Gen. 887 (1974).

Promotion in a missing in action (MIA) status

Limitations on grade for retirement purposes, such as the six-month in grade requirement, do not apply to promotions in cases of members who are killed in action since under 37 U.S.C. 552(a), such promotions received are "fully effective for all purposes." B-195625, February 28, 1980.

Retirement qualification

An annuity is not payable under 10 U.S.C. 1448(d) in case of commissioned officer with over 20 years service when he died on active duty, since he was not eligible for retirement under 10 U.S.C. 8911 (1970) because he had less than 10 years of service as a commissioned officer and was not eligible for retirement under 10 U.S.C. 8914 (1970) as an enlisted member since at the date of his death he was an officer. 55 Comp. Gen. 854 (1976).

C. Computation of Retired Pay

10 U.S.C. 1402(a) or (e)

Service member with over 20 years of service who is retired, immediately recalled to active duty and dies while on such duty, for purposes of determining annuity authorized by 10 U.S.C. 1448(d), retired pay is computed under 10 U.S.C. 1402(a) or (e) to reflect later active duty. B-179018, August 6, 1976.

Rates on TDRL

Member whose grade was rear admiral (08) and who was serving as an admiral (0-10) when transferred to the TDRL and died while thereon before the Senate could confirm him as an admiral (0-10), regardless of grade to which entitled on the retired lilst, under Formula No. 2, 10 U.S.C. 1401, such member's retired pay while on the TDRL is computed on basic pay of an admiral (0-10) and SBP annuity based thereon. 55 Comp. Gen. 667 (1976).

Promotions in a missing in action (MIA) status

Limitations on grade for retirement purposes, such as the six-month in grade requirement, do not apply to promotions in cases of members who are in an MIA status and have been determined to be killed in action since under 37 U.S.C. 552(a), such promotions received are "fully effective for all purposes." B-195625, February 28, 1980.

D. Annuity inception date

MIA Members

The inception date for payment of an annuity under 10 U.S.C. 1450 for MIA members is the day after the date the Secretary concerned makes a determination of death as long as such date of determination occurs after September 21, 1972, notwithstanding the fact that the date of death is determined to have occurred earlier than the date of determination. 53 Comp. Gen. 887 (1974).

Successive child benefits

When a member elects coverage under the SBP for his spouse and child, the child may not receive the annuity until the widow or widower dies or remarries prior to age 60, even though she is not receiving SBP benefits pursuant to 10 U.S.C. 1450(c) as a result of her entitlement to DIC. B-191524, June 30, 1978.

IV. ANNUITY ADJUSTMENTS

A. Dependency and Indemnity Compensation

SBP reduction

Cost computation--Where widow's SBP annuity is reduced pursuant to 10 U.S.C. 1450(c) by the award of DIC, in order to determine amount of refund due pursuant to 10 U.S.C. 1450(e), computation of cost of reduced annuity is to be made on a monthly basis and include all cost-of-living increases in retired pay and all increases in DIC rates from the date of member's retirement until the date of his death. 56 Comp. Gen. 482 (1977). See also 57 Comp. Gen. 847 (1977); and B-203380, March 2, 1982, 61 Comp. Gen. ___.

Delay in payment of DIC until first of following month--When upon a service member's death the surviving spouse is eligible for both a Survivors Benefit Plan (SBP) annuity and Veterans Administration Dependency and Indemnity Compensation (DIC), the amount of the SBP payment is reduced by the amount of DIC and a corresponding refund of the member's SBP contributions is paid to the beneficiary. Despite the fact that under 38 U.S.C. § 3011 DIC payments are not effective until the first of the month following the

month of the service member's death, the beneficiary will be deemed eligible for, and in receipt of, DIC payments for the purposes of SBP annuity computation and refund of SBP contributions pursuant to 10 U.S.C. § 1450(c) and (e). B-214461, August 20, 1984.

Spouse coverage only--Widow is entitled to refund of deductions from retired pay if the annuity is reduced based upon receipt of DIC, however, such refund is only computed on retired pay reductions for spouse coverage and does not include retired pay deductions for dependent children coverage. 55 Comp. Gen. 1409 (1976). See also B-203950, March 19, 1982, 61 Comp. Gen. ____.

Limitation on refund--Where the surviving spouse receives the full amouint of selected SBP annuity for any period, because an award of DIC could not be made retroactive to date of death since recalculation of SBP annuity pursuant to 10 U.S.C. 1450(c) and (e) is permitted only when annuity is reduced by DIC award effective "upon the death" of the retiree, no refund is due. 56 Comp. Gen. 482 (1977).

Loss of DIC

SBP reinstatement--Where annuity is either terminated or reduced in accordance with 10 U.S.C. 1450(c) and (e) because of receipt of DIC, and spouse subsequently loses eligibility of DIC because of remarriage after age 60, such spouse would only be entitled to reinstatement of the annuity paid for and not refunded. 54 Comp. Gen. 838 (1975). But see 10 U.S.C. 1450(k) as added by section 203 of Public Law 95-397, for annuities payable on and after October 1, 1978. See also 58 Comp. Gen. 626 (1979).

DIC eligibility lost and later regained--When upon a service member's death the surviving spouse is eligible for both SBP annuity and DIC, the amount of the SBP payment is reduced by the amount of the DIC and a corresponding refund of the member's SBP contributions is due the spouse. If DIC entitlement is subsequently lost due to remarriage of the spouse, SBP may be reinstated provided the refund is returned. However, no refund is payable once the benefit of the plan has been derived. Accordingly, when a refund is repaid and SBP payments are thereafter made, no additional refund is authorized should the spouse again become eligible for DIC. B-203380, March 2, 1982, 61 Comp. Gen. ____.

SBP increases--Where reductions from retired pay are refunded pursuant to 10 U.S.C. 1450(e) because spouse is receiving DIC, repayment of that refund for the purpose of acquiring increased SBP coverage when DIC is lost due to remarriage after age 60 was not authorized. 54 Comp. Gen. 838 (1975). However, pursuant to 10 U.S.C. 1450(k) as added by section 203 of Public Law 95-397, the full SBP annuity may now be restored upon repayment of retired pay contributions the spouse received when the SBP annuity was reduced. However, under § 210(a) of Public Law 95-397, the full annuity may not be paid for months prior to October 1, 1978. 58 Comp. Gen. 626 (1979).

Subsection 1448(a) and (d) comparison--When widow loses eligibility for DIC by reason of remarriage after age 60, an SBP annuity payable under 10 U.S.C. 1448(d) should be made on the same basis as the widow under 10 U.S.C. 1448(a) at the time loss of DIC occurred, since the legislative history of SBP indicates that widows of members dying on active duty are accorded the same treatment as widows of other participants in the SBP with exception of cost free coverage. 54 Comp. Gen. 709 (1975).

SBP continuation--Widow who is receiving a reduced SBP annuity under 10 U.S.C. 1448(d) and then remarries after age 60, thereby losing eligibility for DIC, SBP annuity may still be paid since restrictions in 10 U.S.C. 1448(d) applying to eligibility for DIC have been construed as prohibiting payment of an SBP annuity only to the extent that the amount of the SBP plus the DIC payable would exceed the maximum annuity payable under SBP. 54 Comp. Gen. 709 (1975).

SBP termination--Where no SBP annuity is payable under 10 U.S.C. 1448(d) because DIC is greater, spouse's entitlement terminates permanently, since spouse coverage under 10 U.S.C. 1448(a) in the same circumstances is permanently terminated. It appears from the legislative history that Congress, while providing that widows of members eligible to retire who die while on active duty should not receive an annuity less than widows of members who did retire, did not intend only a temporary termination of benefit under these circumstances. 54 Comp. Gen. 709 (1975). However, see also 10 U.S.C. 1450(k) as added by section 203, Public Law 95=397, and 58 Comp. Gen. 626 (1979).

Termination effect on Child SBP Coverage--A widow receiving Dependency and Indemnity Compensation (DIC) under 38 U.S.C. 411(a) in an amount equal to or greater than an SBP annuity, and who is therefore precluded from participating in the SBP because of 10 U.S.C. 1450(c), is not considered as being otherwise ineligible under 10 U.S.C. 1450(a)(1) for the purpose of having the annuity succeed to the child under 10 U.S.C. 1450(a)(2). B-191524, June 30, 1978.

SBP prohibition--Where a surviving spouse is eligible for an annuity under 10 U.S.C. 1448(d), such language contained therein which relates to the eligibility to receive DIC payments, when considered in conjunction with the other portions of subsection (d), must be construed only as prohibiting an SBP annuity if the VA benefits exceed the maximum annuity otherwise payable under 10 U.S.C. 1448(d). 53 Comp. Gen. 847 (1974).

B. Civil Service Survivor Annuity

SBP annuity when retired pay waived

SBP annuity elected by retiree, who later waives military retired pay for use of military credits to increase his Civil Service retirement benefits, is not payable unless retiree elects not to participate in Civil Service retirement survivorship plan. 53 Comp. Gen. 857 (1974).

SBP participation suspension

SBP participation is suspended during period that a member has in effect a waiver of military retired pay for Civil

Service annuity purposes based on combining military service with Civil Service, but if waiver is no longer effective, previously elected SBP would be resumed and military retired pay reduced thereafter. 55 Comp. Gen. 1178 (1976). Cf. B-192470, January 3, 1979, and B-192470, January 24, 1980.

Reduced civil service annuity

A member who elects SBP coverage and who later elects to combine military service credits with Civil Service credits for Civil Service annuity purposes, may elect to participate in the Civil Service survivorship plan at a level lower than his SBP coverage. 55 Comp. Gen. 1178 (1976).

Refund of costs

Where member who elected SBP coverage waived retired pay to receive VA compensation, but informed Civil Service Commission that purpose of waiver was to have Civil Service annuity computed on basis of total Federal service, even though service Finance Center was not so advised until after member's death, his widow is not eligible for SBP annuity, however, she is entitled to refund of costs paid by member after waiver. 55 Comp. Gen. 684 (1976).

SBP deposits not required

Deposits are not required to be made under SBP by retiree who elects to use military credits to increase Civil Service retirement benefits unless retiree elects not to participate in Civil Service retirement survivorship plan. 53 Comp. Gen. 857 (1974). See B-192470, January 3, 1978. and B-192470, Januaary 24, 1980. Cf. B-188932, December 22, 1977.

Previous waiver

An election by a retiree to participate in the SBP and cancel his RSFPP coverage, is of no force or effect in view of the limitation contained in 10 U.S.C. 1450(d), where he has previously waived his retired pay in order to increase his Civil Service annuity and has survivor annuity coverage under the program, and the widow of such a member is to have her RSFPP coverage reinstated. B-183374, June 4, 1975.

C. Foreign Service Survivor Annuity

SBP nontermination

A surviving spouse of retired military member, who validly elected into the SBP to provide spouse coverage and who later retired from the Foreign Service having validly

elected spouse coverage under that retirement system, is entitled to payment of the elected SBP annuity as well as the Foreign Service survivor annuity. See B-188932, December 22, 1977.

D. Social Security Setoff

Reductions in benefits before age 65

Computation of setoffs from Survivor Benefit Plan annuities which are required to be made in an amount equal to the retiree's social security benefit based solely on military service must take into account the reduction in social security benefits when the retiree received benefits before reaching age 65. Thus, where a widow's social security benefit is reduced because of the reduction in the retiree's benefit, the services may not calculate the offset against the Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment. 62 Comp. Gen. 471 (1983).

No claim made for social security benefits

An offset against the Survivor Benefit Plan annuity, computed solely on the military service of deceased spouse, is imposed when the annuitant reaches age 62. This offset may be reduced if the annuitant would have social security survivor benefits reduced because of work even though no claim has been made for social security benefits. B-202625, December 31, 1981.

Effect of reduction in social security benefits for work

SBP annuity offsets, under 10 U.S.C. 1451 because of social security entitlement, are computed when the annuitant reaches age 62. This offset may be reduced if the annuitant's social security entitlement is reduced because of work. If the SBP offset is reduced or eliminated because of work and the annuitant discontinues working and becomes entitled to social security benefits the SBP offset is reinstated computed at age 62. B-202625 December 31, 1981.

Military service only

Setoff of amount from annuity representing social security benefit payable to widow at age 62 and widow with one dependent child must be calculated on the basis of wages attributable to member's military service only and the formula used to calculate wages attributable to the military service may not include wages from nonmilitary employment. 53 Comp. Gen. 733 (1974). See also 58 Comp. Gen. 795 (1979); B-196569, July 8, 1980; and B-202625, December 31, 1981.

Widow's vs. widower's benefit

For purposes of social security setoff widower's benefit is not subject to same reduction as widow's benefit when there is one dependent child since widower receives no benefit comparable to "mothers benefit" under social security laws. 53 Comp. Gen. 758 (1974).

Social security benefits for own work

A widow's Survivor Benefit Plan annuity payments were offset to the extent of the Social Security mother's benefit to which she would have been entitled based on the deceased

service member's military Social Security coverage. However, she was actually receiving Social Security benefits based on her own work record and, therefore, received a reduced mother's benefit due to the benefits payable based on her own record. She is not entitled to reimbursement of the Survivor Benefit Plan annuity withheld for the difference between the mother's benefit to which she would have been entitled had the mother's benefit not been reduced in her case and the reduced mother's benefit which she actually received. 60 Comp. Gen. 129 (1980).

E. Cost of Living Adjustments

Less than maximum coverage

Base amounts designated less than maximum coverage are not subject to modified cost-of-living adjustments to retired pay computation at time of retirement. 55 Comp. Gen. 1432 (1976). See also B-190908, April 26, 1978, and June 26, 1980.

Maximum coverage

All base amounts designated under 10 U.S.C. 1447(2) upon which SBP annuities are based are subject to cost-of-living adjustments under 10 U.S.C. 1401a(b). 55 Comp. Gen. 1432 (1976).

F. Remarriages

Annulment

Where a surviving spouse beneficiary loses annuity entitlement because of subsequent remarriage, but where that remarriage is annulled, annuity payments may be reinstated effective the first day of the month in which annulment decree was rendered. B-197601, September 12, 1980. See also B-210542, August 23, 1983.

V. PRE-EFFECTIVE DATE RETIREES

A. Spouse Coverage

Newly acquired - limitation

Member who was retired prior to the effective date of the SBP and who marries prior to the first anniversary of the Plan (September 21, 1973), may provide immediate coverage for his spouse regardless of the 2-year limitation under 10 U.S.C. 1447(a)(A), provided such an election is made within the time limitation stated in subsection 3(b) of the act, as amended by section 804 of Public Law 93-155. 54 Comp. Gen. 266 (1974). See also B-190908, April 26, 1978, and B-190908, June 26, 1980.

Expansion of coverage to include

Spouse of member retired prior to effective date of the SBP, who had divorced member prior to SBP effective date, but who had remarried member within time limit imposed under subsection 3(b) of Public Law 92-425, as amended, and where retired member, as a single person had previously elected SBP coverage for dependent child, such spouse immediately qualifies as an eligible surviving spouse if he elected to expand that coverage to include such spouse within the time limitation referenced in the fourth sentence of 10 U.S.C. 1448(a). 54 Comp. Gen. 732 (1975).

B. Children Coverage - Selection Time Limitation

Service member who was married, had a dependent child and retired prior to effective date of SBP, who was subsequently divorced prior to March 21, 1974 (anniversary of effective date of Plan as extended by section 804 of Public Law 93-155), and who did not elect children coverage within 18-month time limitation stated in subsection 3(b) of act, is not eligible to elect children coverage thereafter in absence of further legislation reopening Plan to him. B-187179, November 30, 1976. See also 56 Comp. Gen. 1022 (1977).

C. Elections

Timeliness

A member retired prior to the effective date of SBP, who executed a section 3(b) election to provide spouse coverage before anniversary date but died prior to the receipt of the election in the administrative office, made a valid election, where the election document had been witnessed and passed from his control prior to death, since section 3(e) requires only that an election timely made is effective when received by the Secretary concerned. 53 Comp. Gen. 519 (1974).

Recall to active duty during election period

A service member retired before enactment of the SBP and was entitled to elect SBP coverage for his spouse under the provisions of subsection 3(b) of Public Law 92-425, 86 Stat. 706, 711, as amended, during the 18 months after enactment of the SBP. Before he made an election, but during the 18-month period, he was recalled to active duty and was not returned to the retired list until after the close of the election period. In view of the purpose of the plan--to include as many retirees as possible--and since the statutory provisions do not contain a rule applicable to this situation the election made at the end of the period of extended active duty which began during the 18-month period may be considered valid. B-201229, August 24, 1981.

Divorce set aside after election period

A Navy warrant officer who retired prior to the effective date of the Survivor Benefit Plan was in a divorced status during the 18-month period to elect to participate in the Plan, but his divorce was later set aside by a court of competent jurisdiction. In those circumstances an election made by the retiree shall be considered valid if made within a reasonable period from the time that the voidance of the divorce decree properly established the previous existence of the marriage. For purposes of computing reduction of retired pay, the effective date of the election is the first day of the first calendar month following the month in which the election is received by the Secretary of the Navy. The member's wife shall be considered an eligible spouse beneficiary from the time of the election. B-205173, June 9, 1982.

Effect of election

Member, retired prior to effective date of SBP, who as single person elects coverage for dependent child through subsection 3(b) of that act, at that point participation in Plan to the same degree as posteffective date retirees and subject to the postparticipation election restrictions contained in 10 U.S.C. 1448(a). 54 Comp. Gen. 732 (1975).

Void election-invalid marriage

A service member retired prior to the effective date of the Survivor Benefit Plan contracted a second marriage apparently without having dissolved his prior marriage. He thereafter elected spouse coverage as authorized by section 3(b) of Public Law 92-425 in the name of the second spouse. Upon his death payment of an annuity to the second spouse may not be made unless it is established in a court of competent jurisdiction that his marriage to her was valid. Otherwise the election to participate in the Plan is void as having been made with the intention of providing an annuity to an ineligible beneficiary. If that be the case, the amount deducted from member's retired pay for coverage costs are to be paid to the eligible beneficiary under 10 U.S.C. 2771. B-207625, September 22, 1982. See also 57 Comp. Gen. 426 (1978); 63 Comp. Gen. 63 (1983).

Fourth sentence of 10 U.S.C. 1448(a) elections

A pre-SBP effective date retiree who is unmarried with a dependent child on the first anniversary date of the Survivor Benefit Plan, may elect spouse coverage under the fourth sentence of 10 U.S.C. 1448(a) upon marriage after the close of the 18-month election period authorized under subsection 3(b) of Public Law 92-425, as amended, notwithstanding fact that he could have elected coverage for his

dependent child during that period and failed to do so. 57 Comp. Gen. 98 (1977). Compare B-187179, November 30, 1976.

Revocation

Members who retired before SBP effective date and elected to participate under subsection 3(b) of Public Law 92-425, may not unilaterally revoke such elections during the 18-month period provided for such election or at any time thereafter. 53 Comp. Gen. 158 (1975).

D. Record Correction

Coverage not automatic

Person whose military record is corrected on or after September 21, 1972, to show entitlement to retired pay on date prior to September 21, 1972, is not automatically covered under SBP since purpose of record correction is to place member as nearly as possible in same position he would have occupied had he been retired at earlier date and in order to be automatically covered under SBP member must become entitled to retired or retainer pay subsequent to effective date of SBP. 54 Comp. Gen. 116 (1974).

Time limit to elect

Members, who become entitled to retired or retainer pay on date prior to effective date of SBP by virtue of record correction occuring after effective date of SBP, must be afforded an equal opportunity to elect coverage which in this case is 18 months from date of notification of records correction. 54 Comp. Gen. 116 (1974).

IV. RECOVERY AND WAIVER

A. Waiver

Blanket waiver

Automatic and blanket waiver of erroneous annuity payments under the SBP to a specific but unnamed class of annuitants, which erroneous payments were caused by a retroactive pay increase, is not authorized because waiver may only be granted individually where there is a showing of no fault and recovery would be contrary to purpose of Plan and therefore be against equity and good conscience. B-167266, April 7, 1975. Cf. B-133142/B-178696, September 6, 1978.

Criteria

Waiver of erroneous payments under SBP pursuant to 10 U.S.C. 1453 should be similar to the criteria for waiver

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under 5 U.S.C. 5584; 10 U.S.C. 2774 and 32 U.S.C. 716, and therefore, although waiver may not be granted unless collection would be contrary to the purpose of the plan and against equity and good conscience proof of financial hardship will not be required if waiver is otherwise in order. 54 Comp. Gen. 249 and 55 id. 401, overruled. 55 Comp. Gen. 1238 (1976).

B. Debts of Deceased Member

In view of limitations in 10 U.S.C. 1450(i), since general debts of a deceased retired member are not the responsibility of his widow, such debts may not be setoff against an SBP annuity payable to such widow. 54 Comp. Gen. 493 (1974). See also B-209306, March 24, 1983.

Insufficient SBP cost charge

Where debt of a deceased retired member arises from insufficient reduction of retired pay to cover cost of annuities, annuities payments may be reduced to cover added cost. 54 Comp. Gen. 493 (1974).

C. Underpayment of Annuities/Over Reduction of retired pay

Amounts due members or beneficiaries for over reduction of retired pay or underpayment of annuities due to computation of SBP based amounts should be paid to persons entitled thereto. 55 Comp. Gen. 1432 (1976).

D. Collection of Overpayment of Annuity

Collection of overpayment of an SBP annuity due to retroactive payment of DIC may be effected by withholding the amount of overpayment from the premium refund due upon recalculation of the SBP annuity as authorized by 10 U.S. 1453 (1976). B-192223, December 19, 1978.

VII. SECTION 4, PUBLIC LAW 92-425

A. Effective Date of Entitlement

The effective date of entitlement to annuity under section 4, Public Law 92-425, is the date on which the requirements of the law are met or on the effective date of the law, which ever is later. 54 Comp. Gen. 493 (1974).

B. Termination of Entitlement

Amounts of annuity payments due a beneficiary under section 4, Public Law 94-425, but unpaid at the beneficiary's death either because annuity checks were not negotiated or because payments had not been established, may be paid to the estate of the deceased beneficiary. 54 Comp. Gen. 493 (1974).

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