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Title I — Compensation

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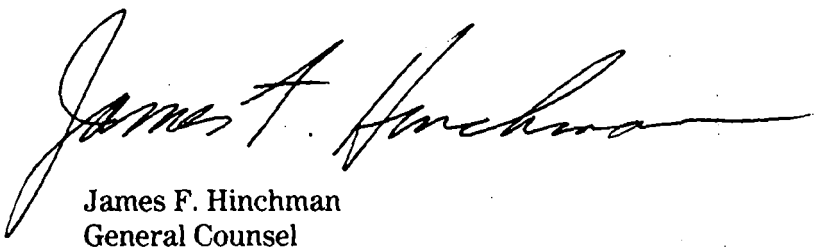

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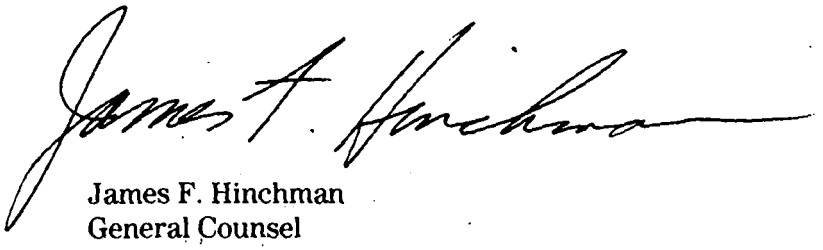
Foreword

This is Title I of the Third Edition of the Civilian Personnel Law Manual. The Manual is prepared by the Office of General Counsel, U.S. General Accounting Office (GAO). The purpose of the Manual is to present the legal entitlements of federal employees, including an overview of the statutes and regulations which give rise to those entitlements, in the following areas: Title I—Compensation, Title II—Leave, Title III—Travel, Title IV—Relocation. Revisions of Titles II, III, and IV have been issued.

This edition of the Civilian Personnel Law Manual is being published in loose leaf style with the introduction and four titles separately wrapped. The Manual generally reflects decisions of this Office issued through September 30, 1989, in Titles I and II and September 30, 1988, in Titles III and IV. The material in the Manual is, of course, subject to revision by statute or through the decision-making process. Accordingly, this Manual should be considered as a general guide only and should not be cited as an independent source of legal authority. This Manual supersedes the Second Edition of the Civilian Personnel Law Manual which was published in June 1983 and the supplements published in 1984, 1985, and 1986.



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Abbreviations

AFB	Air Force Base
AID	Agency for International Development
ARBA	American Revolution Bicentennial Administration
AWOL	absent without leave
Canal Zone	former Panama Canal Zone
"certain areas in Panama"	the areas and installations in the Republic of Panama made available to the United States by various agreements
C.F.R.	Code of Federal Regulations
CFWS	Coordinated Federal Wage System
ch.	chapter
COLA	cost-of-living allowance
Comp. Gen.	Decisions of the Comptroller General of the United States (published volumes)
CONUS	continental United States
CPLM	Civilian Personnel Law Manual
CPR	Department of the Army, Civilian Personnel Regulations
CSC	former Civil Service Commission
CSRS	Civil Service Retirement System
Ct. Cl.	Court of Claims
DOD	Department of Defense

DOE	Department of Energy
EEO	equal employment opportunity
EEOC	Equal Employment Opportunity Commission
EMT	electronic maintenance technician
FAA	Federal Aviation Administration
FBI	Federal Bureau of Investigation
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FEA	Federal Energy Administration
FEC	Federal Elections Commission
Fed. Reg.	Federal Register
FEGLI	Federal Employees' Group Life Insurance
FEHBA	Federal Employees Health Benefits Act
FERS	Federal Employees' Retirement System
FICA	Federal Insurance Contributions Act
FLRA	Federal Labor Relations Authority
FLSA	Fair Labor Standards Act
FPM	Federal Personnel Manual
FPMR	Federal Property Management Regulations
F. Supp.	Federal Supplement, cases from federal district courts
FTC	Federal Trade Commission
GAO	General Accounting Office
GAO	(in a citation) General Accounting Office Policy and Procedures Manual for the Guidance of Federal Agencies
GPO	Government Printing Office
GS	General Schedule
GSA	General Services Administration
HEW	former Department of Health, Education and Welfare
H.J. Res.	House Joint Resolution
HUD	Department of Housing and Urban Development
ILO	International Labor Organization
INS	Immigration and Naturalization Service
IPA	Intergovernmental Personnel Act
IRS	Internal Revenue Service
LWOP	leave without pay
MSPB	Merit Systems Protection Board
NASA	National Aeronautics and Space Administration
NCUA	National Credit Union Administration
NFFE	National Federation of Federal Employees
NSA	National Security Agency

OMB	Office of Management and Budget
Op. Atty. Gen.	published Opinions of the Attorney General
OPM	Office of Personnel Management
OTA	Office of Technology Assessment
para.	paragraph
Pub. L. No.	Public Law Number
QSI	quality step increase
RIF	reduction in force
SBA	Small Business Administration
SES	Senior Executive Service
S.R.	State Standardized Regulations (Government Civilians/Foreign Areas)
Stat.	Statutes at Large
Supp.	supplement
TDY	temporary duty
TVA	Tennessee Valley Authority
U.S.C.	United States Code
VA	formerly Veterans Administration, now Department of Veterans Affairs
WAE	when actually employed
WG	Wage Grade
§	section
§§	sections

Civilian Pay Systems

A. Generally

The pay systems, schedules, and authorities for fixing the compensation of civilian employees of the United States and the District of Columbia governments are many and varied. However, for practical purposes these pay fixing procedures may be grouped into five categories: (1) the General Schedule system, (2) the Senior Executive Service pay system, (3) the Merit pay system, (4) prevailing rate systems, and (5) other systems, schedules, and authorities.

B. General Schedule System

1. Statutory authority

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

2. Coverage

The great majority of employees in clerical, administrative, technical and professional positions fall within the General Schedule system. Specific coverage is defined in 5 U.S.C. § 5102; subpart B, part 511, Title 5 of the Code of Federal Regulations (C.F.R.); and Subchapter 2, Chapter 511 of the Federal Personnel Manual (FPM). Generally speaking, this system applies to all employees in the executive branch and the District of Columbia government except those whose positions are specifically excluded by statute, and a number of employees in the judicial and legislative branches whose positions are included by statute. In addition some agencies with authority to fix the pay of their employees administratively have adopted this system in whole or in part. Office of Personnel Management (OPM) has final authority to determine whether an employee's position is covered by the General Schedule system. 5 U.S.C. § 5103. But see B-170668, September 30, 1970.

3. Position classification

a. Generally

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

b. By agencies (GS-1 through GS-15)

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

(2) Effective date

(a) Administrative actions—Administrative action is effective from the date the action is taken by the proper administrative officer to finally allocate or reallocate the position, or such later date as may be administratively fixed. 30 Comp. Gen. 156 (1950).

(b) Reasonable time—Such later date as may be administratively fixed must be a reasonable time. 37 Comp. Gen. 492 (1958). When an agency reclassifies an occupied position to a higher grade, it must within a reasonable time either promote the incumbent, if qualified, or remove him from the position. 53 Comp. Gen. 216 (1973).

Where, however, an employee performed the duties of a position that was later reclassified to a higher grade level, which resulted in the employee's promotion, he is not entitled to a retroactive promotion and backpay for the period his position may have been wrongly classified at the lower grade level. An employee is entitled only to the salary of the position to which he is appointed, even though the agency may have unreasonably delayed the reclassification process. For delay associated with reclassification, alleged violation of merit system principle of equal pay for equal work does not create action for monetary damages for a period of erroneous classification. B-205641, June 22, 1982.

An employee of the government was the incumbent of a position which was regraded upward incident to an agency position reclassification audit. She was retained in that position beyond the reasonable time period defined in 53 Comp. Gen. 216 (1973). While an agency must within a reasonable time, promote an individual, if qualified, or remove him from the position, where the individual is not qualified for promotion temporary retention beyond the time period alone does not serve as a basis for retroactive temporary promotion and backpay. B-195020, July 11, 1979.

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

A new classification guide did not set up an agency-wide Army policy that required an employee's promotion. The Civilian Personnel Regulation (CPR) required that first a manpower space and funds must be available; second, a properly signed job description must be prepared and officially authenticated; third, the position must be entered in the personnel control file as a result of processing a personnel document. Until all of these actions were taken, the employee was not entitled to a promotion. B-202689, July 8, 1982.

(d) OPM decisions—For effective date of classification decisions made by OPM, see subpart G, part 511, Title 5, C.F.R.

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

c. By Director, OPM (GS-16, 17, 18)

Unless specifically provided otherwise by statute, a position may be classified in grade GS-16, 17, or 18 or in the Senior Executive Service only by action of the Director, OPM. 5 U.S.C. § 5108.

d. By statute

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

C. Senior Executive Service

1. Statutory authority

The Senior Executive Service (SES), 5 U.S.C. §§ 5381 – 5385 covers many career and a limited number of noncareer managers and supervisors whose positions formerly were or would have been in grade GS-16, 17, or 18 of the General Schedule or level V or IV of the Executive Schedule or equivalent to one of these grades or levels. There are six rates of basic pay for SES (the law requires five or more), the lowest of which equals the first step of grade GS-16 and the highest equals level IV. These rates are adjusted by an amount determined by the President when comparability adjustments are made in General Schedule rates under the provisions of 5 U.S.C. § 5305. The head of the agency determines, in accordance with criteria established by the Office of Personnel Management, at which of the rates of basic pay each appointee under his jurisdiction will be compensated.

2. Special situations

a. Department of Medicine and Surgery, VA

The Department of Medicine and Surgery, Veterans Administration, is covered by Title IV of the Civil Service Reform Act of 1978 establishing a Senior Executive Service. Although the department was created with autonomy in matters of personnel management with separate authority for hiring and compensating its employees outside the civil service, it satisfies the SES agency and position definitions in 5 U.S.C. § 3132 and was not specifically excluded from SES as were certain other agencies and positions. B-196611, December 19, 1979.

b. Federal Reserve

The Federal Reserve Act expressly excepts the appointment and compensation of all employees of the Board of Governors, Federal Reserve System, from the provisions of the civil service laws and regulations. Since the act takes priority over subsequently enacted statutes applicable to the federal agencies generally, absent clear indication that Congress intended otherwise, the provisions of the Civil Service Reform Act of 1978 establishing a Senior Executive Service do not apply to the employees of the Board. 58 Comp. Gen. 687 (1979).

c. Panama Canal Commission

Panama Canal Act of 1979 expressly excepts the appointment and compensation of all Panama Canal Commission positions from the provisions of the civil service laws and regulations. Additionally, provisions of the Panama Canal Treaty of 1977 would be in conflict with the implementation of the Senior Executive Service. The Treaty must be given priority over a subsequently enacted statute applicable to federal agencies generally. Hence, the provisions of the Civil Service Reform Act of 1978 establishing a Senior Executive Service do not apply to the employees of the Panama Canal Commission. 60 Comp. Gen. 83 (1980).

3. Performance awards

In addition to basic pay, career appointees in the SES may earn performance awards in an amount not less than 5 percent nor more than 20 percent of basic pay (limited in an agency by statutory restrictions), 5 U.S.C. § 5384. However, several appropriation acts have restricted the payment of performance awards to lesser percentages of the total number of SES positions. Where more awards have been granted than are allowed by law, we have permitted waiver of the overpayment. B-203478, December 30, 1981.

Under 5 U.S.C. § 5383(b)(1), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, level I, at the end of that year. However, see § 5383(b)(2).

For the purposes of establishing aggregate amounts paid during a fiscal year, an SES award is considered paid on the date of the Treasury check. Senior Executive Service, 62 Comp. Gen. 675 (1983).

Performance awards (bonuses) may be paid to career Senior Executive Service members under 5 U.S.C. § 5384, not to exceed 20 percent of annual basic pay and subject to the aggregate limitation in 5 U.S.C. § 5383(b). If a bonus was paid by Treasury check dated on or after October 1, 1982, an agency may, in its discretion, make a supplemental payment limited only by the new Executive level I ceiling provided the bonus amount was calculated on a percentage basis. No supplemental payment may be made if the check is dated before October 1, 1982. Senior Executive Service, 62 Comp. Gen. 675 (1983).

Fiscal year 1982 presidential rank awards were paid to members of the Department of Energy Senior Executive Service on November 22, 1982, although the checks were dated September 29, 1982. Under 5 U.S.C. § 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, level I, at the end of that year. For purposes of establishing aggregate amounts paid during a fiscal year, an SES award generally is considered paid on the date of the Treasury check. Senior Executive Service, 62 Comp. Gen. 675 (1983). In this case, however, since the agency can conclusively establish the actual date the employee first took possession of the check, the date of possession shall govern. Elizabeth Smedley, 64 Comp. Gen. 114 (1984).

4. Meritorious and distinguished executive awards

Career appointees in the SES may also earn the rank of Meritorious Executive with a lump-sum payment of $10,000 (limited to 5 percent of the total SES). The pay limitations of sections 5308 and 5547 of Title 5 of the United States Code do not apply to the appointees in the SES, but their total compensation may not exceed the rate payable for level I of the Executive Schedule.

Career Senior Executive Service members who receive Presidential rank awards under 5 U.S.C. § 4507 are entitled to either $10,000 or $20,000, subject to the aggregate amount limitation in 5 U.S.C. § 5383(b). See Senior Executive Service, 62 Comp. Gen. 675 (1983).

5. Suspensions for periods of 14 days or less

Agency questions whether career Senior Executive Service (SES) employees may be suspended for periods of 14 days or less for disciplinary reasons. We agree with the position of the Office of Personnel Management, the agency vested with the authority to issue regulations implementing the statutes governing SES employees, that there is no authority to suspend career SES employees for periods of 14 days or less. Any prior suspensions must be regarded as unwarranted personnel actions which require the payment of backpay. Senior Executive Service, 66 Comp. Gen. 338 (1987).

D. Performance Management and Recognition System (Merit Pay)

1. Statutory authority

The merit pay system, 5 U.S.C. Chapter 54, covers certain supervisory and management officials of the General Schedule.

2. Specific authority necessary for meritorious awards program

The U.S. Sentencing Commission does not have authority under its authorization or current appropriation acts to establish a meritorious awards program since such a program could not be considered a "necessary expense" in light of the fact that Congress in other acts has specifically legislated for meritorious award expenses, indicating that such expenditures should not be incurred except by its express authority. U.S. Sentencing Commission, B-227781, September 11, 1987.

E. Prevailing Rate Systems (See Chapter 11)

1. Generally

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

2. Federal wage schedules

a. Generally

The great majority of prevailing rate employees are paid under federal wage schedules. These schedules are provided for in Subchapter IV, Chapter 53, Title 5, U.S.C., and are implemented by part 532, Title 5, C.F.R. and FPM Supplement 532-1.

b. Coverage

The coverage of the federal wage schedules is defined in 5 U.S.C. § 5342. Generally speaking it includes most prevailing rate employees in the executive branch, some in the legislative and judicial branches, and some paid in part from nonappropriated funds. In addition some prevailing rate employees in the executive, legislative, and judicial branches and the District of Columbia government who are exempted from the mandatory coverage of this system by 5 U.S.C. § 5342 may be

included in whole or in part at the option of the pay-fixing authorities of the agencies involved. 5 U.S.C. § 5349.

3. Crews of vessels

a. General rule

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

b. Public interest

Not only must there be evidence that a pay adjustment is in accordance with prevailing rates and practices in the maritime industry but there must also be a determination by the administrative office that it is consistent with the public interest. 50 Comp. Gen. 93 (1970).

F. Other Systems, Schedules, and Authorities

1. Generally

There are numerous other systems, schedules, and authorities for fixing the pay of civilian employees, some of which are established by statute, and others which are established administratively within guidelines or limitations established by statute.

Illustrative of these other systems are the following:

- providing for the adjustment of executive, judicial, and legislative salaries—2 U.S.C. §§ 351 - 361;
- cost-of-living adjustments—5 U.S.C. § 5305;
- the Executive Schedule—5 U.S.C. Chapter 53, Subchapter 11;
- the Postal Service system—39 U.S.C. part II;
- the Government Printing Office system—4 U.S.C. § 305;
- the Foreign Service system—Title 22 and Subchapter I, Chapter 53, Title 5, U.S.C.;
- the system of the Department of Medicine and Surgery, Veterans Administration—38 U.S.C. Chapter 73, and 5 U.S.C. Chapter 53, Subchapter 1;

- the authority for fixing the compensation of experts and consultants contained in 5 U.S.C. § 3109 and various other provisions of law, and
- some other pay fixing authorities are identified in 5 U.S.C. § 5102(c).

See also 5 U.S.C. § 5307 which provides for the adjustment of administratively fixed pay and 5 U.S.C. § 5373 which sets a limitation on such pay.

2. General Accounting Office

Section 732(c)(1) of Title 31, U.S. Code, provides that the Comptroller General shall publish a schedule of basic pay rates for officers and employees of GAO. Section 733 of Title 31, U.S. Code, authorizes the Comptroller General to establish a SES for GAO.

3. Panama Canal Commission firefighters

Firefighters employed by the Panama Canal Commission normally receive pay adjustments based on District of Columbia firefighters' pay, limited by the annual percentage adjustment in General Schedule pay rates. Where the General Schedule employees received a 3.5 percent pay increase which was later retroactively increased to 4 percent, these firefighters are entitled to the same retroactive increase since the employing agency adopted a mandatory policy of basing adjustments on the rates of pay for General Schedule employees. Panama Canal Commission Firefighters, 64 Comp. Gen. 806 (1985).

4. Panama Area Wage Base

Employees of Department of Defense (DOD) in Panama claim higher pay based on General Schedule rates. Decision of DOD to adopt lower-paying Panama Area Wage Base for U.S. employees in Panama is authorized under Panama Canal Act of 1979. Claim is denied since these employees have no entitlement to pay based on General Schedule rates. Ginny L. Ater, B-208715, May 10, 1984.

Entitlement to Compensation

A. Generally

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

B. Appointments

1. Generally

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

2. Definitions

a. Authorized position

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

b. Distinguished from classification

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

c. Competitive service distinguished from excepted service

(1) Generally—For definitions of the competitive service and the excepted service, see 5 U.S.C. §§ 2102 and 2103 and Parts 212 and 213, Title 5, C.F.R.

(2) Exceptions must be specific—Appointments may not be made without regard to competitive appointment laws and regulations unless

specifically authorized by statute. 17 Comp. Gen. 1114 (1938) and 18 Comp. Gen. 67 (1938).

(3) President's authority to create excepted positions—Creation of the President's Management Intern Program by Executive Order No. 12,008 is within the President's statutory authority under 5 U.S.C. §§ 3301 and 3302 to regulate admission into the civil service and to make exceptions of positions from the competitive service. B-192657, November 22, 1978.

(4) GAO jurisdiction—Authority to determine whether appointments must be made competitively rests primarily with OPM. 5 U.S.C. §§ 1301 and 1302; 5 C.F.R. § 212.102; 17 Comp. Gen. 786 (1938); and 21 Comp. Gen. 113 (1941). But final authority to withhold compensation of individuals improperly employed rests with GAO. 5 C.F.R. § 5.3(c) and B-101093, May 10, 1951.

3. Effective date

a. Generally

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

b. Service prior to appointment

Generally an employee is not entitled to compensation for any period prior to date of appointment, although during such period, he may have actually performed the duties of the position and taken the oath of office. 4 Comp. Gen. 675 (1975); 20 Comp. Gen. 267 (1940); and B-157876, November 4, 1965. However, see section F of this chapter, De Facto Employment.

4. By the President with advice and consent of the Senate

a. Generally

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

b. Recess appointments

(1) Authority—The President shall have power to fill up all vacancies that may occur during the recess of the Senate, by granting commissions which shall expire at the end of the next session. Article II, section 2, clause 3, U.S. Constitution. For the implementing statutory provisions, see 5 U.S.C. § 5503.

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

c. Effective date

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

d. Power of the President to remove

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

e. Holdover at the end of term

Under the holdover provision of 7 U.S.C. § 4a(a)(B), a Commissioner appointed to serve for a 2–year term on the newly created Commodity Futures Trading Commission may hold over in his position until his successor is appointed or until the expiration of the next session of Congress. The language of that subsection, which provides that a Commissioner may not continue to serve beyond the expiration of the "next session of Congress subsequent to the expiration of said fixed term of office" has reference to the adjournment of a subsequent session of Congress. 57 Comp. Gen. 213 (1978).

Commissioners of Copyright Royalty Tribunal may not continue to serve beyond the expiration of their terms of office since there is no specific

statutory provision authorizing the commissioners to hold over in office. B-191036, August 19, 1982.

New full-term appointments to the Merit Systems Protection Board are governed by 5 U.S.C. § 1202. Under that statute, Board members appointed to a full 7-year term are ineligible for reappointment but may hold over in office for up to 1 year after the end of their terms; however, Board members who are appointed to fill a vacancy in office and who serve out the remainder of a 7-year term, may be reappointed to another term but are not specifically authorized to hold over in office. These individuals should not hold over unless the law is changed to specifically authorize holdover. B-202734, June 30, 1981.

5. Restrictions

a. Attorneys

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

b. Publicity experts

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

c. Detectives

GAO interprets Anti-Pinkerton Act, 5 U.S.C. § 3108, in accord with judicial interpretation in United States ex rel. Weinberger v. Equifax Inc., 557 F.2d 456, 463 (5th Cir. 1977), providing that "an organization is not 'similar' to the Pinkerton Detective Agency unless it offers quasi-military armed forces for hire." 57 Comp. Gen. 480 (1978).

d. Relatives (nepotism)

(1) Generally—A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, a relative to a civilian position in an agency in which the official is serving or over which he exercises control. 5 U.S.C. § 3110.

Regarding members of Congress, see B-163773, April 23, 1968. Regarding spouses of relatives, see 47 Comp. Gen. 636 (1968).

(2) Retaining compensation—Since the anti-nepotism statute, 5 U.S.C. § 3110, prohibits payment to an individual appointed, employed, promoted or advanced in violation of that section, an individual whose father-in-law recommended his appointment is not entitled to unpaid compensation or payment for accrued annual leave, and must refund wages already received since he cannot be regarded as either a de facto or a de jure employee. B-186453, May 2, 1977.

An individual appointed in violation of the anti-nepotism provisions is not entitled to retain salary received or to the payment of unpaid salary since 5 U.S.C. § 3110 expressly prohibits the payment of pay from the Treasury where an appointment violates that provision of law. However, waiver of the erroneous salary payments may be granted under 5 U.S.C. § 5584 if there is no indication that the individual was at fault in the matter.

In addition, the individual is entitled to retain payment of travel expenses received and to payment of unpaid travel expenses since the prohibition contained in 5 U.S.C. § 3110 only applies to pay or compensation. B-204266, April 22, 1982.

e. Positions restricted to preference eligibles

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

f. Retired members of the armed forces

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

C. Oath of Office

1. Statutory authority

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

2. Who may administer

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

3. Effect on compensation

The payment of compensation is not authorized before the oath is taken, but when it is taken it relates back to the date of entrance on duty so as to permit payment of compensation from that date. 21 Comp. Gen. 817 (1947). See also B-159277, June 7, 1966; B-181294, November 8, 1974; and B-188574, December 29, 1977. Distinguish B-186643, October 28, 1976. Cf. 40 Comp. Gen. 500 (1961); B-159399, November 30, 1966.

4. Renewal

a. Change in status

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

b. Restoration

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

D. Other Affidavit Requirements

1. Purchase of office

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

2. Loyalty and striking

a. Statutory authority

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

3. Effect on compensation

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

4. Exceptions

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

E. Entrance on Duty

1. Generally

There must be an entrance on duty under a valid appointment before the payment of compensation is authorized. 20 Comp. Gen. 267 (1940) and cases cited therein. See also B-183440, August 12, 1975, and Harry Olson, B-224600, October 8, 1986.

2. Exception

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

F. De Facto Employment

1. Generally

De facto employment involves the rendering of services to the government by individuals who were improperly or who were never actually appointed.

2. Valdez decision

In Victor M. Valdez, Jr., 58 Comp. Gen. 734 (1979), the earlier distinction between void and voidable appointments discussed in 58 Comp. Gen. 197 (1979) was abandoned. It was held that a person whose appointment is found to be improper or erroneous is entitled to receive unpaid compensation, service credit for purposes of accrual of annual leave, and lump-sum payment for unused leave upon separation, unless:

- the appointment was made in violation of an absolute statutory prohibition, or;
- the employee was guilty of fraud in regard to the appointment or deliberately misrepresented or falsified a material matter.

This rule does not apply to individuals who have never been appointed or who serve after their appointments have expired. Those persons do not satisfy the definition of "employee" in 5 U.S.C. § 2105.

3. Valdez extended

Valdez was extended in a subsequent case in which an individual who was terminated from employment after his appointment was found to be erroneous, was reemployed temporarily in a lower-graded position after a break in service, and was then properly appointed to the original position. We held that, for the period of employment prior to termination, he was entitled to compensation earned, lump-sum payment for accrued annual leave, service credit for annual leave accrual purposes, and recredit of accrued sick leave to his leave account. We also held that if OPM denied service credit for the period of the improper appointment, the employee would be entitled to a refund of the retirement deductions made from his salary during the period of the erroneous appointment, less any necessary social security deductions. 61 Comp. Gen. 127 (1981).

4. Reasonable value of services

a. Individual serving before appointment

Individuals serving in a de facto status before they are officially appointed should be compensated for the reasonable value of their services performed during that period, established at the rate of basic compensation set for the positions to which they are ultimately appointed. B-191397, September 6, 1978, and B-189741, April 4, 1978.

b. Individual never appointed

The reasonable value of the services of an individual, who was never in fact appointed to the position which he purportedly filled, should have been established at the rate of basic compensation for the position that was ultimately advertised and filled. B-193605, January 8, 1979.

c. Premium pay

The rule that a de facto employee is entitled to the reasonable value of his services does not limit the employee to receipt of basic compensation only. Rather, the reasonable value of his services includes premium pay, including holiday pay, which he would normally receive. B-188574, December 29, 1977.

5. Erroneous personnel actions discovered by OPM

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

6. To career status or position

An Air Force employee who received three erroneous appointments among the many federal positions she held over a period of 30 years may be considered a de facto employee during the periods of erroneous appointments. Although the employee never achieved career status because she held temporary or excepted appointments, she was erroneously appointed to career positions on three occasions. These erroneous appointments did not violate any absolute statutory prohibition, and there is no evidence of fraud or misrepresentation by the employee.

Sidney P. Arnett and Mary Ann Barron, B-220720, B-220791, September 8, 1986.

A temporary employee was promoted to a competitive position at GS-4, step 1. It was later discovered that the promotion was erroneous since she did not have competitive status. However, she was retained in the position pending a request for a variation. The request was denied and she was returned to her prior position. Since she performed the duties of the GS-4 position, she is entitled to retain the pay of the GS-4 position as a de facto employee and is not indebted for the additional compensation received in that position. Marie L. Vaughn, B-219565, February 11, 1986.

7. Service after expiration of term of office

a. Generally

Where an employee rendered service in good faith and under color of authority beyond the term of his 180–day appointment, he is to be considered a de facto employee and is to be compensated for services in excess of his appointment limitation. B-186229, June 8, 1977; B-189413, March 14, 1978; and B-191884, February 5, 1979.

A university employee, who began a second Intergovernmental Personnel Act (IPA) detail pursuant to an agreement which was never signed by the agency or the university, may be considered to have served as a de facto employee. Donald G. Stitts, B-216369, March 5, 1985.

b. Knowledge of appointment rule

Intermittant consultant of Department of Energy (DOE) who worked beyond his appointment limitation, relying on past practices of agency and on official request of superior was subsequently notified that DOE could not make retroactive appointments. He is not entitled to compensation beyond the date of such notification. B-196940, December 29, 1980. See also Robert Lobato, B-216090, February 12, 1985, as modified by B-216090, May 8, 1986, for travel period.

8. Service prior to effective date of appointment

a. Generally

Where an individual begins working before he is in fact appointed, his appointment may not be made retroactively effective unless it was the result of a clerical or administrative error that (1) prevented a personnel action from taking effect as originally intended, (2) deprived the employee of a right granted by statute or regulation, or (3) would result in the failure to carry out a nondiscretionary administrative regulation or policy. However, in such cases, the individual may be entitled to compensation as a de facto employee. B-188424, March 22, 1977. Thus, an employee who began working 2 weeks prior to the date his position description was approved and, hence, before he was properly appointed, may be compensated for the reasonable value of the services he performed in good faith prior to the date of his appointment. 57 Comp. Gen. 406 (1978). See also B-198575, August 11, 1981; B-191397, September 6, 1978, and B-189351, August 10, 1977.

Where an employee worked 40 hours prior to the Army's discovery that she had not been processed by the personnel office, she may be compensated for the services rendered as a de facto employee. The fact that she did not take the oath of office at the time of her entry on duty is no bar to the payment of compensation since the oath, when taken, relates back to the date of entry on duty. B-188574, December 29, 1977.

An individual appointed in error from a PACE register prior to his completion of the educational requirements for PACE certification, and who subsequently completed the requirements, was entitled to retain compensation he received for the period of the irregular appointment. B-207856, September 13, 1982.

b. Color of authority

An individual, ultimately appointed as an intermittent consultant, attended three meetings at the Department of Energy's request prior to the date of his appointment. He was reimbursed for his travel and transportation expenses under invitational travel orders. Since the record does not support the conclusion that he attended the meetings under color of authority and with the expectation that he would be compensated for other than his travel expenses, the individual may not be compensated for his services prior to appointment as a de facto employee. B-196088, November 1, 1979.

9. Employee never appointed

a. Not on civil service register

An individual began performing services under a contract which had not been properly approved by the Army official with contracting authority. A decision was made to hire him and he continued to work while the necessary employment documentation was being processed. Although he was not on the civil service register and consequently was never hired, he performed his duties with apparent right and under color of authority. Since he served in good faith with no indication of fraud, he may be compensated as a de facto employee for the reasonable value of his services. B-193605, January 8, 1979. A similar result was reached in the case of an individual who was listed too low on a civil service register to be hired. B-192264, April 3, 1979.

b. Falsification of educational qualifications

In cases where falsification of educational information at the time of employment would be an absolute bar but not a statutory prohibition to employment, the employee who performs services prior to disclosure of the record falsification is in a de facto status which entitles the employee to retain compensation previously received but does not give rise to any enforceable right to compensation not received. 38 Comp. Gen. 175 (1958). See also B-160282, November 15, 1966; B-185443, August 4, 1976; and B-195279, September 26, 1979.

c. Physically unqualified

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

d. Failure to meet professional license requirement

Physician who was appointed to Veterans Administration (VA) medical department before required state medical license was issued may be considered a de facto employee and retain compensation paid since claimant rendered services in good faith and administrative officials were lax in processing appointment. B-111684, October 8, 1952. See also B-159325, August 1, 1966.

e. General experience requirements not met

An employee was temporarily and then permanently promoted from a GS-4 position to a GS-5 position. It was later discovered that the promotion was erroneous because she did not meet the general experience requirement of the position to which she was promoted. The error was corrected and a bill of collection issued. Since she performed the duties of the GS-5 position based on the apparent authority of the promoting officials, she may be regarded as a de facto employee and therefore entitled to retain the compensation of a GS-5. Janice M. Simmons, B-221745, April 28, 1986.

f. Annuitant improperly reemployed

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

g. Citizenship requirement

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

h. Promotion in violation of statute

Employee promoted to the next higher salary grade contrary to the specific statutory provision setting forth a prescribed period of service as a prerequisite for advancement to the higher grade is not to be regarded as a de facto employee and is not entitled to retain compensation received prior to the time the error was brought to the attention of the administrative officials. 29 Comp. Gen. 75 (1949). See also 31 Comp. Gen. 564 (1952) and 36 Comp. Gen. 230 (1956).

i. Dual compensation involved

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

j. Nonexisting positions

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

k. De facto pay not highest previous rate

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

10. Validity of acts of de facto employees

In general, acts performed by an individual serving in a de facto status are as valid and effectual as those of a de jure employee insofar as they concern the public and third parties. B-189935, November 16, 1978. Compare B-150136, May 16, 1978.

11. Contract for services

Payment may be allowed to a retired Public Health Service officer for dental services furnished to the Coast Guard on the theory of quantum meruit where (1) the government received a benefit, (2) the contractor acted in good faith, and (3) the amount claimed represents the reasonable value of the services rendered. Dr. Edward Kuzma, B-215651, March 15, 1985.

However, an active duty Public Health Service officer who performed consulting work for the Social Security Administration may not retain compensation received from such contracts under de facto or quantum meruit theories in the absence of clear and convincing evidence that he acted in good faith under the circumstances. Public Health Service Officer, 64 Comp. Gen. 395 (1985).

G. Waiver of Compensation

1. Compensation fixed by law

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

Agency for International Development (AID) may not pay officers and employees less than the compensation for their positions set forth in the applicable Executive Schedule, General Schedule, or Foreign Service Schedule. While 22 U.S.C. § 2395(d) authorizes AID to accept gifts of services, it does not authorize the waiver of all or part of the compensation fixed by or pursuant to statute. 57 Comp. Gen. 423 (1978). To the same effect, see B-189897, September 5, 1978, holding that an Air Force employee may not waive and refund compensation to set back his retirement date.

2. Compensation set by administrative action

If they so desire, members of the United States Metric Board may waive their compensation or accept but return it as a gift to the Board. Since the applicable statute authorizes payment of Board members at a rate not to exceed the daily rate currently being paid for grade 18 of the General Schedule, their pay is not considered to be salary fixed by or pursuant to statute which would preclude waiver. Also, since the statute authorizes the Board's acceptance of gifts and donations, members may make gifts of their salary to the Board. 58 Comp. Gen. 383 (1979).

3. Experts and consultants

(See also CPLM Title I—Compensation, Chapter 10.) In the absence of a statute specifically fixing the amount to be paid in the particular case, an expert or consultant whose services are procured by contract on a

temporary or intermittant basis without regard to civil service or classification laws, in accordance with 5 U.S.C. § 3109, may agree to serve without compensation and thereafter be estopped from asserting any valid claim for compensation on account of services performed. 27 Comp. Gen. 194 (1947).

H. Voluntary Services

1. Statutory authority

No officer or employee of the United States shall accept voluntary services for the United States or employ personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.

This section prohibits the acceptance by the United States of voluntary services—that is, services furnished on the initiative of the persons rendering them without a proper request from or agreement with the United States. It does not however, prevent the acceptance of gratuitous services, if otherwise lawful, when they are rendered by one who, upon being appointed as a government employee without compensation, agrees in writing and in advance that he waives any and all claims against the government for such services. 7 Comp. Gen. 810 (1928); 23 Comp. Gen. 272 (1943); 23 Comp. Gen. 900 (1944); 24 Comp. Gen. 314 (1933); 26 Comp. Gen. 956 (1947); B-148302, June 30, 1975; B-204326, July 26, 1982; 30 Op. Atty. Gen. 51 (1913); and 30 Op. Atty. Gen. 129.

2. Student volunteers

Section 301(a) of the Civil Service Reform Act of 1978, 5 U.S.C. § 3111, authorizes a limited exception to the prohibition against the acceptance of voluntary services by federal agencies, by allowing agencies to establish certain educational programs for high school and college student volunteers. Sponsoring agencies may not pay for the student volunteers' traveling or living expenses, since the statute and its legislative history make no provision for payment of those expenses, and the statute specifically excludes the volunteers from being considered federal employees for most purposes, including travel and transportation entitlements. 60 Comp. Gen. 456 (1981).

3. Reemployed annuitant

An employee who retired offered to continue working until a replacement could be found. His claim for compensation is denied even though the retired employee asserts that his supervisor accepted his offer to continue working and stated that he would try to find a way to pay him. Under 31 U.S.C. § 1342, an officer or employee of the government is prohibited from accepting the voluntary services of an individual. Nathaniel C. Elie, 65 Comp. Gen. 21 (1985).

4. Senior community service employment program

The Equal Employment Opportunity Commission questions whether it may be a "host" agency under the Senior Community Service Employment Program, which is funded by federal grant and administered under federal statute by the American Association of Retired Persons. The Commission may properly act as a "host" agency in this context since this would not contravene the provisions of 31 U.S.C. § 1342, which prohibits federal agencies from accepting voluntary services from private citizens in the absence of statutory authority. Senior Community Service Employment Program, B-222248, March 13, 1987.

Basic Compensation

Subchapter I—Computation

A. Hours of Work, Duty

1. Basic 40–hour workweeks and work schedules

a. Statutory authority

Title 5, U.S. Code, § 6101 and 5 C.F.R. Part 610.111 direct the establishment of a 40–hour administrative workweek to be performed within a period of not more than 6 of any 7 consecutive days for all full-time employees of the federal government, as defined in § 6101.

Title 5 of the Code of Federal Regulations, § 610.121 requires the establishment of work schedules as follows:

"(a) Except when the head of an agency determines that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide that:

"(1) Assignments to tours of duty are scheduled in advance over periods of not less than 1 week;

"(2) The basic 40–hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;

"(3) The working hours in each day in the basic workweek are the same;

"(4) The basic nonovertime workday may not exceed 8 hours;

"(5) The occurrence of holidays may not affect the designation of the basic workweek; and

"(6) Breaks in working hours of more than 1 hour may not be scheduled in a basic workday."

Employee's work schedule was changed from Monday through Friday schedule to a Sunday through Wednesday and Saturday with Thursday and Friday off. It is within the agency's discretion to change the administrative workweek, and the employee, upon conversion to the new schedule, is not entitled to two consecutive days off. William Kohler, B-216756, February 19, 1985.

b. Lunch and rest period

An agency may not expand a regularly scheduled lunch break of 30 minutes to 45 minutes by permitting an employee to take a 15-minute compensable rest period prior to lunch. The lunch break can only be extended under the authority in 5 U.S.C. § 6101(a)(3)(F). Nor may an employee be permitted to depart his work place 15 minutes before the beginning of a leave period if he refrains from taking a scheduled 15-minute afternoon rest break. Since rest periods are included with the basic workday, early departure would not satisfy the time and attendance reporting requirement to be credited with working a full 40-hour week. B-190011, December 30, 1977.

c. Uncommon tours of duty

The establishment of the first 40 hours of duty as the basic workweek of government quality control inspectors due to the release from work of contractor employees when unpredictable interruptions and delays occur in the checkout of missiles prior to launch-countdown was in accord with 5 U.S.C. § 6101 and 5 C.F.R. § 610.111, which authorize uncommon tours of duty to maintain efficient operations and prevent cost increases. Therefore, the determination of an arbitration board under Executive Order No. 10,988 that the new work schedule was in violation of the collective-bargaining contract need not be implemented. 50 Comp. Gen. 708 (1971).

d. Work performed at home

The Veterans Administration may permit a select group of typists to work at their home instead of at their duty stations so long as their actual work performance can be measured against established quantity and quality standards in order to verify their time and attendance reports. B-214453, December 6, 1984.

The Department of Housing and Urban Development proposes to allow an employee with multiple sclerosis to work at home during temporary periods when the employee will not be able to commute to an office because of that illness. While generally federal employees may not be compensated for work performed at home rather than at their duty stations, under limited circumstances when actual work performance can be measured against established quantity and quality norms so as to verify time and attendance reports, and there is a reasonable basis to justify the use of a home as a workplace, payment of salaries for work

done at home may be authorized under an established and approved program. Thus, if the agency has determined that appropriate measures have been taken to ensure quantity and quality of work done and time and attendance, the employee may be paid for work done at home. Work Performed at Home, B-222246, September 4, 1986.

2. Flexible and compressed work schedules

a. Statutory authority

Sections 6120 - 6133 of Title 5, U.S. Code, provide an exception to the basic 40-hour week and schedule. It authorizes an agency to establish programs which allow the use of flexible and compressed work schedules. Notwithstanding the prohibition in 5 U.S.C. § 6106 the OPM or any agency may use time clocks as part of a flexible schedule program.

b. Payment for credit hours

A grade GS-16, step 4, employee of the National Security Agency, being paid $50,112.50 per annum, the maximum salary payable under 5 U.S.C. § 5308, was transferred from an office participating in a flex-time experiment under Title I of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, to an office not participating. He may be paid for his accumulated credit hours under the authority of section 106 of that act. The limitations on maximum allowable pay in 5 U.S.C. §§ 5547 and 5308, and section 304 of the Legislative Branch Appropriation Act of 1979, do not apply to payments for credit hours. B-201031, August 3, 1981.

c. Credit hours distinguished from overtime hours

Under Title I (flexible schedules) of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, credit hours are hours of work performed at the employee's option and are distinguished from overtime hours in that they do not constitute overtime work which is officially ordered in advance by management. Therefore, an employee who was ordered to work 5 hours at the end of the pay period when she was scheduled to take off, and who had already accumulated 10 credit hours, and who had already worked 40 hours that week, is entitled to overtime for the 5 hours of work. 60 Comp. Gen. 6 (1980).

d. Compensatory time for overtime work

An employee on a flexible schedule who is ordered to work 5 hours which are overtime hours at the end of a pay period, may, on her request, receive compensatory time off for such time so long as she does not accrue more than 10 hours of compensatory time in lieu of payment for regularly or irregularly scheduled overtime work. 60 Comp. Gen. 6 (1980).

B. Biweekly Pay Periods and Hourly Rates

1. Statutory authority

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

2. Computation of pay

a. Conversion of rates

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

- To derive an hourly rate, divide the annual rate by 2,087.
- To derive a daily rate, multiply the hourly rate by the number of daily hours of service required.
- To derive a weekly or biweekly rate, multiply the hourly rate by 40 or 80, as the case may be.

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

3. Senior Executive Service

Under 5 U.S.C. § 5504(a), members of the Senior Executive Service (SES) are paid at biweekly intervals. They are not, however, included under the provisions of 5 U.S.C. § 5504(b) (1982) which establish the procedures for determining the hourly, daily, weekly, or biweekly rates of pay for all other employees paid on a biweekly basis, and no other statute establishes a method to compute their pay. By regulation, OPM has determined that SES members should have their pay computed in the same manner

as other employees paid on a biweekly basis. See 5 C.F.R. § 534.404(a) and (b).

4. Experts and consultants

Under the pay period requirements and computational principles set forth at 5 U.S.C. § 5504, experts and consultants are required to be paid on a pay period basis. Thus, by virtue of 5 U.S.C. § 5308, an expert or consultant may not, within any biweekly pay period, receive compensation in excess of the rate of basic pay for level V of the Executive Schedule. 58 Comp. Gen. 90 (1978).

Under 5 U.S.C. § 3109, it is within an agency's discretion to compensate experts and consultants on an hourly basis. Because this is a discretionary matter, the agency may set an hourly rate without regard to the computational principles set forth at 5 U.S.C. § 5504(b), provided the total amount received for services within any 1 day does not exceed the highest daily rate payable under 5 U.S.C. § 5332. B-193584, January 23, 1979.

C. Monthly Pay Periods

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

D. Work Less Than Full Time

1. Hourly rate

Employees subject to 5 U.S.C. § 5504 who work less than full time should be compensated on an hourly rate. 25 Comp. Gen. 121 (1945). For fractional pay periods for any cause, including separations, retirements, and leave without pay, pay will be computed for the number of hours of duty performed during the biweekly period. See Salary Tables issued by OPM. For additional material concerning hours of duty, pay, and leave, see Federal Personnel Manual, FPM Supplement 990-2.

2. Part-time career employment

In order to promote part-time career employment opportunities in all grade levels, the head of each agency, by regulation, shall establish and maintain a program for part-time career employment within such agency. 5 U.S.C. § 3402(a)(1). This provision does not require part-time career employment in positions the rate of basic pay for which is fixed

at a rate equal to or greater than the minimum rate fixed for GS-16 of the General Schedule. 5 U.S.C. § 3405(b).

3. Government Printing Office

The establishment of a workweek of less than 40 hours for all Government Printing Office employees, whose wages are fixed pursuant to the Kiess Act, 4 U.S.C. § 305, and the payment of overtime for any hours of work in excess of the shorter workweek may be accomplished by the Public Printer under said act. 36 Comp. Gen. 163 (1956).

4. Classification Act employees

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

5. Furloughs—intermittent employees

Intermittent employees who were furloughed for 4 hours on October 17, 1986, due to a lapse in appropriations are entitled to be compensated for the period during which the lapse occurred. See H.J. Res. 754, October 27, 1986. Intermittent Employees, B-233656, June 19, 1989.

6. Stay-in-school program

A student, who participates in a Stay-in-School Program with part-time employment by an agency, is entitled to compensation for hours worked outside the normal tour of duty which was approved in advance by the supervisor. In addition, a student who, under occasional special circumstances, is asked to work overtime may be compensated for such work even though it may exceed the 20–hour per week limitation for the Program. Thompson and Serna, B-215923, January 8, 1985.

7. Part-time teachers

Two employees were hired by the Department of Defense in Germany as part-time teachers and compensated at the rate of one-half of that earned by full-time teachers. The employees taught two-thirds the number of classes taught by full-time teachers and claim compensation

in that proportion. Since it is a longstanding departmental policy established under statute that the pay of part-time overseas teaching positions be fixed at exactly one-half the rate of corresponding full-time positions, and this policy has not been shown to be contrary to the statute or otherwise invalid, their claims are denied. E. Kay Weger and Martha Wilson, B-223389, September 19, 1986.

E. Date of Death

1. Pay status through date of death

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

2. Nonpay status prior to date of death

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

F. International Dateline

In accordance with the general rule cited in 48 Comp. Gen. 23 (1968), six Navy employees who crossed the international dateline in both directions while traveling between Hawaii and Guam may not receive basic pay or overtime compensation for work performed during regular work hours of the day gained due to crossing the dateline in an eastward direction. Nonpayment for the regular duty hours worked on the day gained is offset by the fact that they were paid 8 hours of basic pay for a workday lost in crossing the international dateline going west earlier during the same cruise. Effects on Pay of Crossing International Dateline, B-223047, June 8, 1987.

An employee who is nonexempt from the provisions of the Fair Labor Standards Act (FLSA) crossed the international dateline in both directions while performing official travel between Hawaii and Guam. Under Title 5, U.S. Code, the employee may be paid 8 hours' basic pay for a

workday "lost" traveling westbound, but receives no pay for the workday "gained" traveling eastbound. However, where the "lost" day and the "gained" day occur in different workweeks, a nonexempt employee traveling eastbound may receive overtime pay under the FLSA for each hour in excess of 40 hours actually worked during that workweek since under the FLSA each scheduled administrative workweek is deemed separate and distinct. Crossing the International Dateline, B-229355, November 22, 1988.

Subchapter II—Establishment of Compensation Incident to Certain Personnel Actions

A. New Appointments

1. Minimum rate for new appointments

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

2. Superior qualifications appointment

a. Generally

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

b. Failure to obtain OPM approval

Employee was hired with the understanding she would be appointed at step 3 of grade GS-14. After actual appointment at minimum step of that grade, it was discovered that prior approval of the higher rate was not obtained from the Office of Personnel Management (OPM), due to administrative oversight. Although the employee was later granted a higher step placement by OPM, she is not entitled to a retroactive increase since

such appointments are discretionary and not a right. Susan E. Murphy, 63 Comp. Gen. 417 (1984). See also Rose Marie Bacon, B-219973, December 9, 1985.

c. Erroneous determination

Employee was hired by the Navy, and his pay was set at step 8 of grade GS-15 based on superior qualifications authority in 5 U.S.C. § 5333(a). His pay was later reduced to step 1 based upon instructions of Office of Personnel Management (OPM) that military retired pay cannot be considered in establishing an advanced rate under a superior qualifications appointment. We held that the Navy exceeded its authority as delegated by OPM by considering military retired pay as current earnings for a superior qualifications appointment. The employee's claim for restoration of his advanced rate is denied. Darrel W. Starr, Jr., B-214266, July 30, 1984.

3. Higher rates for supervisors of prevailing rate employees

a. Statutory authority

Under 5 U.S.C. § 5333(b) and 5 C.F.R. §§ 531.301 – 531.305, a General Schedule employee who regularly supervises prevailing rate employees may be paid at one of the rates for his grade which is above the highest rate of basic pay being paid to any such prevailing rate employee regularly supervised, or at the maximum rate for his grade.

b. Agency discretion

A General Schedule employee who received a pay adjustment effective January 21, 1979, as a supervisor of a prevailing rate employee being paid a higher rate may not be granted retroactive pay prior to that date. Entitlement to pay adjustments is within the discretion of the agency since there was no mandatory agency policy to make the adjustment and there was no abuse of discretion which warrants retroactive compensation. B-193131, June 5, 1980. See also B-165042, December 21, 1978, and B-191523, September 5, 1978.

After an agency initially decides to grant a pay adjustment, 5 C.F.R. § 531.305(c) provides that the effective date of the salary increase is the first day of the first pay period following the date of the agency determination to make the adjustment. That provision, however, applies only to the initial determination to grant the adjustment and does not apply to subsequent fluctuations on the rate at which the adjustment is paid.

Thus, where retroactive increases were granted to the Wage Board employees he supervised, a General Schedule supervisor's pay may be adjusted retroactively to reflect those increases. B-180010.07, June 15, 1977. Distinguish B-193176, May 4, 1979. See also James L. Davis, B-212581, May 16, 1984.

c. Agency bound by its regulation

Where Air Force regulations specifically provided that a request for pay adjustment must be initiated on behalf of a General Schedule supervisor of higher paid Wage Board employees, the Air Force's failure to identify an employee as eligible for pay adjustment under 5 U.S.C. § 5333(b) constituted a failure to carry out a nondiscretionary regulation. The employee's pay may be adjusted retroactively and he may be awarded backpay. 55 Comp. Gen. 1443 (1976) and B-186896, November 2, 1976.

d. Continued supervision required

(1) Supervision terminated—Pay adjustment for General Schedule supervisors of Wage Board employees under 5 U.S.C. § 5333(b) is conditioned on continued supervision of the Wage Board employee and is limited to the nearest rate of the supervisor's grade which exceeds the highest rate of basic pay paid to the supervised employee. When these conditions are no longer met, as when the supervised Wage Board employee is separated or reduced in pay, the adjustment previously granted to the supervisor must be eliminated or reduced, as required by the circumstances. 55 Comp. Gen. 1443 (1977). However, the holding of that decision is not to be implemented while the Civil Service Commission (CSC) reviews regulations to determine modifications that may be needed to implement the decision. 57 Comp. Gen. 97 (1977).

(2) Supervision only while on temporary duty—A General Schedule employee who held a position that did not involve supervisory duties was assigned to temporary duty in Spain for 6 months, during which time he supervised Wage Grade employees with higher rates of pay. Pay adjustment for supervisors under 5 U.S.C. § 5333(b) is conditioned upon regular responsibility for supervision of Wage Grade employees. Since the General Schedule employee's position did not have any supervisory responsibilities, there is no authority to adjust his salary to a higher rate based on his temporary supervision of the higher paid Wage Grade employees. B-190124, November 23, 1977.

(3) Regular responsibility required—An employee is not entitled to a supervisory pay adjustment where he does not have regular responsibility for the supervision of the technical aspects of the work of the prevailing rate employees. John B. Tucker, B-215346, March 29, 1985.

4. Special rates of recruitment and retention

Agencies may, for shortage category positions, pay a special rate established under 5 U.S.C. § 5303 and the implementing regulations found at 5 C.F.R. §§ 530.301 - 530.306.

5. Employment of specifically qualified scientific and professional personnel

Under the authority of 5 U.S.C. § 3104 the agency heads listed may establish scientific or professional positions to carry out agency research and development functions which require the services of specifically qualified personnel. An agency head under the authority of 5 U.S.C. § 5371 sets the pay rate at not less than the minimum of GS-16 nor more than the maximum of GS-18 for positions established under the 5 U.S.C. § 3104. Department of Defense may establish such positions and similarly set such rates under the authority of 10 U.S.C. § 1581.

B. Position or Appointment Changes

1. Statutory authority

The rate of basic pay to which an employee is entitled is governed by OPM regulations prescribed in conformity with Chapters 51 and 53 of Title 5, U.S. Code, and 5 U.S.C. § 5334. See also this chapter, "C. Promotions and Transfers," "Highest Previous Rate Rule," below.

An employee whose temporary appointment was converted to a permanent appointment was delayed in his subsequent promotion to the grade GS-5 level due to time-in-grade restrictions. Where the conversion of the appointment was not erroneous, the agency may not retroactively change the action to allow the employee an earlier promotion to grade GS-5. Dewey R. Castelein, B-216970, April 1, 1985.

2. Retroactive change in appointment

An employee who was appointed as a commissary store worker on an intermittent basis may not be retroactively granted a regular part-time

appointment, with accompanying fringe benefits, in the absence of evidence establishing that he worked a pre-scheduled, continuous, regular tour of duty. Since he has not produced evidence sufficient to counter the administrative determination that he was not provided specific duty hours in advance, we cannot authorize a retroactive change in status on the basis of his claimed continuous regular tour of duty. B-206035, April 26, 1982.

3. Retroactive change in separation date

A former employee seeks a retroactive change in his date of separation on discontinued service retirement due to the abolishment of his job. The duties of his job were combined with the duties of another position to form a new position established on July 31, 1980. The abolishment of the claimant's job and notification to him of his impending separation were delayed until October 1980. The delay is not an administrative error justifying the retroactive change of his separation date. B-206131, June 25, 1982.

4. Reappointments

a. From unclassified position

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

b. Regulation concerning prior service

Employee who had previous service with the Postal Service, was appointed to position of Document Control Clerk with the Internal Revenue Service (IRS) at GS-3, step 1. He is entitled to retroactive adjustment to rate of pay within GS-3 equal to rate of GS-4, step 1. IRS regulations direct appointing officer to set employee's rate of pay based on his previous service and employment qualifications and IRS has stated employee's prior service at Postal Service qualified him for the GS-4 level in his new position. Bobby M. Siler, B-202863, January 8, 1982. Sustained on reconsideration, B-202863, Feb. 8, 1984.

c. Consultants

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

C. Promotions and Transfers

See also Chapter 7 of this title, Employee Make-Whole Remedies.

Effective Date

1. Generally

The effective date of salary changes resulting from administrative action exclusively is the date the action is taken by the administrative officer vested with the proper authority, or a subsequent date specifically fixed. 21 Comp. Gen. 95 (1941). See also 5 C.F.R. § 511.701(a). The general rule is that a personnel action may not be made retroactively effective so as to increase the right of an employee to compensation. 40 Comp. Gen. 207 (1960); B-193723, September 1, 1979.

2. Delay prior to approval

Although the employee was selected for promotion from a register, was orally notified of her promotion, and reported to her new position, she is not entitled to a retroactive promotion where her promotion was delayed 1 month due to administrative delays in processing the necessary paperwork. The promotion may not be effective earlier than the date of approval by the authorizing official, and the failure to promote the employee at an earlier date did not violate a nondiscretionary agency policy. Agnes Mansell, 64 Comp. Gen. 844 (1985). See also Carol A. Barraza, B-219221, September 6, 1985.

Where an agency relied upon the employee's part-time status rather than the actual number of hours worked, her promotion after 1 year of experience was delayed. However, in the absence of a nondiscretionary agency policy, the promotion may not be made retroactively effective since the delay occurred before the appropriate official had approved the promotion. Rita H. Rains, B-217831, October 23, 1985.

3. Timing within-grade step increase

Employee, who was promoted 4 weeks before she was eligible for within-grade increase, claims retroactive promotion and backpay. Employee alleges that agency violated policy of deferring grade promotions until eligible employees receive anticipated within-grade increases. Claim is denied since agency has not established nondiscretionary policy described by claimant. Disparate treatment of employees similarly situated does not provide a basis for an aggrieved employee's retroactive promotion. Rather, the granting of promotions is within the discretion of agency, whose findings shall not be upset except for abuse of discretion. B-207129, August 26, 1982.

4. Failure to counsel

Student trainee with Small Business Administration's (SBA's) Cooperative Education Program claims retroactive promotion and backpay where the agency failed to counsel him with regard to seeking entry-level career-conditional appointments. His claim is denied since the failure to properly advise and the delays that occurred did not deprive him of any rights granted by statute or regulation and did not violate any nondiscretionary regulation or policy. Gregory A. Walter, B-208397, August 29, 1983, sustained on reconsideration, B-208397, March 6, 1984.

5. Exceptions

The exceptions to the general rule against retroactive promotions are administrative or clerical errors which (1) prevent a promotion action from being effected as originally intended, (2) result in a nondiscretionary administrative regulation or policy not being carried out, or (3) deprive an employee of a right granted by statute or regulation. B-190408, December 21, 1977.

While employees have no vested right to promotion at any specific time, an agency, by regulation, policy, or provision of a collective-bargaining agreement, may limit its discretion so that under specified conditions it becomes mandatory to make a promotion on an ascertainable date. For example, see B-186916, April 25, 1977, where, based upon the IRS policy to promote agents in career-ladder positions at 1 year where their level of performance has been certified acceptable, eight IRS agents were retroactively promoted after their promotions had been administratively delayed by oversight. Compare B-204299, June 2, 1982.

An individual in the IRS Student Trainee Program was delayed 4 months in his promotion to a grade GS-7 position. The delay occurred when he was discovered to be ineligible for noncompetitive conversion to the target position upon completion of his bachelors degree because he was appointed under temporary appointment authority rather than from a competitive civil service register. His appointment may not be made retroactive since he was not deprived of a right granted by statute or regulation, nor was there a failure to carry out nondiscretionary administrative policies or regulations. Edward M. Wirth, B-228711, December 8, 1988.

6. Criteria for proper revocation of promotions before effective date

Ten employees of Merit Systems Protection Board were selected for promotion effective December 13, 1981. Due to budget cuts, the Managing Director announced on December 16 that all promotions would be suspended. These 10 promotions were not properly revoked before they became effective and are retroactively effective on December 13, 1981. Eight employees of the Merit Systems Protection Board were selected for promotion effective December 27, 1981, or later. Due to budget cuts, the Managing Director announced on December 16 that all promotions would be suspended. These promotions were effectively revoked, even though written notification was not issued until December 29. There is no basis to allow retroactive promotions for these eight employees. Mitchell J. Albert, B-208406, July 15, 1983. See also Department of Agriculture, B-211784, May 1, 1984.

7. Nondiscretionary agency policy

Where, incident to the appointment of a former Foreign Service officer to a position under the Classification Act of 1949, an administrative error was made in fixing his salary at the minimum instead of at the highest rate he had previously earned. Since this was contrary to the policy of appointing former federal employees at the highest salary rate previously attained, retroactive salary adjustment may be made. 34 Comp. Gen. 380 (1955).

An employee, who was assigned the duties of a vacant higher-graded position, is entitled to a retroactive temporary promotion where the agency failed to carry out a nondiscretionary policy of granting temporary promotions to employees who assume the duties of a vacant position. Donna J. Safreed, B-216605, March 26, 1985. See also Wiley H. Stephens, B-222901, December 5, 1986.

8. Employee organization agreements

A collective-bargaining agreement provided that certain Internal Revenue Service career-ladder employees would be promoted effective the first pay period after 1 year in grade, but promotions of seven employees covered by the agreement were erroneously delayed for periods up to several weeks. Since the provision relating to effective dates of promotions became nondiscretionary agency requirement, if properly includable in bargaining agreement, GAO did not object to retroactive promotions based on an administrative determination that employees would have been promoted as of revised effective dates but for failure to timely process promotion in accordance with the agreement. 55 Comp. Gen. 42 (1975). Distinguished by 58 Comp. Gen. 59 (1979).

9. Original intent effected

Where a promotion request was clerically misplaced, the promotion may not be made effective retroactively because it was not first approved by the official with authority to approve promotion requests and, thus, administrative intent to promote could not be established. 58 Comp. Gen. 51 (1978). See also B-168683, January 22, 1970.

10. Termination of temporary promotion

An employee was given a temporary promotion not to exceed 1 year. During that period the agency instituted a reorganization and notified the employee that he would be in the lower grade position after the reorganization. The employee claims backpay because he was not given specific notice of the termination of his temporary promotion until some weeks after it became effective and because he continued performing the higher level duties. Upon reconsideration, denial of the employee's claim for backpay is affirmed since temporary promotions may be terminated at any time in the agency's discretion. B-198142.2, February 24, 1982. See also B-202631, August 24, 1982.

11. Details

The subject of retroactive temporary promotions for over-long details is dealt with extensively in CPLM Title I, Chapter 8, Part B.

Highest Previous Rate Rule

1. Generally

Under 5 U.S.C. § 5334 and 5 C.F.R. § 531.203, when an employee is reemployed, transferred, reassigned, promoted, or demoted, an agency may pay him at any rate of his grade that does not exceed his highest previous rate. Thus, an employee hired after a period of employment in the private sector who had been previously employed by the government at GS-5, step 6, cannot be reemployed at a rate in excess of GS-5, step 6, even though she may have been misled to believe she would be rehired at GS-5, step 10, and notwithstanding her claim that she would not have left her private employer for less than a step 10. B-193588, April 10, 1979.

2. Administrative discretion

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

Each agency is permitted to formulate its own policy regarding application of the rule. B-186554, December 28, 1976. Where an agency had not relinquished that discretion through adoption of a mandatory policy or administrative regulation, the agency is under no obligation to set an employee's pay at the highest rate of her new grade which did not exceed her highest previous rate. B-189378, December 6, 1977, and B-184280, February 17, 1977. See also Stanley P. Laber, B-220701, March 31, 1986.

3. Abuse of administrative discretion

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

4. Agency regulation and policy

Under VA regulations requiring that, in the absence of a finding of justification and an affirmative determination, the employee's rate of pay is not to be set on the basis of the highest previous rate rule, but at a lower step of grade, an employee demoted from GS-9, step 2, was properly placed at a GS-7, step 8, rather than step 9. B-191881, July 25, 1978. A similar policy, requiring an affirmative determination to apply the highest previous rate was considered in B-195032, July 25, 1979.

Compare NASA's policy discussed in B-188343, November 17, 1977, providing that the highest previous rate will generally be given and that exceptions should be justified in writing. Where NASA had determined not to give the employee the highest previous rate, but failed to document its determination at the time of the employee's appointment, the employee is not entitled to have his pay set based on his highest previous rate. Mere failure to document such a determination does not constitute an unwarranted or unjustified personnel action.

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

However, where an administrative error was made in fixing the employee's initial salary at less than the highest rate he had previously earned contrary to the policy of the employing agency which provided for establishment of salary rates at the maximum permissible rate, a retroactive salary adjustment may be made. 39 Comp. Gen. 550 (1960).

Employee, who was serving in a temporary position following a reduction in force, was released by the agency when her temporary appointment expired. Employee was later reemployed by agency following a service break, in a grade previously held, but at step 1 of grade. Employee claims entitlement to retroactive step adjustment and backpay to step 9, the highest step of grade previously held. Use of highest previous rate is discretionary on agency's part, there being no employee-vested interest in that higher step upon reemployment in absence of regulation so providing. In view of existing agency policy

that highest previous rate would only apply to reappointments without a service break, agency action was proper. Irene Sengstack, B-212085, December 6, 1983.

Although Air Force regulations are contradictory as to whether this employee should or should not have been given benefit of highest previous rate rule, the final decision was discretionary with the local commander. In the absence of an abuse of discretion, we find no entitlement to receive the highest previous rate upon reemployment. Carma R. Thomas, B-212833, June 4, 1984.

Contracting officers were promoted even though they did not complete necessary training requirements before, or within 12 months after, their promotion to the next higher level. Where the training requirements are inconsistent with OPM regulations, we hold that such training is desirable but not mandatory. The failure to complete such training does not require revocation of their promotions. Compensation Recoupment, 63 Comp. Gen. 418 (1984).

5. Delay in appointment

Employee, whose temporary position expired, contends improper agency delay in processing permanent appointment caused her to lose the benefits of the highest previous rate rule when she was reemployed at step 1 of her prior grade following break in service. Absent mandatory policy or administrative regulation on processing appointment, delay in processing prior to approval by authorized official does not constitute administrative error which supports retroactive step adjustment and backpay. Carma R. Thomas, B-212833, June 4, 1984.

Employee accepted a grade GS-4, step 1, position with the Department of the Air Force having previously been employed by the Department of the Navy. She later resigned that position to accept a grade GS-7, step 1, position at the same Air Force activity, without a break in service. She seeks a retroactive salary adjustment and backpay for both positions based on her highest previous rate of pay (grade GS-6, step 8). The Air Force activity has applied the highest previous rate rule to her grade GS-4 position and determined she was retroactively entitled to the pay of step 10 of that grade. With regard to the use of the highest previous rate rule for the grade GS-7 position, we hold that her claim must be denied. The Air Force regulations in effect at the time of the claim, as supplemented by local activity regulations, provide that the rate of pay payable on a position change during a period of continuous service will be at

least equal to present rate of pay. Since the rate for grade GS-7, step 1, exceeded the rate for grade GS-4, step 10, her rate of pay in the grade GS-7 position was properly set. Barbara J. Cox, 66 Comp. Gen. 684 (1987).

6. Demotion at employee's request

Department of Health, Education, and Welfare (HEW) regulations provide that an employee's pay will normally be set on the basis of his highest previous rate, except that, where a change to a lower grade is at his request, a rate will be selected in the lower grade which, upon repromotion will place the employee at the rate of pay he would have attained had he remained at the higher grade. Under that policy, Administrative Law Judges who were voluntarily demoted from GS-14 to GS-13 to increase their promotion potential were not entitled to have their pay in the GS-13 positions set on the basis of their highest previous rates. B-192562, June 11, 1979.

7. Availability of funds

a. Source of funds

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

b. Availability at later date

The highest previous rate rule may be applied only so far as appropriations or funds are available. Thus, in the case of an employee who, because of limited funds, has been transferred, promoted, demoted, reinstated, or reemployed in a classified position at a rate of pay less than that attained by him in a prior position in the executive branch of the government, administrative action may not be taken at some later date as funds become available to increase the rate of pay of such employee within the salary range provided by law for the position, although such increased compensation would not exceed the highest rate of pay

attained by him in any prior position in the executive branch of the government. 27 Comp. Gen. 550 (1948).

8. Averaging method

The Federal Aviation Administration and the Federal Aviation Science and Technological Association seek our approval of an averaging method for the computation of the highest previous rate upon promotion from a Wage Grade position to a General Schedule position where the employee has worked rotating shifts and has received night differential. The averaging method was arrived at in order to complete action on United States district court's Consent Order of Remand requiring the agency to include night differential in computing the highest previous rate. We have no objection to proposed method since pay rates under that method would not exceed those authorized under 5 C.F.R. Part 531. 59 Comp. Gen. 209 (1980).

9. Legality of previous rate

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

10. Prior position not within Classification Act

Initial salary may be fixed at a rate within the appropriate grade which does not exceed the highest rate previously received regardless of whether the prior employment was within the Classification Act. 26 Comp. Gen. 530 (1947); 26 Comp. Gen. 601 (1947); and 28 Comp. Gen. 71 (1948).

11. Present position not within Classification Act

An employee of the Government Printing Office (GPO), who was improperly demoted from Policeman (First Class) to Printing and Plant Worker (Janitor) and was later restored to his former position as Policeman, suffered a reduction in the actual rate of pay upon restoration. The employee seeks to retain the higher rate of pay under the highest previous rate rule. Since 5 U.S.C. § 5334(a) does not apply to GPO employees whose positions are not subject to the Classification Act, employee may not retain higher rate of pay. B-196053, February 29, 1980.

12. Nonappropriated fund activities

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

13. Foreign Service

Employees of the Department of Agriculture, who completed service in overseas positions under 22 U.S.C. § 2385(d)(1) and who are entitled to the same benefits as provided for persons appointed to the Foreign Service Reserve, may have their salaries set under the highest previous rate rule in accordance with 5 U.S.C. § 5334(a) and 5 C.F.R. § 531.203(c) upon reinstatement to their former positions. The highest previous rate rule has never been construed as excluding salary rates attained in the Foreign Service. 51 Comp. Gen. 50 (1971).

14. Position occupied less than 90 days

Section 531.203(d)(1) of Title 5, Code of Federal Regulations, permits the use of a rate of pay received under an appointment not limited to 90 days or less as a highest previous rate, regardless of the length of time the position is in fact occupied. However, an Army regulation provided that an employee assigned to a lower grade before he has served 90 days under an unlimited promotion in his present grade, may not be given the benefit of the rate earned in that briefly held position. Under that regulation, an employee in GS-11, step 4, less than 90 days before being reduced in grade to GS-9, properly had his rate of pay set at GS-9, step 9, rather than step 10 based on the highest previous rate of GS-10, step 4. B-192890, January 10, 1979.

15. Position held under temporary promotion

The use of a rate received under a temporary promotion of more than 90 days is neither required nor precluded. An employee who returned to his prior grade after a 1-year temporary promotion was not entitled to

application of that highest previous rate where there was no agency regulation requiring such action and documentation issued him in connection with the temporary promotion stated that he would be returned to this former grade and position with time credited for within-grade increases. B-189567, November 21, 1977.

16. Reassignment but duties unchanged

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

17. Transfers to federal government

a. International agency

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

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

b. Transfers from legislative or judicial branch

The 1958 amendments to section 802(a) of the Classification Act of 1949, 5 U.S.C. § 5334, with respect to individuals with prior employment in the legislative and judicial branches of the government, are construed as enlarging CSC's authority to regulate the compensation rates, including the application of the highest previous rate rule to legislative and judicial employees upon appointment to positions under the Classification Act. The enactment of a new subsection (c) to section 802, 5 U.S.C. § 5334(c), authorizing the use of the highest previous rate rule to legislative and judicial employees who after 2 or more years of service transfer to Classification Act positions is construed as authority to use

the rule without regard to CSC's regulations. Therefore, in a case that arose after the 1958 amendments, an agency properly applied the highest previous rate rule under 5 U.S.C. § 5334 to the promotion of an employee who had less than 2 years of legislative service when she was appointed to the executive branch. 41 Comp. Gen. 389 (1961).

18. Basic pay

a. Hazardous duty pay

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

b. Overseas tax benefits

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

c. Tropical differential

The rule which permits previous rates of compensation to be used in fixing initial salary rates upon transfer, reinstatement, promotion, demotion, etc., has been applied in terms of rates prevailing in the United States so that the tropical differential paid to employees who served in the Canal Zone, though regarded as basic compensation, results in an increase of Canal Zone rates over United States rates. Therefore, it is not for consideration in fixing the compensation of former Canal Zone employees upon transfer to positions in the United States. 39 Comp. Gen. 409 (1959) and 56 Comp. Gen. 60 (1976).

d. Night differential

Employees promoted from Wage Board to General Schedule positions may have night differential included in the Wage Board rate of pay for

the purpose of determining their highest previous rate upon transfer to a General Schedule position. B-170675, August 8, 1979, and B-189852, February 14, 1979.

19. Conversion versus transfer

Conversions from prevailing rate positions are not covered by the highest previous rate rule. However, when employees transfer to General Schedule positions, their salaries are determined pursuant to the "highest previous rate rule" in 5 C.F.R. Part 531. 52 Comp. Gen. 695 (1973).

20. Promotion subsequent to demotion

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

21. Periodic step increase

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

22. Retroactive salary increases

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

the time of the change of status of the employee. 50 Comp. Gen. 414 (1970).

Employee accepted a grade GS-3, step 1, position with Veterans Administration (VA), but seeks retroactive salary adjustment and backpay because the VA did not allow her additional steps in grade GS-3 based on her highest previous rate (grade GS-6, step 8). The employee's claim is denied since (1) payment of the highest previous rate is discretionary with the agencies, (2) applicable VA regulations do not require payment of the highest previous rate in these circumstances, and (3) the VA's determination was not shown to be arbitrary, capricious, or an abuse of discretion. Barbara J. Cox, 65 Comp. Gen. 517 (1986). See also Jean M. Drummond, B-229165, August 8, 1988.

23. Rule applies to salary rate not grade

The highest previous rate rule has reference to the salary rate rather than the step within the grade. There is no authority to fix the employee's salary rate in excess of the highest previously attained salary rate. 34 Comp. Gen. 691 (1955). See also Ronald L. Fontaine, B-214885, August 20, 1984; Banaag S. Novicio, 64 Comp. Gen. 17 (1984); Marc D. Theriault, B-225305, June 24, 1987; and Lucio R. Gallardo, B-226020, October 23, 1987.

24. Intermittent employee

An employee who previously held a position as an intermittent employee is not eligible for highest previous rate consideration upon reemployment under 5 C.F.R. § 531.203(c) (1987), since the highest previous rate rule is based upon a regularly scheduled tour of duty and intermittent employment by definition does not involve a regularly scheduled tour of duty. Helen M. Jew, 67 Comp. Gen. 570 (1988).

25. "Two-step increases" rule

See also this chapter, "E. Grade and Pay Retention," "2. Decisions under the Civil Service Reform Act of 1978," and "3a. Saved pay effect on 'two-step increases' rule," below.

a. Promotion or transfer to higher grade

The statutory language of 5 U.S.C. § 5334(b) provides for a minimum two-step pay increase only when a General Schedule employee is promoted

or transferred to a position in a higher grade. It does not apply in the case of an assignment to a position at the same grade. Thus, Customs Service employees reassigned from their GS-7 Dog Handler positions to GS-7 Customs Inspector positions are not entitled to a two-step increase, even though the Customs Inspector position was a journeyman grade position involving a greater potential for promotion. 58 Comp. Gen. 181 (1978). Also see B-188521, September 7, 1978.

b. Promotion or transfer between General Schedule and other pay systems

An employee hired by the Architect of the Capitol pursuant to 2 U.S.C. § 60e-2a is not entitled to have his salary calculated with reference to the "two-step increase" rule, 5 U.S.C. § 5334(b), when he is appointed to a General Schedule position with the Department of Energy. The "two-step increase" rule pertains only to transfers and promotions within the General Schedule system, and employees hired by the Architect of the Capitol under 2 U.S.C. § 60e-2a are not within the General Schedule. Thus, employee's salary was correctly adjusted in accordance with the "highest previous rate" rule, 5 U.S.C. § 5334(a). Charles L. Steinkamp, B-208155, April 15, 1983.

An employee of the Air Force Accounting and Finance Center who transferred from a higher paying position with the Naval Supply Center claims that under the highest previous rate rule she is entitled to higher grade and pay after a subsequent promotion. Since the employee's salary after promotion exceeded her existing rate of pay by two step increases, as required under 5 U.S.C. § 5334(b) (1982), the highest previous rate rule does not apply. Sheryl L. Stanley, B-230720, November 16, 1988.

26. Simultaneous actions

Under 5 C.F.R. § 531.203(f), if an employee is entitled to two pay benefits at the same time, the employing agency shall process the changes in the order which gives the employee the maximum benefit. See 36 Comp. Gen. 217 (1956). See also 31 Comp. Gen. 207 (1951) and 31 Comp. Gen. 62 (1951).

D. Classification and Reclassification

1. Statutory authority

Chapter 51 of Title 5, U.S. Code, and 5 C.F.R. Part 511 provide a system whereby positions are grouped and identified by classes and grades in accordance with their duties, responsibilities, and qualification requirements. The rate of basic pay which an employee will receive is based upon the principle of "equal pay for substantially equal work." Variations in rates of basic pay paid to different employees are to be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of employees to efficiency and economy in the service. Section 5107 of Title 5, U.S. Code, provides individual agencies with authority to place positions in appropriate classes and grades GS-1 through GS-15 in conformance with standards published by OPM. Under 5 U.S.C. §§ 5110–5112, OPM reviews agency classifications and may revoke or suspend the agency's classification authority. The procedure by which an employee may appeal his classification is found at 5 C.F.R. § 511.603. A position may be classified in grade GS-16, 17, or 18, or in the Senior Executive Service, only by OPM.

2. Jurisdiction

a. OPM and employing agency

(1) Generally—Statutory authority to establish appropriate classification standards and to allocate positions subject to the General Schedule rests with the agency concerned and OPM. GAO has no authority to settle claims on any basis other than the agency or OPM classification. B-183103, June 2, 1975. Thus, employees should appeal alleged improper classification to their agencies or to OPM. B-187234, December 8, 1976; B-190442, April 13, 1978; and B-198473, April 12, 1982.

(2) Administrative action—authority—An agency reclassification of a position to grade GS-5 after certification of the position as grade GS-4 by CSC was not within the scope of the agency's authority. Since the agency lacked authority to reclassify positions classified by OPM, the action taken was without legal effect. 42 Comp. Gen. 521 (1963).

(3) Allocation versus reallocation—A position allocation is made based upon the duties and responsibilities assigned to the position. The responsibility for assigning, changing, or withdrawing these duties rests with

the administrative office. Thus, a position allocated originally in a particular Classification Act grade may be reevaluated and allocated to a different grade upon the basis of changed duties and responsibilities, subject to post audit by OPM. However, a reallocation is a corrective action where the original allocation was erroneous. It is not based upon change of duties and responsibilities. 26 Comp. Gen. 573, at page 576 (1947).

(4) GAO

(a) Bound by OPM determinations—Since OPM determinations on classification appeals are binding on GAO under 5 U.S.C. § 5112(a), GAO has no authority to modify such actions. B-183120, February 21, 1975. See also B-188211, November 17, 1977.

(b) Discrimination—intentional misclassification—Position description and classification of civil service employees is not within the jurisdiction of GAO. If the employing agency and/or OPM should determine that an employee's position has been illegally and deliberately misclassified due to discrimination because of race or sex, then the matter would be for consideration by GAO for the purpose of payment of any adjustments in salary found to be due, but not for review of any findings on the question of classification. 50 Comp. Gen. 581 (1971) and B-173831, September 27, 1971.

3. Effective date

a. Generally

Employees of the federal government are entitled only to the salaries of the positions to which they are actually appointed regardless of the duties they perform. When an employee performs duties at a grade level higher than that in which his position is classified and is successful in obtaining reclassification of his position and promotion, no entitlement exists for compensation at the higher grade level prior to the date the necessary administrative actions are taken to effect the promotion. 52 Comp. Gen. 631 (1973) and 39 Comp. Gen. 583 (1960). See also B-204769, April 13, 1982; and B-207889, August 31, 1982. When an employee performs duties normally performed by one in a grade level higher than the one he holds, no entitlement to the salary of the higher level position exists until such time as the individual is actually promoted to that level. B-192560, December 14, 1978. Under 5 C.F.R. § 511.701, the effective date of a classification action taken by an

agency is the date the action is approved in the agency or a subsequent date specifically stated. Section 511.702 provides that the effective date of a classification action upon appeal to the agency or OPM, subject to the provisions of section 511.703, is no earlier than the date of the decision and no later than the beginning of the fourth pay period following the date of the decision, except that a subsequent date may be specifically provided in the decision.

b. United States v. Testan

The Supreme Court in United States v. Testan, 424 U.S. 372 (1976), specifically held that neither the Classification Act, 5 U.S.C. §§ 5101 – 5115, nor the Back Pay Act, 5 U.S.C. § 5596, creates a substantive right to backpay for periods of wrongful classification. B-190695, July 7, 1978, and B-191360, May 10, 1978.

c. Prior to reclassification

There is no entitlement to backpay for the period prior to reclassification of incumbent's position. Alleged delays in processing job descriptions to a higher grade position do not provide a basis for backpay. Where final classification action rested with headquarters office, the employee may not be promoted prior to date of final agency action. B-200638, October 9, 1981. See also B-173783.140, March 22, 1977.

d. Upon reclassification

(1) Generally—The effective date of changes in salary due to allocations or reallocations of positions is the date on which the action is taken by the administrative office to allocate or reallocate the position or such later date as may be administratively fixed. 30 Comp. Gen. 156 (1950). Amplified by 37 Comp. Gen. 492 (1958) to provide that such later date must be within a reasonable time. The time frame for a "reasonable time" is prescribed in 5 C.F.R. §§ 511.701 and 511.702. 53 Comp. Gen. 216 (1973). B-186758, November 3, 1978.

(2) Employee lacks experience—An employee's position was reclassified from GS-3 to GS-5 and she was retained in that position at her GS-3 rate of pay for beyond four pay periods. Because she did not have the necessary specialized experience for promotion to GS-5 at the end of the four pay periods, the agency's failure to either promote or reassign her within a reasonable period does not serve as a basis for payment of backpay. B-195020, July 11, 1979.

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

(4) Position occupied by another employee—A former employee of the Department of the Army is not entitled to backpay on the basis that she held a position that was reclassified from grade GS-12 to grade GS-13. The evidence furnished by the Army indicates that the position was in fact occupied by another employee. The burden of proof is upon the employee to establish the liability of the government and her right to payment, and she has not met that burden. Agnes T. Crouch, B-217885, September 25, 1987.

e. Retroactive pay adjustments allowed

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

(2) Appeal from downgrading—Under 5 U.S.C. § 511.703, an employee who successfully appeals from the downgrading of his position may be awarded backpay for the period during which he was downgraded. The downgrading action, however, must be a downgrading of the position to which the employee himself has been appointed. Thus, an employee whose position was ultimately reclassified from GS-11 to GS-12 is not entitled to retroactive award of a GS-12 salary based on the fact that coworkers, whose positions were initially classified at GS-12, successfully appealed from the downgrading of their similar positions to GS-11. B-191794, September 19, 1978.

f. Retroactive pay adjustments disallowed

(1) Arbitration award for violation of negotiated agreement—Arbitrator's finding of a violation of negotiated agreement dealing with classification and position descriptions, does not provide a basis for retroactive pay. B-192366, October 4, 1978.

(2) Suspension of classification action—Suspension of a classification action does not provide a basis for payment of backpay to employees whose positions might otherwise have been reclassified upward. B-189101, November 30, 1977. See also B-181223, April 30, 1976.

g. Reallocations

See also this chapter, "E. Grade and Pay Retention," below, and "C. Promotions and Transfers," above.

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

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

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

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

E. Grade and Pay Retention

1. Civil Service Reform Act of 1978

Title VIII of the Civil Service Reform Act of 1978 repealed 5 U.S.C. § 5337, as well as sections 5334(d) and 5345. In its stead, it enacted a new Subchapter VI to Chapter 53 (5 U.S.C. §§ 5361 – 5366) which provides broad authority for grade and pay retention incident to a change of position to downward reclassification occurring after January 11, 1979, or, in certain instances, retroactive to January 1, 1977.

Under 5 U.S.C. § 5362, any employee subject to Subchapter VI who is reduced in grade is entitled to have the grade of the position he held treated as his retained grade for 2 years. An employee whose reduction in grade is the result of a reduction in force is similarly entitled if he has served for 52 or more consecutive weeks in a higher grade position(s) that is also covered by the subchapter. Unless the employee's entitlement to the retained grade is earlier terminated for one of the reasons specified at subsection 5362(d), the retained grade terminates upon expiration of 2 years from the date of the downgrading. Section 5363 of Title 5, U.S. Code, provides that the employee is entitled to basic pay at a rate equal to his former rate of basic pay plus 50 percent of the amount of each increase in the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay, if such allowable rate exceeds the maximum rate for such grade. That entitlement continues until the employee has a break in service, is demoted for cause or at his request, or is entitled to or is offered and declines an equal or higher rate of pay. Under 5 U.S.C. § 5362, pay retention is also provided for any employee who is subject to a reduction or termination of a special rate of pay under 5 U.S.C. § 5303 or who would be subject to a reduction in pay under circumstances prescribed by OPM. OPM's implementing regulations are found at 5 C.F.R. Part 536.

2. Decisions under the Civil Service Reform Act of 1978

a. Agency training program and reassignment to same pay schedule

Navy employee who accepted demotion from a General Schedule position to a lower-graded General Schedule position in order to enter internal training program is not entitled to pay retention. Training program is not one of three formal governmentwide programs qualifying for pay retention under these circumstances, and the employee was not reassigned to a different pay schedule. B-198765, March 19, 1981.

b. Agency training program and reassignment to different pay schedule

Two Navy Wage Grade employees accepted demotions to General Schedule positions in order to enter agency training program. Training program is not one of three formal governmentwide programs qualifying for pay retention and Navy did not offer pay retention under these circumstances. However, since demotion was not considered to be at employees' request and employees were reassigned to different pay schedule (WG to GS), they are entitled to pay retention. B-198765, March 19, 1981.

c. Erroneous advice of agency officials

FAA employee accepted "career progression downgrade assignment" in May 1979, after FAA advised he would be entitled to salary retention. Statute and regulations governing salary retention were superseded effective January 1979, by statute and regulations governing pay retention which, under the circumstances, provides lesser monetary benefit to employee. Employee is entitled only to pay retention and may not receive additional compensation due to erroneous advice of agency officials. B-199461, April 15, 1981.

Civil Service Reform Act repealed some salary protection benefits for downgraded employees and enacted new ones. FAA Air Traffic Controller, downgraded after effective date of changes but erroneously advised he was entitled to more liberal repealed benefits, claims unjustified personnel action and backpay. Claim must be denied. Government is not bound by erroneous advice and it does not constitute unjustified personnel action. FAA had no authority to grant repealed benefits and no alternative but to apply law in effect at time of downgrading. 60 Comp. Gen. 417 (1981).

d. Reemployment from temporary appointment in Foreign Service

An employee who held a 30-month Foreign Service term appointment with the Peace Corps was not entitled to retained pay when he exercised his statutory reemployment rights and was reemployed at ACTION at a lower rate of pay. The employee's statutory rights define the extent of his agency's obligation to reemploy him in his former position, and there is no authority in the grade and pay retention statute, 5 U.S.C. §§ 5361 - 5366, to expand upon this authority. Further, Office of Personnel Management regulations specifically preclude an employee serving under a temporary reassignment from retaining a grade or rate of basic pay held during a temporary reassignment. Edward F. Carey, B-229104, April 4, 1988.

e. Transfer of function

An employee who held a GS-13 position with the Department of Energy (DOE) exercised statutory rights he had with former agency to reemployment in the GS-12 position he held with that agency prior to appointment with DOE. He is not entitled to grade and pay retention under 5 U.S.C. §§ 5361 - 5366, since he was not placed in a lower grade position as a result of declining to transfer with his function. He chose to exercise his statutory rights of reemployment independent of any rights he may have had in connection with the transfer of function. 59 Comp. Gen. 311 (1980).

f. Cost-of-living allowance

Department of Transportation questions payment of full cost-of-living allowance (COLA) to Coast Guard employee in Alaska whose position was converted from the prevailing rate system to the General Schedule. Employee retained his WS-6 grade for 2 years and is now on retained pay in excess of GS-11, step 10, under 5 U.S.C. §§ 5362 and 5363 (Supp. III 1979). Employee is entitled to full 25 percent COLA for the area under 5 U.S.C. § 5941 (1976), based on the rate of basic pay for GS-11, step 10, not on his retained rate of pay. U.S. Coast Guard, B-206028, December 14, 1982.

g. Incident to transfer

Civilian employee of the Air Force at the Pentagon in a grade GS-7, step 5, position was selected for a position in California that she had previously held at the same grade and step level as when she previously

occupied the position, grade GS-6, step 6. The employee claims that since she was contacted by the chairman of the medical department regarding her availability for employment, her acceptance does not constitute a demotion at the employee's request and the Air Force should have applied the highest previous rate rule or pay retention rule to appoint her at a level commensurate with her highest level. Absent a mandatory policy or administrative regulation, the use of the highest previous rate is discretionary on the agency's part. We conclude that the authorized appointing official did not abuse his discretion in setting her pay at the grade GS-6, step 6, level. Doris M. Arehart-Zuidema, B-223356, August 21, 1987.

Employee contends that local Air Force base supplementary regulation regarding use of the highest previous rate rule discriminates against persons not married to military or federal civilian employees. Our Office does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in the agencies of the government. Doris M. Arehart-Zuidema, B-223356, August 21, 1987.

h. Reduction in force

A grade GS-12 employee of the Department of the Air Force stationed overseas was subject to a reduction in force. He refused a GS-9 position and chose to go on discontinued service retirement. Approximately 6 months later, he accepted a grade GS-9 position with the Department of the Army in the same area. The Army committed an unjustified and unwarranted personnel action when it erroneously denied him grade retention, pay retention, and living quarters allowance on the basis of his previous denial of a grade GS-9 position. We are unaware of any authority that would permit reinstatement of his retirement. John T. Zervas, B-231061, January 26, 1989.

Agency abolished employee's position of Quality Assurance Specialist, GS-12, effective November 17, 1981, and offered employee a Wage Grade position in lieu of separation by reduction in force (RIF). Employee was erroneously notified that acceptance of Laborer position would include indefinite retention of GS-12 pay. Employee elected the lower grade position, rather than discontinued service retirement pursuant to RIF. In January 1984, employee was notified that GS-12 pay was not indefinite, but would be reduced retroactively to November 19, 1983. Employee is not entitled to pay of GS-12 position beyond statutory period of 2 years. Notice by agency official to contrary does not provide a basis to allow him additional compensation. Government cannot be bound beyond the

actual authority conferred upon its agents by statute or regulations. Anthony M. Ragunas, 68 Comp. Gen. 97 (1988).

i. Foreign Service

An employee who held a 30–month Foreign Service term appointment with the Peace Corps was not entitled to retained pay when he exercised his statutory reemployment rights and was reemployed at ACTION at a lower rate of pay. The employee's statutory rights define the extent of his agency's obligation to reemploy him in his former position, and there is no authority in the grade and pay retention statute, 5 U.S.C. §§ 5361 – 5366, to expand upon this authority. Further, Office of Personnel Management regulations specifically preclude an employee serving under a temporary reassignment from retaining a grade or rate of basic pay held during a temporary reassignment. Edward F. Carey, B-229104, April 4, 1988.

j. Temporary reassignment

An Internal Revenue Service employee requested pay retention upon his return from a "limited assignment overseas," based upon 5 U.S.C. § 5363 (1982). The employee had attained career status; therefore, a limited assignment of that employee to an overseas duty station was not proper. However, since the employee was assigned overseas for a definite period of time and was informed in advance that the assignment was temporary, he is not entitled to pay retention because 5 C.F.R. § 536.105(b) (1985) precludes pay retention for the pay rate earned during a temporary assignment. John C. Ramos, B-220829, September 26, 1986.

k. Promotion in violation of merit system principles

General Services Administration requests reconsideration of decision Paul W. Braun, B-199730, July 31, 1981, contending that Mr. Braun is entitled to grade retention under 5 U.S.C. § 5362. We sustain our July 31, 1981, decision and reject the agency's contention concerning grade retention. Mr. Braun is not entitled to grade retention because the Office of Personnel Management found his promotion to the GS-15 position to have been in violation of merit system principles and ordered GSA to cancel the improper promotion. Paul W. Braun, B-199730, January 18, 1983.

3. Decisions under repealed "saved pay" law

a. Saved pay effect on "two-step increases" rule

For decision on saved pay effect on "two-step increases" rule under predecessor saved pay law, see B-199834 et al., March 17, 1981. See also Ronald S. Wong, B-202643, February 7, 1984.

b. Personal cause

For an interpretation of "personal cause" under the predecessor saved pay law, see 39 Comp. Gen. 193 (1959).

c. Employee's request

For an interpretation of "employee's request" under the predecessor saved pay law, see 56 Comp. Gen. 199 (1976); B-198941, August 19, 1980; B-191229, June 1, 1978; and B-174997, April 21, 1972.

F. Special Situations

1. Public Health Service—medical officer

A medical officer of the Public Health Service is not eligible to enter into a service agreement for retention special pay when he is satisfying a pre-existing service obligation incurred as the result of financial assistance he received in medical school under the National Health Service Corps Scholarship Program. Thomas D. Matte, M.D., B-231407, March 6, 1989.

2. Reemployment under 10 U.S.C. § 1586—saved pay

An employee, who exercised his reemployment rights under 10 U.S.C. § 1586 (1982), accepted a demotion and returned from overseas to his prior position in Hawaii. He is not entitled to additional compensation on the basis that the agency erroneously set his pay upon his return since he was granted saved pay under applicable statute and regulations and this was the greater benefit available to him at that time. Yukio Fujikawa, B-231927, February 3, 1989.

Subchapter III—Step Increases

A. Periodic Step Increases

1. Statutory authority

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

- the employee did not receive an equivalent increase in pay from any cause during the period; and
- the work of the employee, except a hearing examiner appointed under 5 U.S.C. § 3105, is of an acceptable level of competence as determined by the head of the agency.

OPM regulations are found for 5 U.S.C. § 5335 at 5 C.F.R. §§ 531.401 – 531.413.

2. Applicability

Under the provisions of 5 U.S.C. § 5335, an employee paid on an annual basis and occupying a permanent position within the General Schedule is entitled to within-grade salary increases in pay. A "permanent position" is defined by 5 C.F.R. § 531.403 as "one filled on a permanent basis, that is an appointment not designated as temporary by law and not having a definite time limitation of one year or less."

3. Non-applicability

Employees not covered by the step increase provisions are:

- Employees who are covered by the Performance Management and Recognition System established under Chapter 54 of Title 5, United States Code;
- Members of the Senior Executive Service established under Subchapter II of Chapter 31 of Title 5, United States Code;
- Individuals appointed by the President, by and with the advice and consent of the Senate; and

- Employees of the government of the District of Columbia. 5 C.F.R. § 531.402(b).

4. Waiting period

Section 5335(a) of Title 5, U.S. Code, prescribes a waiting period of 156 weeks in step 7 before an employee may be advanced to step 8 of his grade, and section 5336(b), provides that a quality increase is not an equivalent increase in pay within the meaning of section 5335(a). Thus, an employee who was advanced on January 2, 1966, to step 6 of grade GS-13, and who received a quality increase on July 3, 1966, to step 7, had not received an equivalent increase under section 5336(b) and did not start a new waiting period to qualify for step 8. However, the employee is required to serve not the 104-week waiting period prescribed for step 6 but the 156 weeks prescribed for step 7, which began January 2, 1966, the date of his advancement to step 6. 48 Comp. Gen. 150 (1968).

5. Creditable service

a. Time in nonpay status

Under OPM regulations time in a nonpay status in excess of specified amounts shall not be considered creditable service for the purpose of periodic step increases. Thus, an employee who was separated by a reduction in force on August 31, 1973, did not receive her periodic step increase because her eligibility was delayed until September 2, 1973, by excess use of leave without pay (LWOP). She may not have annual leave substituted for LWOP for the purpose of accelerating the effective date of her periodic step increase and increasing severance pay since she had been advised of the consequences of the use of excess LWOP. Annual leave may be substituted retroactively for LWOP only where LWOP was charged as a result of a mistake of law or fact. B-180870, August 27, 1974. See also B-191713, May 22, 1978.

An FAA employee who was on leave without pay while performing active duty for training in the Army Reserve is entitled to creditable service for this period for the purposes of computing the waiting period for a step increase. Ronald E. Ferguson, B-215542, August 1, 1985.

b. Effect of nonpay status on prior pay status

Employee sustained a disabling injury as the result of a household accident. He had served approximately 20 months at the GS-14, step 4, grade level and under normal circumstances would have been eligible to receive a within-grade increase to step 5 on October 22, 1978, after a waiting period of 104 calendar weeks. At his request, he was granted leave without pay (LWOP) and placed in a nonpay status from July 11, 1978, to August 7, 1979. Because the employee was in a nonpay status for a period in excess of 52 calendar weeks, the approximate 20 months of service prior to that period does not constitute creditable service for purposes of eligibility to receive a within-grade increase and a new waiting period is required to begin effective August 8, 1979. 61 Comp. Gen. 255 (1982).

c. Lump-sum leave period

Employees cannot receive credit for accrued annual leave on his service computation date upon separation and reappointment by different agency since period covered by lump-sum payment is not counted as civilian federal service. 59 Comp. Gen. 15 (1979).

d. Equivalent increase

(1) Promotion following demotion—A General Schedule employee was reduced in grade when he exercised his right under 10 U.S.C. § 1586 to return to a position in the United States following overseas duty. In accordance with 10 U.S.C. § 1586, as implemented by Department of Defense Instruction 1404.8 (April 10, 1968), the employee was afforded pay retention under 5 U.S.C. § 5363. The employee's subsequent repromotion to his former grade and step commenced a new waiting period for within-grade increases, since the constructive increase in pay which occurs upon repromotion during a period of pay retention is an "equivalent increase" under 5 U.S.C. § 5335(a); 5 C.F.R. § 531.403. Eric E. Bahl, 63 Comp. Gen. 105 (1983), reversing Eric E. Bahl, 62 Comp. Gen. 151 (1983).

(2) COLA earned at TVA—Navy employee transferred to a position with Tennessee Valley Authority (TVA) and later transferred back to a position with the Navy. The cost-of-living allowance (COLA) and the within-grade increase he received at TVA constitute an "equivalent increase" under 5 U.S.C. § 5335(a) and 5 C.F.R. § 531.403. Ronald L. Fontaine, B-214885, August 20, 1984.

(3) Promotions after demotions—Where an employee is demoted and later repromoted to the same grade and step level as previously held, a new waiting period for periodic step increases begins, even though the employee received the same rate of pay during the demotion period as saved pay. On repromotion, the constructive increase in pay from the applicable rate determined under 5 U.S.C. § 5334(b) for the lower grade held during demotion is an equivalent increase under 5 U.S.C. § 5335(a). B-193394 and B-193336, March 23, 1979.

When an employee was promoted from GS-11, step 9, to GS-12, step 5, in November 1975, his increase in pay attributable to that promotion constituted an equivalent increase and would be the inception date for a new waiting period. The fact that the employee was later demoted and returned to his former grade and step would not negate the new waiting period since at the time it began, the promotion was proper and he received benefits thereunder. Therefore, the employee's new waiting period for a periodic step increase to GS-11, step 10, extends 3 years from the effective date of his promotion to GS-12. 57 Comp. Gen. 646 (1978).

(4) Demotion following promotion—FAA employee, a GS-12, step 5, Air Traffic Control Specialist, was transferred and promoted to GS-13, step 2, in connection with developmental training assignment and subsequently received within-grade increase to GS-13, step 3. When employee failed to meet training requirements and was voluntarily demoted back to GS-12, step 5 position, agency's nondiscretionary salary setting orders required that correct date of commencing waiting period for advancement to GS-12, step 6, be set at original effective date of employee's advancement to GS-12, step 5, prior to his promotion and transfer to developmental training position. Employee's claim as to beginning of waiting period is correct. B-201037, February 2, 1981.

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

(6) Work of an acceptable level of competence—Claim for additional compensation, for the period during which a periodic step increase was withheld following a negative acceptable level of competence determination by the agency, may not be allowed since the negative determination was sustained by both the agency on reconsideration and by Board of Appeals and Review. Decisions of the Board are final and conclusive in such matters and there is no basis for further administrative review. B-180706, August 7, 1974. See also 5 C.F.R. § 531.409.

B. Quality Step Increases

1. Statutory authority

Section 5336 of Title 5, U.S. Code, provides that an agency may, under OPM regulations, grant an additional step increase in recognition of high quality performance. Such increases are not equivalent increases under 5 U.S.C. § 5335. Only one quality step increase may be given within any 52-week period. OPM regulations for quality increases are set forth in 5 C.F.R. §§ 531.501 - 531.508.

2. Agency discretion

An agency has the discretion to approve or disapprove a quality step increase. Thus, where an agency erroneously filed a supervisor's insufficiently documented recommendation for a quality step increase, delaying its effect, the increase may not be granted retroactively. The employee did not have a vested right pursuant to statute or agency regulation to a quality step increase until the appropriate agency official approved the recommendation. Thus, the employee did not suffer an unjustified or unwarranted personnel action by the fact that her increase was delayed beyond the date she first became eligible. 58 Comp. Gen. 290 (1979). Also see B-193583, May 17, 1979.

However, where agency regulations required agency approval or disapproval of a quality step increase within 30 days of recommendation, an employee's quality step increase may be made retroactively effective under the Back Pay Act where the approving officer's failure to act upon the recommendation for almost a year was found to be improper by the agency and hence was tantamount to an unjustified or unwarranted personnel action. B-192372, January 2, 1979.

There was no inconsistency between awarding quality step increase (QSI) for GS-11 work while the employee was detailed to a GS-12 position and later granting a retroactive temporary promotion for the detail. Once

granted, employee had vested right to QSI, since it did not violate any statute or regulation. Consequently, the employee is entitled to both QSI and retroactive temporary promotion. B-192684, November 19, 1979.

Although the employee was recommended for a QSI, the award was not approved since performance standards had not been approved for that office unit. The employee has no vested right to the award, even though recommended by his supervisor. Carl L. Haggins, B-216952, October 18, 1985.

Quality Step Increase (QSI) for IRS employee was delayed due to administrative oversight in failing to timely process paperwork necessary for approval. Agency has policy of mandatory Sustained Superior Performance Awards of at least 1 percent of salary for various employee categories including that of employee here. An award is automatically triggered if an employee receives a rating above a stated level when his annual rating is completed each year. Employee here was evaluated as Distinguished for the evaluation period of October 1, 1983, to September 30, 1984, which mandated a sustained performance award. At time of employee's annual rating which qualified him for performance award, supervisor tentatively decided that award would be a lump-sum cash payment of at least 1 percent of salary. However, some months later when supervisor submitted formal written recommendation he decided to recommend upgraded award of QSI. Approving official authorized QSI. Retroactive granting of QSI may not be made since IRS retained discretion to grant or deny it until approving official acted. As long as final agency discretion to grant or deny a QSI has not been exercised, employee has no vested right to the QSI and it may not be made retroactively effective. Frederick J. Kahn, B-221128, September 26, 1986.

3. Retroactive increase

As the result of a discrimination complaint, an employee is promoted to GS-12 retroactive to a date prior to the date he was awarded a quality step increase in his GS-11 position. The amounts attributable to the quality step increase in the lower grade are to be deducted from the pay of the higher grade position to determine the employee's backpay entitlement. Because a quality step increase may not be granted retroactively, the employee may not be granted a quality step increase effective retroactive to a date 1 year after the effective date of his retroactive promotion to GS-12. Rufus R. Johnson, B-221176, April 24, 1986.

C. Performance Management and Recognition System (Merit Pay)

1. Coverage under the system

An employee's position under the General Schedule was to be converted to merit pay in October 1981. However, in September 1981, his position was removed from those to be converted to merit pay. This occurred after the employee's rating period had concluded resulting in a rating of "highly successful" which would have qualified him for a merit pay increase. We hold that the employee is not entitled to the merit pay increase since his position was not converted to merit pay and he was not under merit pay when the merit pay increases were awarded in October 1981, as required by applicable regulations. Louis J. Derdevanis, B-210859, April 19, 1984.

An employee was reassigned from a merit pay position to a General Schedule position. Within 2 months, the General Schedule position was placed in the merit pay system, and the agency asks if the employee's merit pay status should be made retroactive to the time he was first placed in the General Schedule position. Agencies have authority to determine coverage under the merit pay system, and we will not require retroactive correction of designations where there was no administrative error which would warrant correction of the personnel action. Benedict C. Salamandra, B-212990, July 23, 1984.

2. Conversion between systems

When an agency assigns employees to the merit pay system and then reassigns them back to the General Schedule system, those employees are not entitled to retroactive pay and within-grade waiting time credit equal to what they would have accrued if they had remained in the General Schedule system, unless administrative error occurred. An agency that properly converted an employee to merit pay system and then reconverted him to the General Schedule upon its prospective adoption of a new standard of employee coverage under the merit pay system, and properly assigned the employee to comparable pay levels, acted in conformity with the relevant statutes and regulations, and did not commit administrative error. Therefore, the employee is not entitled to additional pay and within-grade waiting time credit based on his claim that he was improperly assigned to the merit pay system. John R. MacDonald, 65 Comp. Gen. 485 (1986).

D. Incentive Awards

The Director of the Office of Technology Assessment (OTA) does not have the authority to establish an incentive awards program for the Office.

Absent specific authority or inclusion of OTA within the scope of the Incentive Awards Act, 5 U.S.C. Chapter 45 (1982), OTA may not pay incentive awards to its employees. The authority to "fix the compensation" of its employees does not include the authority to make incentive awards. 37 Comp. Gen. 343 (1957), distinguished. Office of Technology Assessment, B-228963, May 19, 1988.

Section 503 of Title 14, U.S. Code, does not provide authority similar to 5 U.S.C. § 4503 to pay monetary incentive awards for superior accomplishments to military members of the Coast Guard who were members of a group comprised of military members and civilian employees that was given a group award. Coast Guard, 68 Comp. Gen. 343 (1989).

Additional Compensation and Allowances

Introduction

Since there are certain instances in which the same or similar laws govern the premium pay entitlements of classified and prevailing rate employees, such as FLSA entitlement, Subchapter I of this chapter will also include specific reference to several decisions concerning prevailing rate employees where the identical rule is applicable to both classified and prevailing rate employees. For additional material concerning prevailing rate employees, see CPLM Title I—Compensation, Chapter 11.

Subchapter I—Premium Pay—Overtime

A. Statutory Authorities

Employees may be entitled to overtime compensation under either 5 U.S.C. § 5542 as amended, or the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 - 219. If an employee is entitled to overtime compensation under both laws, he is entitled to receive compensation under whichever law provides him with the greater benefit. 54 Comp. Gen. 371 (1974); B-200354, December 31, 1981; Henry G. Tomkowiak, et al., 67 Comp. Gen. 247 (1988).

1. 5 U.S.C. § 5542

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

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

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

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

"(3) Notwithstanding paragraphs (1) and (2) of this subsection for an employee of the Department of Transportation who occupies a nonmanagerial position in GS-14 or under and, as determined by the Secretary of Transportation.

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

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

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

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

"(b) For the purpose of this subchapter—

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

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

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

"(B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively."

2. Fair Labor Standards Act

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

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

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

B. Overtime Under 5 U.S.C. § 5542

1. What are compensable hours of work

a. Actual work requirement

(1) Generally—The general rule applicable to both classified and prevailing rate employees is that since the authority for payment of overtime compensation contemplates the actual performance of duty, an employee may not be compensated for overtime work when he does not actually perform work during the overtime period. 42 Comp. Gen. 195 (1962); 45 Comp. Gen. 710 (1966); 46 Comp. Gen. 217 (1966); 55 Comp. Gen. 629 (1976); Emery J. Sedlock, B-199104, February 6, 1985.

(2) Fitness for duty examination—Although time spent taking a physical examination that is required for the employee's continued employment with the agency shall be considered hours of work under FLSA, such time is not hours of work under 5 U.S.C. § 5542. David Ehrich, B-209768, July 15, 1983.

2. Violation of labor-management agreement

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

3. Authorized leave during basic workweek

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

4. Absence on sick leave during overtime period

Title 5 of the U.S. Code, § 5542, authorizes payment of overtime compensation "for all hours of employment, officially ordered or approved,

in excess of 40 hours in any administrative workweek." This contemplates the actual performance of required duty during the prescribed overtime period. While an employee might be granted sick leave during the basic 40-hour week to seek treatment for injury incurred in the line of duty or otherwise, no sick leave can be granted for an overtime day and, accordingly, no compensation is payable for time absent from duty during the scheduled number of overtime hours on an overtime day due to injury incurred or time spent in seeking treatment for such injury. 25 Comp. Gen. 344.

5. Overtime work in excess of 8 hours a day

Where General Schedule employees' basic workweek contains hours of work in excess of 8 in a day payable at an overtime rate, these overtime hours may not be counted in determining whether the employees have worked hours in excess of 40 hours in an administrative workweek for purposes of computing "Title 5" overtime compensation under 5 U.S.C. § 5542 and the implementing regulation, 5 C.F.R. § 550.111(a). John Nyberg, et al., 65 Comp. Gen. 273 (1986).

6. Military and court leave

Under 5 U.S.C. §§ 6323(a) and 6322, respectively, an employee is entitled to receive the same compensation he otherwise would have received but for the fact that he was absent on military or court leave. 27 Comp. Gen. 353, 357 (1947) and 49 Comp. Gen. 233 (1969). In order for overtime work to be compensable with respect to an employee on military or court leave, the overtime duty must have been regularly scheduled which would have required the employee concerned to work overtime had he not been away on military leave or jury duty. B-159835, March 11, 1976. See also Howard L. Young, B-202864, August 10, 1982. Robert Veleta, B-225183, September 3, 1987.

Decision denying claim of employee for overtime compensation for period he was away on military leave is reversed. Claim was denied because although overtime was regularly scheduled, it was not clear that employee would have been required to work the overtime involved. Newly submitted evidence shows that employee would have been required to work and his claim is therefore allowed. Howard L. Young, B-202864, September 2, 1983, reversing B-202864, August 10, 1982.

7. Two-thirds rule

The established rule is that time available for, or spent, sleeping and eating is noncompensable even where the employee is required to be on the employer's premises. The exception to this rule is where substantial labor is performed in the time set aside for sleeping and eating. B-173235, November 22, 1971.

The two-thirds rule does not apply to shifts of less than 24 hours. Thus, federal firefighters who work irregular or occasional overtime of 12 hours are not subject to the application of the two-thirds rule, but bona fide meal periods may be excluded from their overtime hours. Thomas A. Donahue, 64 Comp. Gen. 1 (1984). Also see Frederick Evans, Jr., B-216640, March 13, 1985, sustained in B-216640, September 18, 1985.

Seasonal firefighters who were placed on standby duty may, because of the emergency conditions in effect, be paid under Title 5, United States Code, or under the Fair Labor Standards Act, overtime for their entire shift without deduction of 8 hours for sleep and meal time under the "two-thirds rule." Further, only bona fide meals may be deducted to determine compensable hours of overtime. William W. Smith, et al., B-230414, January 10, 1989.

8. Missing employees

Employees held as hostages in the United States Embassy in Iran are entitled to be paid for overtime they would have worked had they not been taken hostage. If prior to the takeover the employees worked regularly scheduled overtime, for the period of internment, they are entitled to pay consistent with overtime regularly scheduled. For overtime which was not regularly scheduled, the hostages are entitled to overtime they would have earned but for internment and, under the circumstances of this case (i.e., takeover of Embassy and internment of all employees), the determination of how much overtime they would have worked is for Department of State to make. B-206443, May 5, 1982.

9. Work not in excess of 40 hours in workweek

For nearly 2 years, certain FAA payroll employees were given the option of using compensatory time in lieu of overtime pay. One group of employees worked four 10-hour days the first week of each pay period and took Friday off. Although such overtime work normally would be considered "regularly scheduled" for which compensatory time is not

available, we conclude that this was essentially an informal extension of the flexible work schedule worked in prior years. These employees are not entitled to overtime compensation for such "regularly scheduled" overtime work where they did not work more than 40 hours in that workweek. Other employees who worked frequent or sporadic overtime on an irregular or unscheduled basis were properly entitled to compensatory time for such work and are not entitled to additional compensation. Mike Monroney Aeronautical Center (FAA), B-221630, July 10, 1986.

10. Overtime paid under 5 U.S.C. § 5545

A Customs patrol officer had a tour of duty from 8 a.m. to 4 p.m. and was authorized premium pay for irregular, unscheduled overtime under 5 U.S.C. § 5545. He performed callback surveillance duty from 10 p.m. to 3 a.m. on April 27 through 28, 1977, and scheduled surveillance duty from 7 p.m. April 29, to 2:30 p.m. on April 30, his scheduled day off. He is not entitled to payment for regularly scheduled overtime under 5 U.S.C. § 5542 in addition to premium pay since surveillance duty was administratively uncontrollable overtime as it did not occur at such regular intervals as to fall into clear discernible pattern. B-196550, June 5, 1980.

11. Compared to irregular or occasional

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

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

12. While traveling

a. Commuting

It is a well-established rule that normal commuting time between an employee's residence and duty station is not compensable overtime. This rule applies to an employee who commutes in a carpool with his supervisors even if work-related matters are discussed during the commute. Samuel Stern, B-202098, September 18, 1987. See also 41 Comp. Gen. 82 (1961) and 52 Comp. Gen. 446 (1973).

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

Several Charleston Naval Shipyard employees claim overtime compensation when they are in a temporary duty status and travel by bus, outside of their normal duty hours, from their lodgings to the Naval Submarine Base, Kings Bay, Georgia, during extended refit periods. The time spent traveling outside of regular duty hours as passengers by these prevailing rate (Wage Board) employees who are covered by the Fair Labor Standards Act (FLSA) between the point of temporary duty lodgings and the temporary duty job site is not considered compensable hours of work under either the FLSA or 5 U.S.C. § 5544(a) (1982). Thus, the employees' claims for overtime compensation under these statutes are denied. Charleston Naval Shipyard Employees, B-227695, September 23, 1987. See also John B. Cleveland, B-221088, September 11, 1986.

b. Within duty station

Deputy U.S. Marshal, who normally worked evenings and nights on Sky Marshal duties at the Los Angeles Airport, is not entitled to overtime compensation for traveltime during the day from his residence to appear in court in Los Angeles. Since the travel was not "away" from his official duty station, it does not meet the requirements of 5 U.S.C. § 5542(b)(2) for payment of overtime compensation for time spent in a travel status. B-188955, November 23, 1977.

Supervisory employee of the Federal Aviation Administration is not entitled to overtime under 5 U.S.C. § 5542(b)(2)(B) (1982) for time spent traveling outside of his regularly scheduled administrative workweek since (1) the travel was within the employee's official duty station and

(2) the travel must be away from the official duty station to be compensable. Moreover, the employee's tasks to pickup and deliver mail and supplies while traveling to and from his duty site was not compensable traveltime since, as a supervisor, it was not his primary function. James Blackburn, Jr., 66 Comp. Gen. 658 (1987). See also Local 3369, American Federation of Government Employees, AFL-CIO, B-210697, September 29, 1983.

c. Travel as part of regularly scheduled workweek

Diplomatic couriers who have a basic workweek consisting of the first 40 hours of duty performed do not have a regularly scheduled administrative workweek within the meaning of 5 U.S.C. § 5542(b)(2)(A). Their time spent in a travel status away from their official duty station does not qualify as hours of employment or work by virtue of that provision. 57 Comp. Gen. 43 (1977).

Supervisory federal firefighters who are exempt from the Fair Labor Standards Act but who receive premium pay under 5 U.S.C. § 5545(c)(1) on an annual basis for regularly scheduled standby duty are not entitled to additional overtime pay under 5 U.S.C. § 5542 for work that is part of the firefighters' regularly scheduled standby duty and are not entitled to additional overtime pay under 5 U.S.C. § 5542 for work that is part of the firefighters' regularly scheduled administrative workweek. International Association of Firefighters, Local F-48, B-226136, July 13, 1987.

d. Performance of work while traveling

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

(2) Time at airport—no work outside regular working hours—Five employees of the U.S. Naval Ship Repair Facility, Guam, claim that they are entitled to overtime pay under the Fair Labor Standards Act or Title 5, United States Code, for time they spent waiting at air terminals for their flights to depart and for time they spent clearing the airport after their arrival while traveling to and from their temporary duty station at Diego Garcia. They are not entitled to overtime pay under either law because they did not meet the required criteria, particularly the time was outside regular work hours and corresponding hours on

nonworkdays, and they performed no work while traveling. John C. Dudkiewicz, B-226191.2, January 4, 1989.

(3) Escorts and couriers—Employees of the Atomic Energy Commission who are designated as escorts to protect security shipments and who perform continual, long-distance, 24 hours-a-day travel, are in a "work while traveling" status within the contemplation of 5 U.S.C. § 5542(b)(2)(B)(i). The escorts are entitled to payment of regular compensation for 8 hours and overtime compensation for 8 hours for each full day of travel. The 8 hours of the day attributable to eating and sleeping is noncompensable. 47 Comp. Gen. 607 (1968). (See "a. Actual work requirement," and "7. Two-thirds rule," above.)

Diplomatic couriers' travel with "pouch-in-hand" is travel involving the performance of work while traveling and is, therefore, hours of employment or work under 5 U.S.C. § 5542(b)(2)(B). 57 Comp. Gen. 43 (1977).

(4) Couriers compared to others—A courier is one whose duties include carrying information, mail, supplies, etc., work which to a large extent can be performed only while traveling and which would be compensable under subsection 5544(a)(i) (prevailing rate overtime law). A courier's return travel after the delivery of information or supplies would be compensable under subsection 5544(a)(ii) of said subsection as incident to travel which involves the performance of work while traveling. In many instances of travel, a government employee will necessarily transport supplies or equipment and to this extent incidentally serves as a "courier." We have expressly held, however, that the fact that incident to the purpose of travel, files, documents, supplies, etc. are transported, does not change the character of travel. Whether the transportation of equipment is merely incidental to the employee's travel or is itself the employee's primary function is for determination by the administrative agency. B-178458, June 22, 1973 and B-181632, April 1, 1975.

Air safety investigator who is ordered to transport documents, equipment and exhibits and who is required to personally travel with the items in order to protect their integrity or to ensure they are not damaged, lost, or tampered with, may have such traveltime considered work for the purposes of overtime under 5 U.S.C. §§ 911, 912b (1964) (now 5 U.S.C. § 5542). If, however, an investigator incidentally transports these items when the main purpose of his travel is for other reasons, then such travel is not compensable as overtime work. 61 Comp. Gen. 626 (1982).

The fact that the transportation to obtain an affidavit was necessary to the performance of his duties did not convert the return trip to hours of employment within the meaning of 5 U.S.C. § 5542(b)(2)(B)(i), which authorizes the payment of overtime compensation for time spent in a travel status only when the travel involves the performance of work while traveling. 51 Comp. Gen. 727 (1972).

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

e. Incident to travel that involves the performance of work while traveling

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

Under 5 U.S.C. § 5542(b)(2)(B)(ii), the officially ordered or approved "dead head" travel of diplomatic couriers is "incident to travel that involves the performance of work while traveling." Pouch-in-hand time as well as "dead head" traveltime is compensable as overtime hours of work. 57 Comp. Gen. 43 (1977).

f. Arduous conditions

(1) Generally—Whether an employee's travel is performed under arduous conditions must be determined upon the facts in each individual case. For example, travel over unusually adverse terrain or during severe weather conditions—as distinguished from travel over hard surface roads or when no unusually adverse weather conditions are encountered, or travel by rail or other common carrier—is travel under

arduous conditions and is compensable. 41 Comp. Gen. 82 (1961), 57 Comp. Gen. 43 (1977), and B-163654, June 22, 1971. See also B-191045, July 13, 1978.

Absent unusual conditions, travel by automobile over hard-surfaced roads does not constitute arduous conditions under the overtime statute. Dr. Saul Narotsky, B-217685, May 31, 1985. See also B-193623, July 23, 1979. The same is true for long hours of travel on a commercial airliner. Thomas G. Hickey, B-207795, February 6, 1985.

An employee may not be paid overtime or compensatory time for travel outside her regular duty hours on the basis that her travel, which was delayed due to bad weather, was under arduous conditions. Travel by common carrier, including airlines, is not travel under arduous conditions. Eunita Davis, B-231800, February 3, 1989.

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

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

(1) Event—In applying 5 U.S.C. § 5542(b)(2)(B)(iv), which authorizes the payment of overtime when travel after the end of a normal tour of duty "results from an event which could not be scheduled or controlled administratively," the term "event," although including anything which necessitates an employee's travel, requires the existence of an immediate official necessity in connection with the event requiring the travel, and if the necessity is not so immediate as to preclude the proper scheduling of the travel, the time in travel does not qualify as hours of employment, and the phrase "could not be scheduled" contemplates more than the fact that administrative pressures make scheduling in accordance with 5 U.S.C. § 6101(b)(2) difficult or impractical. Events considered beyond administrative control are discussed in FPM Supplement 990.2. 51 Comp. Gen. 727 (1972). B-179003, August 24, 1973 and B-179035, October 4, 1973. See Hankins and Archie, B-210065, April 2, 1984.

(2) Not schedulable or controllable—In the administration of inspection and grading programs, when events are not within the control of the Department of Agriculture, and an Agricultural Commodity Grader is

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

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

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

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

The Food and Drug Administration (FDA) declared a manpower emergency in its San Francisco District caused by shipments of contaminated watermelons and other foods. On July 10, 1985, FDA officially requested investigators from other FDA districts to travel to San Francisco "as soon as possible." Three investigators traveled that same evening in response to the request. Their claim for overtime pay for nonduty travel hours

was denied by FDA on the basis that the travel could have been scheduled the following day. Under 5 U.S.C. § 5542(b)(2)(B)(iv) travel performed as a matter of immediate official necessity outside regular duty hours is compensable as overtime. In this case, since the event was administratively uncontrollable and the travel performed that evening was requested by FDA, the overtime claims are allowed. Charles S. Price, et al., B-222163, August 22, 1986.

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

When an employee of the National Park Service is released from temporary duty assignment to return to his home park as soon as possible and be available for fire fighting duty or for backup duty resulting from forest fire emergency, the condition of immediate official necessity occasioned by an administratively uncontrollable event is properly met under 5 U.S.C. § 5542(b)(2)(B)(iv). His claim for overtime pay for travel-time on an off-duty day is allowed. Gary A. Pace, 68 Comp. Gen. 229 (1989).

(3) Schedulable or controllable

(a) Generally—The scheduling of travel for an employee (to accommodate the Fly America Act) does not qualify as an event which could not be scheduled or controlled administratively. Thomas G. Hickey, B-207795, February 6, 1985.

(b) Travel to meetings—Fact employee's agency indirectly scheduled meeting through USAID Mission in foreign country does not render meetings an administratively uncontrollable or unscheduled event. Though scheduling may have been a matter of accommodation between United States and foreign participants, the lack of governmental control contemplated by 5 U.S.C. § 5542(b)(2)(B)(iv) was not present. B-202694, January 4, 1982.

Although overseas meeting dates could not be controlled by agency, 75–day advance notice of meeting dates provided ample opportunity for employees and agency to schedule actual travel planning requirements in advance so that it could be performed within the employee's regularly scheduled workweek. Claims for overtime compensation are denied since record fails to indicate any "immediate official necessity" for employee's travel within the meaning of 5 U.S.C. § 5542(b)(2)(B)(iv) and

decisions of this Office construing that overtime entitlement authority. Gerald C. Holst, B-222700, October 17, 1986.

Editor's note: The Holst decision was overruled by William A. Lewis, et al., 69 Comp. Gen. 545 (1990), on the basis that the government had no control over the scheduling of the course. The Lewis decision applies to both the out-going and return travel.

Entitlement to overtime compensation by federal employees while in a travel status under 5 U.S.C. § 5542(b)(2)(B)(iv) requires that travel result from an event which could not be scheduled or controlled administratively. Travel performed by an employee to attend an event scheduled and conducted by the employee's agency clearly does not meet this requirement, and the employee may not be paid overtime compensation for that travel. Morris Norris, 69 Comp. Gen. 17 (1989). See also B-146288, January 3, 1988 and B-179430, November 25, 1974.

(c) Travel to training—An arbitration award of overtime to employees required to travel on Sunday to attend training may not be implemented since it conflicts with 5 U.S.C. § 5542(b)(2). The arbitrator concluded that the travel resulted from an event beyond the control of the agency because the agency had relinquished control over the scheduling to the training contractor. However, since the agency could control scheduling through the contract, the training course is not an uncontrollable event for the purposes of the overtime statute. The award conflicts with 5 U.S.C. § 5542 and the FPM and may not be implemented. B-190494, May 8, 1978. Also see B-193127, May 31, 1979.

Finding that travel for employees attending training course away from their official duty station and outside their regularly scheduled administrative workweeks does not qualify as an event which could not be scheduled or controlled administratively within the meaning of 5 U.S.C. § 5542(b)(2)(B), claims for overtime compensation for employees under that statute are denied. Agency here controlled use of training facility and controlled scheduling of participation. Although agencies are exhorted to schedule traveltime to the maximum extent possible within the regular workweek of the employee (5 U.S.C. § 6101(b)(2)), Congress has authorized overtime pay for traveltime only under the specifically limited circumstances set forth in 5 U.S.C. § 5542 and employees in this case are not entitled to overtime compensation merely on the basis that their travel took place outside their regular workweek. Perry L. Golden and Wayne Wood, 66 Comp. Gen. 620 (1987).

(d) Relocation travel—An employee claims overtime compensation for the relocation travel he performed on a Sunday in order to report to his new duty station on Monday morning. The time the employee spent in a travel status does not qualify as compensable overtime under 5 U.S.C. § 5542, since his travel did not result from an administratively uncontrollable event. David D. Reckard, B-215008, September 25, 1984.

(e) Travel to hearings—Department of the Treasury employees traveled on Sunday in order to appear as witnesses at an unfair labor practice hearing the following Monday. Since the Assistant Regional Director, Department of Labor, may cause notice of the hearing to be issued setting the time for the hearing with sufficient time for the agency to schedule travel, administrative control of the hearing remains with the government. Thus, traveltime outside of the regularly scheduled workweek to an unfair labor practice hearing may not be considered as hours of work for overtime compensation. B-180021, August 31, 1978. See Hankins and Archie, B-210065, April 2, 1984.

An employee of the Dairy Division of Consumer and Marketing Services of the Department of Agriculture is ordered to travel on Sunday to attend two national milk hearings scheduled during the week, one on Monday morning and the other on Friday. The requirement in the Administrative Procedure Act, 5 U.S.C. § 554(b), which provides that the convenience of participants should be considered in fixing the time and place of hearings, does not remove the scheduling of hearings from the Department's control. While the provision imposes a rule of reasonableness upon the agency's freedom in scheduling the hearings, it does not require the hearings to be scheduled at any particular time. Therefore, the traveltime of the employee is not traveltime within the meaning of 5 U.S.C. § 5542(b)(2)(B), and is not compensable as overtime. 50 Comp. Gen. 519 (1971). See also Barth v. United States, 568 F.2d 1329 (Ct. Cl. 1978).

(f) Wage Board employee—A Wage Board employee claims overtime pay for hours spent traveling to and from temporary duty where the travel was found to have resulted from an event which could have been scheduled or controlled administratively. Our prior denial of his claim is affirmed since the employee has not provided sufficient factual or legal support for the proposition that his traveltime both to and from temporary duty should qualify as hours of employment under the requirement of 5 U.S.C. § 5544(a) (1982). Lake W. Greene, Jr., B-227489, November 30, 1987.

An employee claims overtime compensation for excess traveltime incurred in driving from his home to his temporary worksite over the course of a year. Entitlement to overtime compensation by the employee while in a travel status under 5 U.S.C. § 5544(a)(iv) (1982) requires that travel result from an event which is totally beyond the control of the government arising from a compelling reason of an emergency nature. Temporary relocation of employee's worksite for 1 year under the direction of the government resulting in additional traveltime during that period does not meet statutory requirements of 5 U.S.C. § 5544(a)(iv). Therefore, employee is not entitled to overtime compensation for excess traveltime under that statute. William Carragher, B-231475, August 12, 1988.

(g) No emergency—A group of Wage Board employees traveled on a nonworkday to a temporary duty station for the purpose of immediately repairing the gun port shields of a ship that had deteriorated due to exposure to the sun so that the ship could meet a sailing deadline. The required repair to the gun mounts was not due to a sudden emergency or catastrophe, and the damage having occurred gradually over a period of time, scheduling the repair was within administrative control and, therefore, the traveltime is not compensable overtime under 5 U.S.C. § 5544(a)(iv). 49 Comp. Gen. 209 (1969).

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

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

An employee who traveled outside of her regularly scheduled administrative workweek in order to be at certain ports 2 or 3 days prior to a

ship's arrival is not entitled to overtime compensation. Although the government could not control the arrival of the ships, adequate notice of their arrival was available in ample time to schedule the employee's travel within her regularly scheduled workweek. Her claims for overtime compensation are denied since record fails to indicate any immediate official necessity for travel within the meaning of 5 U.S.C. § 5542(b)(2)(B)(iv) and decisions of this Office construing that overtime entitlement authority. Aimee A. Stover, B-229067, November 29, 1988.

Entitlement to overtime compensation by federal employees while in a travel status under 5 U.S.C. § 5542(b)(2)(B)(iv) requires that travel result from an event which could not be scheduled or controlled administratively and that there be an immediate official necessity requiring travel in connection with the event. Thus, travel performed by an employee to attend a scheduled event conducted by a licensee of the employee's agency does not qualify as travel to or from an event over which the government had a total lack of control, and the employee may not be paid overtime compensation for that travel. Dr. L. Friedman, 65 Comp. Gen. 772 (1986). See Hankins and Archie, B-210065, April 2, 1984. See also B-172671, March 8, 1977; B-163654, April 19, 1968 and July 26, 1973.

(j) Effect of 2-day per diem rule—The 2-day per diem rule originally evolved as a prohibition against delaying travel over a weekend for the sole purpose of allowing an employee to travel during working hours. It was predicated in part on the statutory policy of 5 U.S.C. § 6101(b)(2) calling for the scheduling of employee travel, to the maximum extent practicable, within the regularly scheduled workweek. See 56 Comp. Gen. 847, 848 (1977). Thus, the "two-day per diem" rule, as stated in that decision and in 55 Comp. Gen. 590, 591 (1975), provides that where scheduling to permit travel during normal duty hours would result in the payment of 2 days or more of per diem, the employee may be required to travel on his own time rather than on official time. In order to be entitled to overtime compensation, however, the circumstances of an employee's travel must meet the distinct and additional criteria for payment of overtime compensation set forth at 5 U.S.C. § 5542(b)(2) i.e., that (1) the travel result from an event which could not be scheduled or controlled administratively, and (2) there be an immediate official necessity in connection with the event requiring the travel to be performed outside the employee's regular duty hours. The mere fact that the "two-day per diem" rule applies is not sufficient to create an entitlement to overtime. 60 Comp. Gen. 681 (1981).

(k) Union representation elections—National Labor Relations Board (NLRB) employees are not entitled to overtime or compensatory time for time spent in travel outside normal work hours to or from union representation elections since the NLRB is given broad discretionary authority to hold and schedule such elections. It cannot be said that such events are unscheduled and administratively uncontrollable so as to permit overtime under the provisions of 5 U.S.C. § 5542(b)(2)(B)(iv). Daniel L. Hubbel, et al., 68 Comp. Gen. 29 (1989).

(l) Return travel—Title 5 of the U.S. Code, § 5542(b)(2) now provides overtime for return travel if overtime was authorized for travel to the event.

The National Labor Relations Board (NLRB) could make a determination as to immediate official necessity and compensate employees for travel during nonduty hours when they must investigate certain unfair labor practice cases. Where an NLRB employee performs return travel from an event which could not be scheduled or controlled administratively, the employee would be entitled to overtime compensation or compensatory time under 5 U.S.C. § 5542(b)(2)(B)(iv) for travel during nonduty hours. Daniel L. Hubbel, et al., 68 Comp. Gen. 29 (1988).

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

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

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

Travel to and from accident sites by air safety investigators on commercial airlines whether performed under access-to-aircraft (cost free) authority or on a fare paying basis, in emergent situations, is compensable work for the purposes of 5 U.S.C. §§ 911 and 912b (1964) (the predecessor statutes of 5 U.S.C. § 5542). The investigators are entitled to overtime pay for such travel outside normal duty hours. Where, however, such travel was utilized in non-emergent situations and no work was performed or was required during the travel, such travel only served the purpose of transporting the investigator and is not compensable overtime work. 61 Comp. Gen. 626 (1982).

Air safety investigators who travel by means other than aircraft, usually by automobile, to and from accident sites, and who are found to perform their investigative function while traveling under emergent conditions, are performing compensable overtime work under 5 U.S.C. §§ 911 and 912b (1964). Likewise air safety investigators who pilot planes under the same circumstances may be paid overtime compensation for such travel. 61 Comp. Gen. 626 (1982).

Mine inspectors' travel, which due to the nature of the mine inspection work is found to be an inherent part of and inseparable from their work, is compensable as regular or overtime work. 55 Comp. Gen. 994 (1976).

(o) To and from terminal—Where an employee's travel results from an uncontrollable event and immediate official necessity and he spends more than 1 hour traveling (1) from his place of business or residence to the common carrier terminal, and/or (2) from the common carrier terminal serving the temporary duty station to either the temporary duty station or his temporary duty residence, and/or (3) from the common carrier terminal at his permanent duty station to either his residence or his place of business, that time may be compensated for at overtime rates. B-175092, April 20, 1972.

(p) Waiting at carrier terminals—Payment may be made for the usual waiting time spent at a common carrier terminal which interrupts travel. In considering a waiting period which had been extended because

of heavy holiday traffic and inclement weather, it would not be unreasonable to allow up to 3 hours beyond an employee's regular tour of duty as usual waiting time. However, usual waiting time would not include time at the common carrier terminal prior to the scheduled departure time. B-175082, April 20, 1972. A Department of Agriculture employee performing return travel, occasioned by an uncontrollable event, from temporary duties, whose flight was delayed, is entitled under 5 U.S.C. § 5542 to compensation for the "usual waiting time" for the interrupted travel that is prescribed by the FPM, which means the time necessary to make connections in the ordinary travel situation, consistent with the performance of travel as expeditiously as possible, with an extension of time for heavy holiday traffic and inclement weather, minus time for eating and rest. As traveltime that cannot be scheduled or controlled qualifies for work, the employee whose regular tour of duty is 8 a.m. until 4:30 p.m., having traveled from 3:10 a.m. to 10:30 a.m. on Thanksgiving Day, is entitled to payment at his overtime rate from 3:10 a.m. to 8 a.m. and at the holiday premium pay rate from 8 a.m. to 10:30 a.m. 50 Comp. Gen. 519 (1971). But see B-170409, October 15, 1970.

(q) Other waiting prior to travel—The addition of up to 6 hours of layover time between two trips or trip segments on split workdays to the definition of hours of employment for diplomatic couriers, while not specifically authorized by statute or OPM regulation, does not appear to be an unreasonable exercise of administrative discretion since the "usual waiting time" which interrupts travel has been held to be compensable. Accordingly, this Office interposes no objection to the inclusion of this layover time in hours of employment from the date it was added to the definition of hours of work on May 24, 1971. 57 Comp. Gen. 43 (1977).

Compare B-194297, August 27, 1979, involving IRS employees who traveled to a shopping mall during regular duty hours from 3:45 p.m. to 4:45 p.m. to provide taxpayer assistance beginning at 6:30 p.m. They are not entitled to overtime compensation for the waiting time from 4:45 to 6:30 p.m., whether the time was spent at home or at the mall. "Waiting time" that is compensable incident to travel is not time spent awaiting the start of work at a temporary duty site, but time spent during travel to make connections. Traveltime to and from the mall is not compensable under 5 U.S.C. § 5542(b)(2)(B).

(r) Rest stops incident to travel—An employee may be permitted to remain in a duty status during rest periods authorized in connection

with official travel if the rest period falls within his regular duty hours. There is no authority, however, which would authorize or permit payment of overtime compensation for rest periods which fall outside of regular duty hours. B-192839, May 3, 1979.

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

(t) Beyond the official duty station—Agencies may not defeat an employee's entitlement to overtime compensation for travel beyond the employee's official duty station by redefining what will be considered to be the employee's official duty station in a manner inconsistent with the definition provided by OPM. B-175608, June 19, 1972.

(u) First-40-hour employees—Mine inspectors who work first-40-hour workweeks may be compensated for time spent in travel on official business during their first 40 hours. Time spent in travel after the first 40 hours may be compensable under the conditions of 5 U.S.C. § 5542(b)(2)(B). 55 Comp. Gen. 994 (1976). See also 57 Comp. Gen. 43 (1977).

(v) Travel may not be compensable—Congress has not provided a remedy by way of compensation where an employee travels on a nonworkday but the circumstances of his travel do not fall within the purview of 5 U.S.C. § 5542(b)(2); B-172671, April 21, 1976; B-163654, January 21, 1974 and 57 Comp. Gen. 43, 50 (1977).

13. Standby duty

a. At employee's duty station

While an employee who is "on call" at home may in fact be found to have spent his time predominantly for his own benefit, Congress has made the determination, reflected by enactment of 5 U.S.C. §§ 5542 and 5545, that where a federal employee is required to remain at his duty station and away from his home his time is necessarily spent for the benefit of his employer. B-170264, December 21, 1973.

However, an FAA employee assigned to a 3–day workweek at a remote radar site, who was required to remain at the facility overnight for nonduty hours, is not entitled to overtime compensation for standby duty for those nonduty hours. The radar site was manned 24 hours per day by on-duty personnel and there is no showing that employees were required to hold themselves in readiness to perform work outside of their duty hours or that they were required to remain at the facility for reasons other than practical considerations of the facility's geographic isolation and inaccessibility in terms of daily commuting. 57 Comp. Gen. 496 (1978).

b. At home

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

A former Medical Technical Assistant of Department of Justice who while serving as duty officer was required to be available by telephone or beeper with range of 10–15 miles, either at his residence or elsewhere within one-half hour's drive to work, is not entitled to overtime compensation for standby duty since standby duty at employee's residence when no work is required is not "hours of work" within the meaning of 5 U.S.C. § 5542 so as to be compensable. B-182207, January 16, 1975. See also B-180036, May 20, 1974; B-188025, July 21, 1977; B-190369, February 23, 1978 and B-205118, March 8, 1982.

An investigator for the Air Force was required to be available by telephone so that he could be called back to his duty station if his services were needed. He is not entitled to premium pay because his residence had not been designated by the agency as his duty station and his duties were not so substantially restricted as to bring him within the purview of 5 U.S.C. § 5545(c)(1) as implemented by 5 C.F.R. § 550.143. Neither would the employee's standby or on-call status be considered hours of work for payment of overtime under 5 U.S.C. § 5542. Richard F. Briggs, B-215686, December 26, 1984. See also B-205442, March 22, 1982.

FAA employees who use automated data processing equipment in their homes to adjust navigation instruments located elsewhere may be allowed overtime compensation provided the work is substantial in

nature and the agency has procedures to verify the time and performance of the work. Work Performed At Home, 65 Comp. Gen. 49 (1985).

Employees who are on call for emergency verification of stockpiles are not entitled to overtime compensation since they are not restricted to their living quarters but may carry a pager for the purpose of being contacted. Gary R. Clarke, B-217490, October 4, 1985.

c. On vessels

The service of a civilian employee aboard a vessel for the purpose of conducting vibration surveys to determine the feasibility of equipment for operation in the vessel does not constitute standby time to entitle the employee to the overtime authorized in 5 U.S.C. § 5542, notwithstanding Navy regulations providing that an employee on a trial trip to test equipment is considered to be in a standby status. The regulations are invalid because they define standby status in terms of the type of trip rather than the criteria established in FPM Supplement 990-2, Book 610, subchapter S1-3d, to the effect that "standby time consists of periods in which an employee is officially ordered to remain at or within the confines of his station, not performing actual work but holding himself in readiness to perform actual work when the need arises or when called." 52 Comp. Gen. 794 (1973).

d. Temporary duty assignment

Two employees performed temporary duty on remote island, and due to inclement weather, they were forced to remain on the island overnight without food or shelter. Although they may have entitlement to overtime under the FLSA, these employees are not entitled to compensation for overtime for the overnight period under Title 5, United States Code. Standby duty was neither contemplated nor performed. Gary Van Hine, B-211007, September 25, 1984.

e. Two-thirds rule

An employee of the Department of Agriculture claimed overtime compensation for periods he would normally be eating or sleeping during several 24–hour periods he was on duty. It has long been the established rule that time available for, or spent, sleeping and eating is noncompensable even where the employee is required to be on the employer's premises. The exception to this rule, not applicable to the employee in the

instant case, is where substantial labor is performed in the time set aside for sleeping and eating. B-173235, November 22, 1971.

Does not apply to shifts of less than 24 hours. Thomas A. Donahue, 64 Comp. Gen. 1 (1984).

14. Relation to other premium pay

a. Under 5 U.S.C. § 5545(c)(1)

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

Firefighters, who work two 24–hour and one 12–hour shift in each administrative workweek, receive premium pay on an annual basis under section 5545(c)(1) for regularly scheduled standby duty. They are precluded from receiving additional overtime pay under Title 5, United States Code, for work in excess of 8 hours a day that is part of their regularly scheduled administrative workweek. NFFE Local 387, B-213931, June 21, 1984.

Employees who are required to remain on standby duty at their homes during the fire season and who, therefore, qualify for standby premium pay under 5 U.S.C. § 5545(c)(1) may not instead be paid overtime compensation under 5 U.S.C. § 5542 for such standby duty. B-189742, December 27, 1978.

Inasmuch as service by Department of State personnel in standby duty officer status on recurring but irregular basis is not within 5 U.S.C. § 5545(c)(1) or 5 U.S.C. § 5545(c)(2) (because hours of regular duty are controllable administratively) premium compensation on annual basis would not be proper. Since assignments to duty officer status are "irregular and occasional," they fall within provisions of 5 U.S.C. §§ 5542–5543,

which provide for overtime being compensable either in monetary equivalent of hours worked (percentage compensation) or in compensatory time off, at discretion of department. Further, 5 U.S.C. § 5542 covers regularly scheduled overtime as well as irregular or occasional overtime should department decide to pay same. B-169113, March 7, 1973.

b. Under 5 U.S.C. § 5545(c)(2)

Employees of the Border Patrol, a component of the Immigration and Naturalization Service, who in addition to performing preliminary and postliminary regularly scheduled duties at headquarters in connection with a regularly scheduled 8-hour tour of duty at traffic checkpoints (which is compensable at overtime rates under 5 U.S.C. § 5542, as is the traveltime to the checkpoints), process cases and handle other enforcement duties after their regularly scheduled 8-hour tours of duty and overtime have ended, may be paid annual premium pay in addition to the regularly scheduled overtime if the additional work qualifies as administratively uncontrollable under 5 U.S.C. § 5545(c)(2). Payment under both 5 U.S.C. §§ 5542 and 5545(c) is not precluded, as premium compensation and regularly scheduled overtime relate to independent, mutually exclusive, methods for compensating two distinct forms of overtime work. 52 Comp. Gen. 319 (1972).

15. Miscellaneous overtime rules

a. Preshift and post shift duties

In 53 Comp. Gen. 489 (1974) we followed the court's ruling in Baylor v. United States, 198 Ct. Cl. 331 (1972) to the effect that where guards were induced to work by the appropriate officials by requiring early reporting and delayed departure in order to change uniforms, draw badges and guns and to walk to posts, such time was work which was ordered or approved and was compensable. (For a further discussion, see "e. Officially ordered or approved," below.)

b. Lunch periods

Guards scheduled for daily duty tours of 8 hours and 15 minutes who have a 30-minute, duty-free lunch period, although required to remain on call in the government building in which employed to be available in the event of emergencies, are in an actual work status only 7 hours and 45 minutes on each daily tour of duty. Therefore, the guards are not entitled to overtime compensation on the basis of Albright v. United

States, 161 Ct. Cl. 356 (1963), in which the court found the guards did not have relieved duty-free lunch periods. 47 Comp. Gen. 311 (1967). See also B-182610, February 5, 1975; B-175363, November 26, 1974; and B-185913, August 3, 1976.

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

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

Under the decision in Baylor v. United States, 198 Ct. Cl. 331 (1972), an employing agency has the burden of proof to establish that work breaks away from posts of duty are taken by employees under such circumstances as would entitle the employer to offset the break time against the employee's claims for overtime. The employee may rebut setoff by evidence that breaks were not available or that break time was substantially reduced by responses to emergency calls. The mere fact that an employee is on call and restricted to the premises will not defeat the setoff. B-188687, September 21, 1977.

Definite amounts of duty-free time taken for breaks for meals may be aggregated for setoff purposes. Thus, two break periods each day of 15 minutes taken by the employee may be aggregated to total 30 minutes subject to setoff. B-188687, September 21, 1977. As distinguished from breaks for meals, rest breaks during which an employee may not absent himself from his place of work, are not to be offset against otherwise compensable overtime. B-188687, May 10, 1978.

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and post shift work which allegedly would be compensable under Title 5 of the United States Code. Although officers are restricted to Library premises and subject to call during lunch breaks, they are relieved from their posts of duty. Moreover, the officers have not demonstrated that breaks have been substantially reduced by responding to calls. Edward L. Jackson, 62 Comp. Gen. 447 (1983).

An administrative law judge who complained he was permitted only 30 minutes for lunch while other employees were allowed 45 minutes is not entitled to overtime compensation for the 15-minute difference since there is no indication that he worked more than 8 hours a day. Don Edgar Burris, B-217874, October 7, 1985.

c. De minimis

Preliminary and postliminary activities which do not exceed 10 minutes a day are considered de minimis and are noncompensable. B-167602, August 4, 1976.

Preshift and post shift activities that might be regarded as work, but which do not involve a substantial measure of time and effort, are de minimis, and may not serve as a basis for the payment of overtime compensation. B-192831, April 17, 1979. Thus, GSA guards are not entitled to overtime for the 3 minutes required to obtain weapons and proceed to their roll call location. The time involved is so nominal that it must be considered de minimis. B-153307, February 15, 1978. Also see B-190803, February 9, 1978, denying overtime compensation for preshift and post shift duties of 2 minutes daily, in view of the Court of Claims' holding that overtime work of less than 10 minutes is not compensable.

Supervisory Customs Inspectors who served as Duty Supervisors after regular duty hours and were required to receive and make telephone calls from home or elsewhere to carry out official business may not be paid overtime under 5 U.S.C. § 5542 where each call was limited to 1 minute in duration. Overtime pay may be allowed only if it is shown that employees worked a continuous period equal to the agency's minimum period for computing overtime on one or a series of telephone calls. B-205118, March 8, 1982.

d. Evidence required

Former General Services Administration employee seeks overtime compensation for 40 hours allegedly worked on five separate Saturdays, 8 hours each, which is in addition to overtime already claimed to have been worked on Saturdays in question and for which compensation has been made, and only evidence to support his claim is a list of hours worked. Settlement disallowing claim is sustained since mere listing of time worked is of insufficient probative value to permit payment of claim. Where a claim is of doubtful validity due to a lack of suitable evidence, GAO's practice is to deny claim and leave claimant to remedy in

court. Longwill v. United States, 17 Ct. Cl. 288 (1881). B-181632, February 12, 1975 and B-184795, August 5, 1976. See also 53 Comp. Gen. 489 (1974).

Under 31 U.S.C. § 71, now 31 U.S.C. § 3702, it is within the discretion of the GAO to determine what evidence is required to support claims for compensation. Time and Attendance Reports, personal daily diaries, and certificates of former supervisors showing the amount of overtime worked by the claimant or a statement as to the standard workweek, including overtime performed by the claimant or other similarly situated employees, are examples of supporting evidence which might be sufficient to support payment of a claim for overtime compensation. The claim of an employee who allegedly worked 1,122 hours of overtime was properly disallowed where the claimant submitted only a list of overtime hours allegedly worked and vague and indefinite statements of former supervisors to support his claim. B-188238, May 20, 1977.

e. Officially ordered or approved

(1) General rule—In order to determine whether an employee is entitled to overtime compensation, it is necessary to determine whether she was ordered or induced to perform the work in question by an official who had authority to order or approve overtime work. 55 Comp. Gen. 55 (1975). See also B-167602, August 4, 1976 and B-182180, January 6, 1982.

An employee's claim for overtime compensation is denied where the overtime work was not ordered or approved by the branch chief, as required by a written agency policy. Carl L. Haggins, B-216952, October 18, 1985.

A FLSA exempt civilian nurse claims entitlement to overtime for periods of time during which she allegedly performed pre-shift duties, attended mandatory meetings and worked through lunch. Her claim may not be allowed since there was no showing the overtime was actually performed or that if it was, it was ordered, approved, or induced by an official with authority to do so. The employee's claim for working through lunch may not be allowed since she worked an 8-hour shift which had no provision for a duty-free lunch. Lillie C. Alexander, B-224094, February 27, 1987.

(2) Induced to work

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

A Bureau of Prisons employee whose assigned duties included supporting inmate activities outside his scheduled duty hours is entitled to be compensated for the overtime performed since its performance was actively induced by the official with authority to order or approve overtime. B-188686, May 11, 1978. Similarly, AID employees who performed "voluntary overtime" work in accordance with duty rosters issued by the official with competent authority to order or approve overtime, and who were responsible for obtaining replacements if unable to work as scheduled are entitled to overtime compensation. Under these circumstances, since overtime was required by the very nature and volume of work assigned and since nonperformance of such work could affect their performance ratings, the overtime was actively induced. B-188089, October 31, 1977.

(b) Inducement not present—An employee who performed and was paid for overtime work during a 4-month period claims overtime for another 4 months after his supervisor indicated he should no longer request payment for overtime. The employee may not be paid overtime under 5 U.S.C. § 5542 (1982) during the second 4-month period. Such overtime was not ordered or approved and there was no inducement on the part of the supervisor for the employee to continue to perform overtime work. Ronald L. Barnhart, 68 Comp. Gen. 385 (1989). See also B-179998, May 23, 1974.

A nonexempt employee who was "suffered or permitted" to begin work 40 minutes early for an extended period and paid overtime compensation under FLSA is not entitled to additional overtime compensation under 5 U.S.C. § 5542. The supervisor's conduct evidenced no more than "tacit expectation" of employee's early reporting which does not meet "officially ordered or approved" requirement. Moreover, there is no

legal authority for compensating employee at basic rates for time in excess of 8 hours a day or 40 hours a week. B-195655, April 10, 1980.

Employee performed overtime work at home in order to reduce a backlog of unprocessed travel vouchers. Although her supervisors were aware of this additional work, there is no indication that they expected her to perform this work or that they led her to believe that the failure to perform such work would adversely affect her performance ratings. Under such circumstances, she is not entitled to overtime under 5 U.S.C. § 5542. Emma H. Welsh, B-214880, September 25, 1984.

(c) Official ordering or approving overtime must be authorized to do so—Federal Protective Officer claims overtime compensation believed due because he was allegedly required to change into and out of uniform after duty hours at his place of employment. The disallowance is sustained, even though claimant may have performed overtime, since even if immediate supervisor required such work, he was not authorized to do so and official who was properly authorized to order or approve overtime work did not require such work and had no knowledge that it was being performed. B-175363, November 26, 1974.

An employee while in a travel status claims overtime compensation since another employee who allegedly worked the same hours received that pay. Overtime under 5 U.S.C. § 5542 is only payable when it is ordered, approved in writing, or induced by an official with authority to order or approve such overtime. In the absence of documentation showing such approval in the employee's case, overtime compensation may not be paid. Christopher Hahin, B-233389, June 23, 1989. See also 59 Comp. Gen. 128 (1979), B-188023, July 1, 1977; B-186297, July 11, 1977.

(d) Optional performance of duty—Civilians employed by the federal government as security guards may be entitled to overtime compensation for time spent changing into and out of uniform if they are required to perform that activity at their place of duty; but if they are permitted to change clothes at home and are not required to do so at the place of work, they are not entitled to additional compensation. B-192831, April 17, 1979. Thus, an employee of the Air National Guard who is permitted to wear his uniform to and from work, may not receive overtime compensation for reporting to work early and staying later after work for the purpose of changing into and out of his uniform. B-191156, June 5, 1978. See also B-156407, July 14, 1976; B-182610, February 5, 1975 and B-205219, March 15, 1982. Similarly, overtime compensation

is not payable for time spent changing into and out of uniform at an employee's residence. B-153307, February 15, 1978.

f. Administrative workweek

(1) Back-to-back shifts—The fact that an employee works more than 5 consecutive 8-hour days does not in itself entitle an employee to overtime compensation unless more than 5 such days are worked between the period commencing on Sunday and ending the next Saturday. It is entirely possible for an employee to work 10 consecutive days, 5 in each of 2 administrative workweeks, and not be entitled to overtime compensation. B-166794, May 23, 1969. The same rule is applicable to Wage Board employees. B-134864, July 27, 1976.

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

Womack Army Hospital has two work shifts: 0500–1330, and 1100–1930. Employees on the 1100–1930 shift, who periodically worked a regular shift one day and a 0500–1330 shift the next day, claimed overtime compensation for work in excess of 8 hours. The definition of "day" for purposes of overtime compensation is not limited to calendar day but may be any 24-hour period. See 42 Comp. Gen. 195 (1962). Since the Army agreed through a negotiated agreement to treat the workday as a 24-hour period from the start of the shift, employees who work more than 8 hours during a 24-hour period but not on the same calendar day are entitled to overtime compensation. 58 Comp. Gen. 347 (1979). The Department of Agriculture may adopt a 24-hour period other than midnight to midnight as a "day" where the administrative workweek involved two shifts within the same calendar day. 57 Comp. Gen. 101 (1977).

In 32 Comp. Gen. 191 (1952) it was held that employees who worked two shifts which began within the same 24-hour period in a basic workweek could be paid for 2 days' work at the basic rate. That decision is no

longer to be followed since 5 U.S.C. § 5542 provides that hours in excess of 8 in a day are overtime work. Therefore, Department of Agriculture employees whose workweek includes two shifts on Monday, 0001 to 0830, and 2000 to 0430, are entitled to overtime compensation for hours worked in excess of 8 hours in the 24-hour period which the agency treats as a day. 57 Comp. Gen. 101 (1977).

A Coast Guard employee whose tour of duty was changed from Monday through Friday tour to Sunday through Wednesday plus Saturday tour is not entitled to overtime compensation for the Sunday he worked at the time of the change of tours. Since the Coast Guard administrative workweek runs from 0000 hours Sunday to 2400 Saturday, the employee did not work more than 5 days or 40 hours in any one workweek. William Kohler, B-216756, February 19, 1985.

g. "Call-back" overtime

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

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

The minimum 2-hour credit for unscheduled overtime work is not available where the employees are called upon to perform unscheduled work at their homes adjusting navigation equipment by remote control. The purpose of the "call-back" statute is to compensate employees for the particular inconvenience in preparing for work and traveling back to their work stations. Work Performed at Home, 65 Comp. Gen. 49 (1985).

(2) On holidays—An employee who is called back to duty on a holiday and performs continuous duty which covers a portion of his regular

daily tour of duty and less than 2 hours overtime is entitled to holiday premium pay for the nonovertime work and to 2 hours minimum overtime pay for the overtime work. 37 Comp. Gen. 1 (1957).

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

(3) More than 2 hours overtime compensation—The proposed inclusion of a provision in a labor-management agreement that employees be paid a minimum of 4 hours overtime for call-back work is not legally acceptable since 5 U.S.C. § 5542, authorizing 2 hours minimum call-back pay for General Schedule employees, provides the statutory maximum overtime pay in the absence of the performance of duty beyond that time. B-175452, May 1, 1972.

(4) Call back for more than 2 hours—The provisions of 5 U.S.C. § 5542(b)(1), relating to call-back time, are not pertinent where the call back was for more than 2 hours. B-163730, April 25, 1968.

h. Aggregate limitation

See also this subchapter, "D. Compensatory Time," below.

Section 5547, Title 5, U.S. Code, limits aggregate biweekly basic pay plus premium pay covered by that section to biweekly rate for maximum rate for GS-15. PATCO's contention that maximum rate for GS-15 is maximum scheduled rate ($57,912), rather than maximum payable rate ($50,112.50), must be rejected. In administering a provision of law such as section 5547 which imposes a limitation on the basis of a rate of basic pay, the rate of basic pay must be construed to be the rate payable. 60 Comp. Gen. 198 (1981).

i. Greater benefit to employee

An FAA employee with a regularly scheduled workweek of 4 10-hour days, 7 a.m. to 5:30 p.m., Monday, Tuesday, Thursday, and Friday, was called back to work from 8 p.m. Friday to 3 a.m. Saturday. In computing the overtime compensation in this case, the greater benefit is derived by

computing overtime on a daily rather than weekly basis. In line with the daily method of computation of overtime hours and as the agency defines "day" as midnight to midnight, GAO concludes that payment of the 3 hours worked from midnight to 3 a.m. Saturday (a separate day), can only be made at the basic rate. B-163730, April 25, 1968.

j. "Rounding" to nearest quarter hour

There is no legal objection to proposal of Director, Office of Personnel Management, to provide by regulation that an agency may institute the practice of "rounding up" and "rounding down" to nearest quarter hour (or fraction less than a quarter of hour) for crediting irregular, unscheduled overtime work under sections 5542, 5544, and 5550 of Title 5, United States Code. 59 Comp. Gen. 578 (1980).

k. Training periods

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

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

Customs Patrol Officers who attended a special training course claim overtime pay under the FLSA or overtime or night premium pay under Title 5, United States Code, for regularly scheduled training sessions conducted after 6 p.m. Where the training qualifies under the exception to the prohibition against payment of premium pay for training in 5 U.S.C. § 4109(a), overtime under FLSA or overtime or night premium pay under Title 5, United States Code, must be paid. Payment should be made to the employees under Title 5 or under FLSA, whichever law gives the greater benefit. 58 Comp. Gen. 547 (1979).

An employee may not be paid overtime compensation for a mandatory Saturday training session which the agency erroneously scheduled during an overtime period since the training does not qualify under one of the exceptions set forth at 5 C.F.R. § 410.602(b) to the prohibition at 5 C.F.R. § 410.602 against payment of overtime compensation in connection with training. B-189006, July 11, 1977.

l. When-actually-employed employees

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

m. Foreign nationals overseas

A Philippine national, employed as a security guard at U.S. Naval Base in the Philippines, seeks overtime compensation of preshift muster and later relief resulting from use of government transportation. International agreement and 22 U.S.C. § 889 require U.S. government, in employing locally hired foreign nationals, to bring wages and compensation plans into conformity with local practice. The claim is disallowed since Navy survey showed that Philippine firms did not pay guards for muster and transportation time and Navy's wage practices appear to be in conformity with local practice. B-118417, December 3, 1974.

n. Crossing international dateline

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

Where Navy employee's travel westward across the international dateline results in the loss of a Saturday, the employee is entitled to overtime pay for all hours worked on a workday gained crossing the

dateline while traveling eastward at end of the same assignment. Where employee loses a nonworkday going west, the workday gained going east is to be treated as a nonworkday added at the end of the employee's regularly scheduled workweek and work performed on that day is to be compensated at overtime rates. Since this is an extension of the principles stated in previous decisions, 48 Comp. Gen. 233 (1968) and 49 Comp. Gen. 329 (1969), it is to be applied prospectively. Effects on Pay of Crossing International Dateline, B-223047, June 8, 1987.

An employee who is nonexempt from the provisions of the Fair Labor Standards Act (FLSA) crossed the international dateline in both directions while performing official travel between Hawaii and Guam. Under Title 5, United States Code, the employee may be paid 8 hours basic pay for a workday "lost" traveling westbound, but receives no pay for the workday "gained" traveling eastbound. However, where the "lost" day and the "gained" day occur in different workweeks, a nonexempt employee traveling eastbound may receive overtime pay under the FLSA for each hour in excess of 40 hours actually worked during that workweek since under the FLSA each scheduled administrative workweek is deemed separate and distinct. Crossing the International Dateline, B-229355, November 22, 1988.

C. Overtime Under FLSA

1. Statutory authority

For rules applicable to federal employees covered by FLSA, 29 U.S.C. § 207(a)(1), see 5 C.F.R. Part 551.

2. GAO's authority under FLSA

a. Exemption determinations

Pursuant to 4 C.F.R. Part 22, an agency and a union jointly request a determination from the Comptroller General on the exempt/nonexempt status for overtime compensation under the Fair Labor Standards Act (FLSA) of a grade GS-12 Audio Visual Production Officer. Since the Office of Personnel Management has the authority to administer the FLSA under 29 U.S.C. § 204(f) for federal employees including the authority to make final determination as to whether employees are covered by its various provisions, the General Accounting Office will not consider overtime claims under FLSA where the employee's position has been classified by OPM as exempt. Appeals of classification status should be directed to OPM. Morris Norris, 69 Comp. Gen. 17 (1989). See also International

Association of Firefighters, Local F-48, B-226136, July 13, 1987 and Civilian Aircraft Pilots, 61 Comp. Gen. 191 (1982) as modified at 66 Comp. Gen. 501 (1987).

b. Claims settlement

However, since OPM was not given authority to settle or adjudicate claims under FLSA, GAO retains jurisdiction to finally decide the propriety of payments under FLSA. B-51325, October 7, 1976; B-163450.12, September 20, 1978 and 57 Comp. Gen. 441 (1978).

OPM and FAA propose to settle approximately 2,500 backpay claims for FLSA overtime by paying a compromise amount instead of computing each employee's entitlement based on available government records. We hold that, where FAA had the necessary records to compute individual backpay entitlements, it may not compromise claims against the United States in the absence of specific statutory authority to that effect. FAA Electronic Maintenance Technicians, B-200112, May 5, 1983.

GAO retains jurisdiction over questions concerning the propriety of payments under the FLSA; that is our Office will consider requests from heads of agencies, certifying or disbursing officers, and claimants or their representatives who question OPM determinations under the FLSA Compliance Program. The party questioning OPM's determination has the burden of proof to show that the determination was clearly erroneous or contrary to law or regulation. See Paul Spurr, 60 Comp. Gen. 354 (1984). Where the agency has no basis to object to OPM's determination, the agency may pay nondoubtful claims under the FLSA, just as the agencies pay nondoubtful backpay or overtime claims under Title 5, United States Code, without resort to a GAO decision. Lee R. McClure, 63 Comp. Gen. 546 (1984). See also Plum Island, B-213179, October 2, 1984; John B. Cleveland, B-221088, September 11, 1986.

c. Barring Act

The fact that an employee's grievance concerning overtime pay was untimely filed under the terms of a collective-bargaining agreement does not preclude consideration of his claim for such pay provided it is filed within the 6 years prescribed in 31 U.S.C. § 3702. Morris Norris, 69 Comp. Gen. 17 (1989).

Fair Labor Standards Act (FLSA) claims which are filed with the General Accounting Office (GAO) are subject to the 6-year statute of limitations

under 31 U.S.C. § 3702(b)(1), in contrast to the 2-year time limitation on "actions at law" under the FLSA. Where by court action an employee has established his right to retroactive overtime compensation under the FLSA for the 2-year period prior to the date here, additional amounts found due may be paid for an earlier period, but not before 6 years prior to the date such claim was filed with the GAO. Civilian Aircraft Pilots, 66 Comp. Gen. 501 (1987). But see new Barring Act tolling rule at page 5, CPLM, Introduction.

3. Effective date of FLSA

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

4. Effective date of OPM exemption determination

To the extent a determination on exemption status is found wrong under OPM's published guidelines, a corrective determination of status may be implemented retroactively. However, where the employees are listed as exempt in published OPM guidelines, any change in designation from exempt to nonexempt will not be retroactive since published OPM instructions should not retroactively change prior published information to the contrary. B-200112, December 21, 1981. See also 61 Comp. Gen. 152 (1981).

Thus, grade GS-12 Electronic Maintenance Technicians (EMTs) employed by Federal Aviation Administration (FAA) were considered nonexempt under Fair Labor Standards Act (FLSA) in 1974 but were found to be exempt in 1976. FAA subsequently changed designation to nonexempt incident to litigation, and Office of Personnel Management posed no objections to changed designation or retroactive entitlement. Therefore, EMTs are entitled to payments under FLSA retroactive to 1974 since retroactive entitlement is based on different interpretation of exemption criteria rather than change in administrative regulations. B-200112, December 21, 1981 and B-170264, September 28, 1982.

5. Weight accorded OPM determinations

The Office of Personnel Management (OPM) issued compliance order requiring Army to pay overtime compensation under Fair Labor Standards Act, 29 U.S.C. §§ 201 – 219, to employee who worked for Army in both civilian and military reserve capacity. GAO will not disturb OPM's findings that employee did perform work in his civilian capacity as such finding is not clearly erroneous and burden of proof lies with party challenging findings. B-202859, April 6, 1982.

6. FLSA's effect on other overtime laws

Federal employees are covered by two statutes requiring compensation for overtime work, the Fair Labor Standards Act, or FLSA, and the Federal Employees Pay Act, commonly called "Title 5" overtime. Under this dual coverage, where there is an inconsistency between the statutes, employees are entitled to the greater benefit. Henry G. Tomkowiak, et al., 67 Comp. Gen. 247 (1988). See also John Nyberg, et al., 65 Comp. Gen. 273 (1986).

Civilian police officers who were required to report 15 minutes early to perform preliminary duties before beginning their regular shift each workday, and who had a 30–minute meal break during each shift, are entitled to overtime credit for both the preshift work and the 30–minute meal break under section 7(k) of the Fair Labor Standards Act (FLSA). Under this FLSA provision applicable to law enforcement personnel, mealtimes, duty-free or otherwise, are counted in determining entitlement to overtime compensation. Henry G. Tomkowiak, et al., 67 Comp. Gen. 247 (1988).

7. FLSA's effect on labor-management agreement

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

8. Effect of Panama Canal Treaty

Panama Canal Commission requests a decision as to whether firefighters employed prior to October 1, 1979, are entitled to overtime pay under

the Fair Labor Standards Act (FLSA). The Panama Canal Treaty and section 1231 of the Panama Canal Act state that prior employees transferred to the Commission shall have terms and conditions of employment which are generally no less favorable than prior terms and conditions. We hold that this clause requires continuation of FLSA overtime pay to Commission firefighters employed prior to October 1, 1979, since otherwise they would suffer a significant, protracted reduction in pay which would operate as a virtual nullification of the "grandfather" clause for them. Panama Canal Commission, B-205126, February 28, 1983.

9. Firefighters

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

Federal firefighters who work two 24–hour and one 12–hour shift each administrative workweek are entitled to compensation under the FLSA for those hours they work in excess of 106 hours in a biweekly pay period, at a rate of not less than one and one-half times their regular rate. NFFE Local 387, B-213931, June 21, 1984; David L. Gipson, B-208831, April 5, 1983; and FPM Letter 551-20, September 22, 1983.

10. Exempt employees

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

11. Forty-hour workweek

An employee worked 5 consecutive 8–hour days, Tuesday through Saturday. The following week his schedule was changed so that he worked

Sunday and Tuesday through Friday, with Monday and Saturday off. Although he worked 6 consecutive 8–hour days, he is not entitled to overtime under 5 U.S.C. § 5542 or the FLSA since he did not work more than 40 hours in an administrative workweek or in a workweek of 7 consecutive 24–hour periods as required by the respective statutes and regulations. B-193384/B-193544/B-194035, June 18, 1979.

12. Standby duty at home

An employee who must live in government-owned housing at a dam reservation and respond to telephone calls after hours is not entitled to overtime compensation under the FLSA since the record does not indicate his off-duty hours were so severely restricted so as to entitle him to overtime compensation. Curtis N. Anderson, B-218519, October 15, 1985.

13. Paid absences

a. Holidays

Nonexempt employee traveled for 6 hours on a nonworkday during his corresponding duty hours. Although such time is hours of work under FLSA, since he had a holiday off and he only worked 38 hours under FLSA during that workweek and he has already been compensated for 40 hours under Title 5, United States Code, he is not entitled under FLSA to 6 hours pay at his regular rate in addition to the 40 hours basic pay he has received. 60 Comp. Gen. 493 (1981).

b. Paid leave time

Our Office will follow the decision in Lanehart v. Horner, 818 F.2d 1574 (Fed. Cir. 1987), which held that the leave with pay statutes prevent any reduction in firefighters' regular and customary pay, including overtime pay under the Fair Labor Standards Act, 29 U.S.C. §§ 201 – 219, when eligible employees are on authorized leave. Therefore, we will allow claims for overtime compensation for all periods of paid leave. Our contrary decisions are overruled. Federal Firefighters, 68 Comp. Gen. 681 (1989).

14. Training—firefighters

There is no basis for providing federal firefighters who attend training with additional compensation where their entitlement to overtime compensation under the Fair Labor Standards Act is reduced due to a shorter tour of duty while attending the training. Overtime Compensation for Firefighters on Temporary Duty, B-211696, September 23, 1983.

15. Lunch periods

The Office of Personnel Management has found that certain air traffic control specialists who worked 8-hour shifts were not afforded lunch breaks. No lunch break was established and because of staffing shortages lunch breaks were either not taken or employees were frequently interrupted while eating by being called back to duty so that no bona fide lunch breaks existed. This Office accepts OPM's findings of fact unless clearly erroneous. Therefore, since the employees worked a 15–minute pre-shift briefing they are entitled to overtime compensation under the Fair Labor Standards Act, 29 U.S.C. §§ 201 – 219, for hours worked in excess of 40 in a week as no offset for lunch breaks may be made. John L. Svercek, 62 Comp. Gen. 58 (1982).

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and post shift work which allegedly would be compensable under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 – 219. The Library of Congress, authorized to administer FLSA with respect to its own employees, has found that the lunch breaks are bona fide—although officers are required to remain on duty and subject to call, they are relieved from their posts during lunch breaks and the breaks have been interrupted infrequently. Since there is no evidence that these findings are clearly erroneous, this Office will accept the Library's determination that the breaks are bona fide. Edward L. Jackson, 62 Comp. Gen. 447 (1983).

16. Fitness for duty examination

Employee was ordered to undergo fitness for duty examination which involved tests in a hospital for a period of 3-1/2 days, and he claims overtime compensation for that period. Under 5 C.F.R. § 551.425(b) time spent taking a physical examination that is required for the employee's continued employment with the agency shall be considered hours of work under the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201 – 219. However, when an employee is in a hospital for the examination, only

the actual examination time is credited as hours of work and hours during which the employee is eating, sleeping, etc., are not creditable work hours. David Ehrich, B-209768, July 15, 1983.

17. Court leave

Labor organization asks whether firefighters are entitled to additional pay under Title 5, United States Code, when their overtime entitlement under FLSA is reduced as a result of court leave for jury duty. The firefighters are entitled to receive the same amount of compensation as they normally receive for their regularly scheduled tour of duty in a biweekly work period. The court leave provision, 5 U.S.C. § 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay. Overtime Compensation for Firefighters, 62 Comp. Gen. 216 (1983).

Our decisions in 62 Comp. Gen. 216 (1983) and David L. Gipson, B-208831, April 5, 1983, held that a firefighter's overtime compensation under the FLSA could not be reduced as a result of court leave or military leave. These decisions are retroactively effective since they involve an original construction of the court leave and military leave statutes. 63 Comp. Gen. 301 (1984).

18. Sleep and mealtime

Two employees, who performed temporary duty on a remote island, were stranded overnight on the island due to inclement weather. Where there were no facilities for food or shelter, sleep and mealtime need not be deducted from their overtime hours under the FLSA. Gary Van Hine, B-211007, September 25, 1984.

19. Burden of proof, evidence

Where claims have been filed by or against the government, records must be retained without regard to record retention schedules until the claims are settled or the agency has received written approval from GAO. See 44 U.S.C. § 3309. Where an agency destroys T&A reports after 3 years, the agency may not then deny claims of more than 3 years on the basis of absence of official records. Claims are subject to a 6-year statute of limitations, and pertinent payroll information may be available on other records which are retained 56 years. Furthermore, the Fair Labor Standards Act (FLSA) requires that the employer keep accurate records, and, in the absence of such records, the employer will be liable

if the employee meets his burden of proof. The Office of Personnel Management may wish to reconsider and impose a specific FLSA record-keeping and requirement on federal agencies. Retention of Time and Attendance Records, 62 Comp. Gen. 42 (1982).

Where agency has failed to record overtime hours as required by Fair Labor Standards Act, and where supervisor acknowledges overtime work was performed, employee may prevail in claim for overtime compensation for hours in excess of 40-hour workweek on the basis of evidence other than official agency records. In the absence of official records, employee must show amount and extent of work by reasonable inference. List of hours worked submitted by employee, based on employee's personal records, may be sufficient to establish the amount of hours worked in absence of contradictory evidence presented by agency to rebut employee's evidence. Frances W. Arnold, 62 Comp. Gen. 187 (1983). See also 60 Comp. Gen. 354 (1981).

Where employee has presented evidence demonstrating that she performed work outside her regular tour of duty with the knowledge of her supervisor, the fact that agency sent her a letter directing that she not perform overtime work does not preclude her from receiving compensation under the FLSA for such work actually performed. Despite its admonishment, agency must be said to have "suffered or permitted" employee's overtime work since supervisor allowed employee to continue working additional hours after employee had received, but had failed to comply with, agency's directive. Frances W. Arnold, 62 Comp. Gen. 187 (1983).

With the knowledge of her supervisors an employee voluntarily performed extra work at home in an effort to reduce a backlog of unprocessed travel vouchers. She is entitled to overtime pay computed under the FLSA because her supervisors "suffered or permitted" the overtime at home. Emma H. Welsh, B-214880, September 25, 1984.

20. Traveltime

a. Outside/within working hours

Time spent in travel outside of regular working hours by prevailing rate employee driving military truck on return trip from temporary duty post to permanent duty station constitutes "hours of work" within meaning of FLSA and entitles him to overtime compensation.

Several Charleston Naval Shipyard employees claim overtime compensation when they are in a temporary duty status and travel by bus, outside of their normal duty hours, from their lodgings to the Naval Submarine Base, Kings Bay, Georgia, during extended refit periods. The time spent traveling outside of regular duty hours as passengers by these prevailing rate (Wage Board) employees who are covered by the Fair Labor Standards Act (FLSA) between the point of temporary duty lodgings and the temporary duty job site is not considered compensable hours of work under either the FLSA or 5 U.S.C. § 5544(a) (1982). Thus, the employees' claims for overtime compensation under these statutes are denied. Charleston Naval Shipyard Employees, B-227695, September 23, 1987. See also B-183577, November 26, 1975.

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

Employees who travel as passengers on their nonworkdays during hours which correspond to their regular working hours, are entitled to have such traveltime credited as hours of work under FLSA. 61 Comp. Gen. 115 (1981).

Nonexempt employees on 1-day assignments involving travel, whose return travel as passengers was delayed beyond the end of the normal workday, are entitled to overtime compensation for hours of return travel under FLSA. B-163654, April 13, 1977.

Employees of Social Security Administration are not entitled to compensation under the FLSA for time spent traveling in agency-hired buses from one district office to another during the New York City transit strike of April 1980 because such travel was home to work travel. The day's work ended before the buses were boarded, and it is undisputed that no work and no preliminary or postliminary activities were performed while traveling or upon debarkation from the buses. Local 3369, American Federation of Government Employees, AFL-CIO, B-210697, September 29, 1983.

Three employees who performed temporary duty at an isolated location, waited several hours on the beach for pickup by a government-owned plane. Travel and waiting time on a nonworkday is compensable under the FLSA when it occurs within the corresponding work hours of the employee's workday. Therefore, those hours between 8 a.m. and 4:30 p.m. when the employees were actually waiting on the beach or traveling are compensable under the FLSA. Gary Van Hine, B-211007, September 25, 1984.

b. Routing and timing of travel

Army civilian intern who traveled to training on nonworkday at time and via route selected by agency is entitled to credit for hours worked under the Fair Labor Standards Act for traveltime during hours corresponding to regular work hours. Where intern, for personal reasons, traveled at time or via route other than time or route selected by agency, she will be credited with lesser of (1) that portion of actual traveltime which is considered to be working time, or (2) that portion of estimated traveltime which would have been considered working time had she traveled at time and by route selected by Army. 60 Comp. Gen. 434 (1981).

Two Army employees, nonexempt under the Fair Labor Standards Act (FLSA), were authorized privately owned vehicle use as advantageous to the government. They drove to temporary duty station on a Sunday and returned on a Saturday, their nonworkdays. The employees are entitled to credit for hours of work under FLSA for time they spent driving. The Army allowed employees to schedule travel and may not subsequently defeat employees' entitlement to overtime compensation by stating that travel should not have been scheduled in the manner the employees chose. 61 Comp. Gen. 115 (1981).

c. Transporting equipment

The CSC's (now OPM) determination that meat graders employed by the Department of Agriculture are entitled to compensation under the FLSA for time expended in transporting 94 pounds of essential work implements between their homes and work sites before and after their regular duty hours, but that the carrying of 20 pounds of hand tools in like circumstances would be noncompensable, is neither erroneous in fact nor contrary to law. B-163450.12, September 20, 1978.

d. Time at airport—no work—outside regular working hours

Five employees of the U.S. Naval Ship Repair Facility, Guam, claim that they are entitled to overtime pay under the Fair Labor Standards Act or Title 5, United States Code, for time they spent waiting at air terminals for their flights to depart and for time they spent clearing the airport after their arrival while traveling to and from their temporary duty station at Diego Garcia. They are not entitled to overtime pay under either law because they did not meet the required criteria, particularly the time was outside regular work hours and corresponding hours on nonworkdays, and they performed no work while traveling. John C. Dudkiewicz, B-226191.2, January 4, 1989.

e. Commuting

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

An employee was detailed to a temporary duty station to which he commuted on a daily basis. Since he traveled away from his official duty station on behalf of his employing agency, he is deemed to be working when traveling under the FLSA, 29 U.S.C. §§ 201 - 219, and is entitled to be compensated for the excess of the time spent in travel to the temporary duty station over the time for his normal home-to-official-duty-station commuting. B-189883, November 7, 1978.

A nonexempt employee under the Fair Labor Standards Act (FLSA), who drives a government vehicle between a temporary duty site and lodgings during hours outside of the normal 40–hour workweek, is not entitled to overtime pay under the FLSA, even though the driver transports another employee, since use of the government vehicle cannot be considered a requirement of the employee's job. Naval Undersea Warfare Engineering Station, 68 Comp. Gen. 535 (1989).

f. Travel during regularly scheduled administrative workweek

Three Navy employees completed temporary duty in Scotland on Friday, the last day of their "regularly scheduled administrative workweek,"

and returned to United States on Saturday, a nonworkday. Travel on nonworkday which is within 7-day workweek is compensable under Fair Labor Standards Act. "Regularly scheduled administrative workweek" is a concept under Title 5, United States Code, and has no application to the FLSA. 60 Comp. Gen. 90 (1980).

g. As part of regular shift—call back

A civilian Wage Grade employee had finished his regular shift, but had not yet entered his car to return home, when he was directed to return to work for an emergency. Since this was a continuation of his regular shift and not a return to his place of employment, the employee is only entitled to overtime compensation for the time he actually worked and not to 2 hours "call-back" overtime compensation. Walter D. Oxford, B-220330, September 11, 1986.

h. Administrative compromise settlement

Electronics Maintenance Technician employed by the Federal Aviation Administration (FAA) claims additional Fair Labor Standards Act (FLSA) compensation. The employee's original entitlement was based on an administrative compromise settlement of an action filed by similarly situated employees. Employee's claim is denied in the absence of evidence that the FAA acted unreasonably in its implementation of the compromise settlement for claimant here and the other 3,000 similarly situated employees. Further, employee has not met his burden of proof to show that meal and sleep periods were not bona fide. Paul E. Laughlin, B-170264, September 22, 1986.

D. Compensatory Time

1. Statutory authority

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

"(a) The head of an agency may—

"(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment for an equal amount of time spent in irregular or occasional overtime work; and

"(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

"(b) The Architect of the Capitol may grant an employee paid on an annual basis compensatory time off from duty instead of overtime pay for overtime work."

2. Relationship to FLSA

Two nonexempt employees of the Department of the Interior earned overtime for travel under the Fair Labor Standards Act, 29 U.S.C. § 201 - 219, but not under Title 5, United States Code. Agency attempted to grant compensatory time off in lieu of paying overtime due to a need to conserve available funds. Since there is no authority for granting compensatory time off under the Fair Labor Standards Act where entitlement to overtime pay accrues solely under the act, a need to conserve funds does not serve as a basis to permit the granting of compensatory time off in lieu of paying the overtime compensation due. Matter of Barnitt, 58 Comp. Gen. 1 (1978) distinguished. Jacquelyn D. Cruce and Christopher F. Perry, B-207446, November 10, 1982.

3. Aggregate salary limitation

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

To determine whether any portion of the compensatory time in lieu of overtime must be forfeited on account of the aggregate salary limitation in 5 U.S.C. § 5547, it is necessary to ascertain the number of overtime hours for which the employee is entitled to receive compensation at the overtime rate applicable to his basic salary rate before reaching the prorated aggregate limitation for the pay period in which the overtime work was performed. Such number of overtime hours constitutes the maximum number of hours of compensatory time which may be credited to the employee in that pay period in lieu of overtime compensation. 37 Comp. Gen. 362 (1975).

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

An exempt employee assigned to attend international conferences may be granted compensatory time in lieu of overtime for hours in excess of 8 in a day or 40 in an administrative workweek if such hours can be properly identified and officially approved. However, to the extent that the overtime hours for which compensatory time is granted would cause the employee's rate of pay to exceed the aggregate salary limitation in 5 U.S.C. § 5547, for any pay period, such compensatory time was erroneously granted. Either the employee's annual leave balance may be reduced by the amount of compensatory time erroneously granted and used; or alternatively, the government may recoup the amount paid for compensatory time erroneously granted. Recoupment of erroneous payments may be considered for waiver pursuant to 5 U.S.C. § 5584, and Part 91, Title 4, Code of Federal Regulations. 58 Comp. Gen. 571 (1979), and B-192839, May 3, 1979.

For the purposes of section 5547, the gross compensatory time earned in a pay period is used in determining whether the employee's aggregate rate of pay exceeds the maximum rate for grade GS-15. The agency may not use the net amount of compensatory time, the hours earned less those used during the pay period, for this determination. Department of the Army, B-211286, October 2, 1984.

4. Statutory authority for compensatory time off for religious holidays

Employees whose salaries have reached the statutory limit may earn and use compensatory time for religious observances under 5 U.S.C. § 5550a, despite fact that they are not otherwise entitled to premium pay or compensatory time. In granting the authority for federal employees to earn and use time for religious purposes, Congress intended to provide a mechanism whereby all employees could take time off from work in fulfillment of their religious obligations, without being forced to lose pay or use annual leave. Since section 5550a involves mere substitution of hours worked, rather than accrual of premium pay, we conclude that compensatory time off for religious observances is not premium pay under Title 5, United States Code, and, therefore, is not subject to aggregate salary limitations imposed by statute. General Services Administration, 62 Comp. Gen. 587 (1983).

5. Discretionary authority to grant overtime

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

Joint submission from agency and union asks whether employees may receive compensatory time off for regularly scheduled overtime work. We hold that both law, 5 U.S.C. § 5543, and regulations, 5 C.F.R. § 550.114, preclude the granting of compensatory time off for overtime other than that which is irregular or occasional. Compensatory Time Off for Regularly Scheduled Overtime, B-212486, October 31, 1983.

6. Failure to use compensatory time

a. Within authorized period

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

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

b. Beyond employee's control

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

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

An employee, requesting reconsideration of that portion of decision B-183751, October 3, 1975, which disallowed his claim for payment of 550 hours of forfeited compensatory time, presented evidence showing that compensatory time was lost during a series of consecutive pay periods in which additional compensatory time was authorized. Simultaneous forfeiture and acquisition of compensatory time over a series of consecutive pay periods is sufficient evidence of exigency of service to preclude forfeiture under 5 C.F.R. § 550.114(c). B-183751, October 19, 1976.

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

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

8. Improper use of compensatory time

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

9. National Guard technicians

Air National Guard technicians, whether they are Wage, non-graded, or General Schedule employees, who for a 12–hour workday receive 4 hours compensatory time for work in excess of 8 hours a day or receive compensatory time for an 8–hour Sunday tour of duty, are not entitled to environmental differential pay, night shift differential pay, or premium pay. Section 709(g) of Title 32, U.S. Code, in authorizing the Secretary concerned to prescribe the hours of duty for the technicians and to fix their basic compensation or additional compensation, provides for the granting of compensatory time in an amount equal to the time spent in irregular or overtime work, with no compensation for the compensatory time, since the compensatory time is intended to be in lieu of overtime or differential pay for additional hours of work. 50 Comp. Gen. 847 (1971).

Under 32 U.S.C. § 709(g)(2), National Guard technicians are entitled to compensatory time in an amount equal to time spent in irregular or occasional overtime work. Even though the traveltime of technicians was not hours of work under 5 U.S.C. § 5542(b)(2), and notwithstanding that 32 U.S.C. § 709(g)(2) excludes National Guard technicians from the overtime pay provisions of FLSA, the concept of hours of work under FLSA is applicable in determining their entitlement to compensatory time under 32 U.S.C. § 709(g)(2). Thus, a technician who performs travel which is "hours of work" under FLSA is entitled to compensatory time under 32 U.S.C. § 709(g)(2). B-191691, March 21, 1979.

10. Part-time employees

Except in limited circumstances where prohibited for nonexempt employees under FLSA, part-time employees may be granted compensatory time off in lieu of overtime compensation for irregular or occasional overtime work performed in excess of 40 hours in an administrative workweek and 8 hours in a day. 5 U.S.C. §§ 5542 and 5543. A part-time employee may not be granted compensatory time off simply because he works hours in excess of his regular part-time tour of duty. 59 Comp. Gen. 237 (1980).

11. Transferred employee

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

12. District court employees

A former employee of a United States district court claims reimbursement for unused compensatory time upon separation on the basis of an agreement between herself and the Clerk of the Court. Her claim is denied. The employee was appointed by the Clerk of the Court under provisions of 28 U.S.C. § 751(b), to a position outside the competitive service, so that compensatory time and overtime provisions in Title 5, United States Code, do not apply. Her compensation is fixed pursuant to statutory authority in 28 U.S.C. § 604(a)(5), and there is no provision for payment for overtime or accrued compensatory time in the statute or implementing regulations. Federal employment relationship is statutory,

not contractual, and government is not bound by the unauthorized acts of its agents. Debra Ruth Wolin, B-226173, August 20, 1987.

13. Separated employee

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

14. Relationship to FLSA

NSA solicited a nonexempt employee under FLSA to volunteer to work overtime supervising cleaning crews in a restricted area with the understanding he would receive compensatory time off in lieu of overtime. No funds were available to pay overtime, and overtime would not have been performed without a volunteer willing to accept compensatory time off. The employee knew that in lieu of overtime compensation he would receive compensatory time off under 5 U.S.C. § 5542. He is not entitled to additional pay under FLSA, since he is also entitled to overtime pay under Title 5, United States Code, equal to or greater than his FLSA entitlement. In such case the regulations provide that the employee may voluntarily accept compensatory time as full remuneration for overtime performed. There is no violation of the FLSA, 29 U.S.C. §§ 201 – 219, in giving compensatory time off under such circumstances. 58 Comp. Gen. 1 (1978).

Subchapter II—Other Premium Pay

A. Night Pay Differential

1. Statutory authority

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

"(a) Except as provided by subsection (b) of this subsection, nightwork is regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m., and includes—

"(1) periods of absence with pay during the hours due to holidays; and

"(2) periods of leave with pay during these hours if the periods of leave with pay during a day period total less than 8 hours.

"Except as otherwise provided by subsection (c) of this section, an employee is entitled to pay for nightwork at his rate of basic pay plus premium pay amounting to 10 percent of that basic rate. This subsection and subsection (b) of this section do not modify section 5141 of title 31, or other statute authorizing additional pay for nightwork.

"(b) The head of an agency may designate a time after 6:00 p.m. and a time before 6:00 a.m. as the beginning and end, respectively, of nightwork for the purpose of subsection (a) of this section, at a post outside the United States where the customary hours of business extended into the hours of nightwork provided by subsection (a) of this section."

2. Regulations for night work

See OPM regulations defining "regularly scheduled." 5 C.F.R. Parts 550 and 610.

3. Basic compensation determination

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

It is necessary to distinguish between the situation where an employee's position is converted from the Wage Grade to the General Schedule and the situation where a Wage Grade employee is transferred or promoted to a position in the General Schedule.

The former action is controlled by 5 C.F.R. Part 539 and the latter is controlled by 5 C.F.R. Part 531. Because of the particular language of 5 C.F.R. § 539.203, this Office has held that under Part 539 an employee's rate of basic pay is determined at the time of conversion. See 51 Comp. Gen. 641 at 643 (1972). Part 531 does not contain similar language. Rather, section 531.203 clearly does not contemplate computing the

highest previous rate on the basis of the rate of basic pay received immediately prior to the personnel action. 59 Comp. Gen. 209, 211 (1980).

Thus we have no objection to averaging method for computation of highest previous rate upon promotion from Wage Grade position to General Schedule position where employee has worked rotating shifts and has received night differential. The averaging method was arrived at in order to complete action on United States district court's consent order of remand requiring the agency to include night differential in computing the highest previous rate. We have no objection to proposed method since pay rates under that method would not exceed those authorized under 5 C.F.R. Part 531. 59 Comp. Gen. 209 (1980).

4. Special shifts

Night differential under 5 U.S.C. § 5545(a) may not be paid to employees who worked occasional overtime at night during a regularly scheduled tour of duty, but not their own, on or after February 28, 1983. Effective that date, OPM regulations implementing 5 U.S.C. § 5545(a) limit the payment of night differential for "regularly scheduled" work to night work performed by an employee during his own regularly scheduled administrative workweek. James Barber, 63 Comp. Gen. 316 (1984). 5 C.F.R. § 560.122(d).

5. Variable tour

Army White Sands Missile Range often assigns General Schedule employees to "variable tour" when hours of work will change frequently. While assigned to a "variable tour," an employee frequently performs overtime and nightwork. White Sands considers any overtime involved to be "regularly scheduled," but it considers night differential to be "regularly scheduled" only when an employee works two or more periods of night work in a week. Under the circumstances we hold that any night work performed during a variable tour is also "regularly scheduled," since it occurs with the same frequency or "regularity" as does the overtime worked by the employee. B-198260, September 29, 1981.

Employee of FCC performed nightwork in connection with temporary duty assignments every month or so. In the absence of established tour including nightwork, employee may be paid night differential under 5 U.S.C. § 5545(a) if it is considered "regularly scheduled." That it was

performed during temporary duty or on overtime does not affect the employee's entitlement to night differential. B-199129, March 5, 1981.

6. Approval requirements

A Customs Service employee was assigned a long-term project lasting nearly 3 years in which a substantial amount of overtime was performed on an almost nightly basis. The fact that the supervisor did not specifically approve the employee's schedule in advance does not bar him from recovering night differential pay. Considering the regularity of the night work, the long duration of its performance, and the knowledge of the Customs Service that it would be required, we hold that the work was regularly scheduled within the meaning of 5 U.S.C. § 5545(a) and is compensable at night pay rates. Frank Newell, B-208396, March 1, 1983.

7. Employees covered

a. Summer aids

Temporary Summer Aids appointed in the excepted service under 5 C.F.R. § 213.3102(v) may be paid night differential. There is nothing to specifically exclude Summer Aids from the definition set forth at 5 U.S.C. § 5541 of employees entitled to receive premium compensation under Subchapter V, Chapter 55, of Title 5 of the United States Code. 58 Comp. Gen. 638 (1979).

b. First-40-hour employees

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

8. Foreign Service nationals—discretionary

The Director, Voice of America (VOA), is advised that there is no authority to retroactively grant payment of a night differential to VOA Foreign Service nationals employed on the Island of Antigua prior to the effective date such premium compensation was specifically authorized

by headquarters or was included in a local compensation plan. Such payment of night differential is discretionary, and an increase in compensation resulting from an exercise of discretionary administrative authority is payable only on or after the effective date of the increase or specific authorization, in this case March 16, 1986. VOA Relay Station, Antigua, B-227411, May 19, 1988.

B. Holiday Pay

1. Statutory authority

Title 5, U.S. Code, § 5546 provides in part that:

"(b) An employee who performs work on a holiday designated by Federal statute, Executive order, or with respect to an employee of the government of the District of Columbia, by order of the District of Columbia Council, is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not—

"(1) in excess of 8 hours; or

"(2) overtime work as defined by section 5542(a) of this title.

"(c) An employee who is required to perform any work on a designated holiday is entitled to pay for at least 2 hours of holiday work.

"(d) An employee who performs overtime work as defined by section 5542(a) of this title on a Sunday or a designated holiday is entitled to pay for that overtime work in accordance with section 5542(a) of this title.

"(e) Premium pay under this section is in addition to premium pay which may be due for the same work under section 5545(a) and (b) of this title, providing premium pay for nightwork."

2. Gradual retirement plan

A regularly scheduled full-time employee participated in one of his agency's gradual retirement plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlements on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days.

56 Comp. Gen. 393 (1977) and B-206655, May 25, 1982, distinguished. Richard A. Wiseman, 62 Comp. Gen. 622 (1983).

3. In lieu of days

a. Sunday

Executive Order No. 11,582, February 11, 1971, provides that whenever a holiday falls on a Sunday, employees whose basic workweek does not include Sunday shall be excused on the next workday of the employee's basic workweek.

Title 5 of the U.S. Code, § 6103(b), which provides that when holidays fall on Saturday the preceding day may be considered a holiday, is applicable to holidays which fall on the regular weekly nonworkday which is in lieu of Sunday. Therefore, employees who had a regular weekly tour of duty Sunday through Thursday and who had July 3 and July 4, 1959, off, and worked on Sunday, July 5, 1959, come under section 4(b) of Executive Order No. 10,358 (now section 3(b) of Executive Order No. 11,582, supra) which provides that when a holiday falls on a regular weekly nonworkday in lieu of Sunday, the next workday will be considered a holiday, and such employees are entitled to holiday compensation for work on such day. 39 Comp. Gen. 253 (1959).

b. Saturday

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

Federal Communications Commission employee performed ship inspection duties on Saturday, November 11, 1978 (Veterans Day)—a holiday. Pursuant to 5 U.S.C. § 6103(b)(1) (1976), employee had received Friday, November 10, 1978, as a paid holiday off. Employee is not entitled to 2 days additional holiday pay for work on Saturday because meaning of term "holiday" in controlling agency regulation requires reference to 5 U.S.C. § 6103 to determine established legal public holidays. Section 6103(b)(1) provides that instead of a holiday that occurs on Saturday, the Friday immediately before is a legal public holiday. 61 Comp. Gen. 3 (1981).

c. Inauguration Day

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

Employees stationed in Fairfax City, Virginia, who worked on Inauguration Day, Monday, January 21, 1985, are entitled to holiday premium pay. Although Fairfax City is not mentioned in section 6103 of Title 5, United States Code, the legislative history indicates the statute was intended to authorize the inaugural holiday for employees working in the geographic locale of Fairfax City. Defense Investigative Service, 64 Comp. Gen. 679 (1985).

d. Other than Monday-through-Friday tour of duty

Employees whose regularly scheduled nonworkdays were Sunday and Monday during the period when the holidays of December 24, 1956, and January 21, 1957 (both Mondays), occurred are not entitled to an extra day off for each of the holidays on the basis of an administrative designation that Monday was in lieu of Sunday within the meaning of section 4(b) of Executive Order No. 10,358 (now section 3(b) of E.O. 11,582), 5 U.S.C. § 6103 note, which permits the designation of a regular weekly nonworkday in lieu of Sunday only when Sunday is a workday in the basic workweek. 37 Comp. Gen. 554 (1958).

Employees regularly scheduled to work Tuesday through Saturday, with "back to back" workweeks—10 duty days, 4 off days—having for the week beginning February 14, 1965, worked Sunday through Thursday, the substitute holiday for Washington's Birthday (Monday, February 22) is the last workday (Thursday, February 18) pursuant to 5 U.S.C. § 6103(b), which provides that the workday immediately preceding the regular weekly nonworkday is the designated day in lieu of

the holiday for employees scheduled to work other than Monday through Friday, Sunday not being a scheduled workday. Excusing the employees Tuesday, February 23, was not authorized under section 4(b) of Executive Order No. 10,358 (now section 3(b) of E.O. 11582), and the employees who worked on Thursday, February 18, are entitled to holiday premium pay for that day and are chargeable with annual leave for absence on Tuesday, February 23. 44 Comp. Gen. 803 (1965).

e. Resignation effect

An employee whose resignation takes effect at the close of business July 3, 1959, is entitled to compensation even though excused for that day under Executive Order No. 10,825, June 12, 1959. 38 Comp. Gen. 869 (1959).

4. No right to holiday work

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

5. Only 1 day is considered holiday

An Alaska Railroad employee whose scheduled tour of duty at beginning of the workweek of Sunday, December 30, 1973, to Saturday, January 5, 1974, was Sunday and Saturday off and work on the other days, and was changed on Wednesday, January 2, 1974, to Monday and Tuesday off and work on the other days, is not entitled to holiday pay for January 2, 1974, which would have been a day off in lieu of January 1, 1974, under new tour since the change in his workweek may not retroactively affect employee's holiday pay entitlement and he had already been paid holiday pay for January 1, 1974. B-181188, February 26, 1975. See also 61 Comp. Gen. 3 (1981).

6. Separation immediately preceding holiday

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

7. Hours of work compensable as holiday pay

An employee who had a regular tour of duty from 8 a.m. to 4:30 p.m. and who performed travel which was worked on a holiday from 3:10 a.m. to 10:30 a.m. is entitled to overtime compensation for the work performed between 3:10 a.m. and 8 a.m. and holiday premium pay for the work performed between 8 a.m. and 10:30 a.m. Holiday premium pay is limited to work on a holiday within the employee's regular tour of duty, and overtime compensation may be paid for any other work done on the holiday. 50 Comp. Gen. 519 (1971); 38 Comp. Gen. 560 (1959); and 37 Comp. Gen. 1 (1957). See also B-188686, May 11, 1978.

An employee who, on a holiday, is called back to work for five separate periods of service within the prescribed daily tour of duty is entitled to holiday compensation for at least 2 hours of service under 5 U.S.C. § 922(b) (now 5 U.S.C. § 5546(c)), subject to the limitation in 5 U.S.C. § 922(a) (now 5 U.S.C. § 5546(b)(1)). 38 Comp. Gen. 560 (1959).

Where an employee was not placed on a "first-40-hour tour of duty" but had a nonstandard tour of duty under which he was regularly scheduled to work 4 hours on the Friday before Saturday, Christmas 1976, the employee is entitled to holiday premium pay only for the 4 hours actually worked. There is no legal requirement that the employee be given 8 hours of holiday entitlement for each federal holiday. If the employee worked overtime hours in excess of the 4 hours regularly scheduled on the Friday, he is entitled to overtime pay for those hours and not to holiday premium pay. B-191561, October 3, 1978.

8. Multiple shifts

a. Workday defined

The definition of "workday" for holiday purposes in Executive Order No. 11,582, does not contemplate a situation where two of the shifts in an employee's basic workweek commence on a holiday and, therefore, the question of which one of the two shifts is to be considered as falling on a holiday is a matter for administrative regulation and determination. 32 Comp. Gen. 191 (1952). See also B-114643, October 5, 1953 and 34 Comp. Gen. 502 (1955).

b. Three shifts in 24 hours

Proposal to grant holiday benefits to construction project inspectors—employed on a three-shift basis for 24–hour periods, with the shifts at 8 a.m., 4 p.m., and 12 midnight—by considering the three shifts in the 24–hour workday unit as falling on the same calendar day so that the effect would be to allow time off with pay to third-shift employees for work wholly outside a federal holiday and to deny holiday pay for work by third-shift employees on a shift wholly within a holiday may not be approved. However, there would be no objection to a proposal to change the three tours of duty by a short period (for example: the third shift could be fixed at 11:59 p.m. to 7:59 a.m.) so that holiday time off and holiday pay would be within the scope of section 6 and 7, Executive Order No. 10,358 (now sections 5 and 6 of E.O. 11,582). 38 Comp. Gen. 499 (1959).

c. Shift spans 2 calendar days

Employee worked 8–hour shift beginning 11 p.m. immediately preceding holiday. The agency paid holiday pay for 7 hours which represented the hours worked on the holiday. If the shift beginning 11 p.m. was his regular shift, the employee is entitled to 8 hours of holiday pay as Executive Order No. 11,582 provides that employees who work a regular tour of duty which extends over 2 workdays shall have their regular tour of duty considered their holiday. Kenneth W. Swartley, B-202626, June 15, 1982, sustained on reconsideration in Kenneth W. Swartley, B-202626, September 4, 1984.

9. During training

While 5 U.S.C. § 4109 prohibits holiday pay for time spent in training, three Defense Supply Agency employees who attended training courses on a legal holiday, November 11, 1969, in nongovernment facilities may be paid holiday pay for November 11, 1969. The training comes under the exception to the prohibition against the payment of premium pay exemption in FPM Chapter 410, Subchapter 6-2b, where the costs of training, premium pay included, are less than the costs of the same training confined to regular work hours. The record shows it would cost less (including premium pay) to have employees attend classes November 11, 1969, rather than make arrangements for them to attend training classes during regular work hours. B-168528, January 2, 1970.

10. During travel

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

11. First-40-hour employees

Employees whose basic workweek consists of the first 40 hours worked during any administrative workweek since they have unpredictable and uncertain daily work tours, are not covered by (5 U.S.C. § 6103(b)), or Executive Order No. 10,358 of June 9, 1952 (now E.O. 11,582), which provide holiday benefits when a holiday occurs on either Saturday or Sunday. Neither section 6103(b) nor the executive order apply to other than employees having regularly scheduled duty hours and days and regularly scheduled weekly nonworkdays. Absent clarifying legislation, first-40-hour employees having no regular hours of duty or regular nonworkdays may not be given holiday benefits during each week in which a holiday occurs without regard to the day on which the holiday falls or the days on which the employee works by authorizing 40 hours of pay for 32 hours of work or allowing 8 hours holiday compensation after 40 hours or more work. 44 Comp. Gen. 167 (1964).

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

When a holiday falls on Saturday and the preceding Friday is the "designated holiday," pursuant to 5 U.S.C. § 6103(b), a first-40-hour employee who works the final 8 hours of his 40–hour week on the Friday being observed as a holiday in lieu of the holiday falling on Saturday is entitled only to his regular basic rate of compensation for his services on such Friday. 44 Comp. Gen. 167 (1964).

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

12. New appointees

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

13. Part-time employees

Regular part-time employees are entitled to holiday premium pay for work performed during their regular prescribed hours of work on any holiday occurring within their regular tour of duty. 26 Comp. Gen. 690 (1947).

The holiday benefit provisions of Executive Order No. 10,358, June 9, 1952, are for application only to employees who have a regularly established basic workweek of at least 40 hours and do not apply to part-time

employees, such employees being entitled to holiday benefits on the same basis as that existing prior to the promulgation of the order. 32 Comp. Gen. 378 (1953).

14. Temporary employees

Temporary employees, (those appointed for limited periods of not in excess of 90 days), are not regular employees within the meaning of 5 U.S.C. § 6104 and are not entitled to their regular compensation when prevented from working on holidays. 34 Comp. Gen. 235 (1954). This rule applies only to regular employees whose compensation is fixed on a rate per day, per hour, or on a piecework basis, and has no application to employees whose compensation is fixed on a per annum basis. 25 Comp. Gen. 877 (1946). Accordingly, an employee appointed on June 5, 1972, for a temporary period not to exceed August 31, 1972, to the position of operations research analyst, GS-13, step 6, at the per annum salary rate of $21,862, is entitled to pay for the July 4 holiday on which he performed no work. B-177093, November 9, 1972. See also 19 Comp. Gen. 337 (1939); 31 Comp. Gen. 565 (1952); and 32 Comp. Gen. 304 (1952).

15. Per diem employees/experts and consultants

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

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

Consecutive time-limited appointments totaling a period of employment in excess of 1 year without a break in service are not extensions of the original appointment so as to constitute regular employment and entitle an expert employed on a when-actually-employed basis, with regular established tour of duty, to compensation for holidays on which no work was performed under the rule enunciated in 32 Comp. Gen. 177, that an employee serving under an indefinite appointment—not limited to 1

year or less—is to be regarded as a regular employee within the meaning of 5 U.S.C. § 6104. 33 Comp. Gen. 371 (1954).

16. Customs employees

For the purposes of 19 U.S.C. §§ 267 and 1471, which provide premium pay for Customs employees, days which are declared by executive order to be holidays for government employees are not to be considered holidays. Accordingly, Customs employees who were paid holiday pay for a holiday declared by executive order have received an erroneous payment of pay. B-153107, October 30, 1969 and 26 Comp. Gen. 848 (1974).

17. FCC ship inspectors

Days which are declared to be holidays for government employees by executive order are not to be considered holidays which would entitle the employee to the special ship inspectors overtime under 47 U.S.C. § 154(f). 61 Comp. Gen. 3 (1981).

18. Employees receiving standby premium pay

Although employees receiving annual premium pay under 5 U.S.C. § 5545(c)(1) may be excused from duty on a holiday without charge to leave under 56 Comp. Gen. 551 (1977), they may not be paid holiday premium pay when required to work on a holiday falling within their regularly scheduled tours of duty. The rate of annual premium pay which the employee received under 5 U.S.C. § 5545(c)(1) includes consideration of the extent to which the duties of his position are made more onerous by holiday work requirements. B-189717, November 30, 1977, and B-192815, December 7, 1978.

19. Furlough for both workday preceding and following holiday

Employees placed on furlough for a period including both the workday preceding and the workday succeeding a holiday are not entitled to holiday pay. They have been removed from duty without expectation of pay and there is no longer a presumption that, but for the holiday, they would have worked on that day. However, agencies are cautioned not to indiscriminately furlough employees for periods when holidays occur. EEOC, B-224619, August 17, 1987.

C. Sunday Premium Pay

1. Statutory authority

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

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

2. Regulations for Sunday work

See OPM regulations defining "regularly scheduled." 5 C.F.R. Parts 550 and 610.

3. Miscellaneous cases—"regularly scheduled"

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

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

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

4. "Sunday" defined

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

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

Under 5 U.S.C. § 5546(a) an employee who performs work during a regularly scheduled 8-hour period of duty which is not overtime, a part of which is performed on Sunday, is entitled to premium pay for Sunday work for the entire period of service. Since a 24-hour period may be treated as a day, an employee who works shifts split into two 4-hour parts separated by 8 nonduty hours, with each shift spanning 2 calendar days, may be paid in excess of 8 hours of Sunday premium pay. Thus, an employee whose Saturday tour of duty includes the periods from 4 p.m. to 8 p.m. on Saturday and 4 a.m. to 8 a.m. on Sunday, and whose Sunday tour includes the periods from 4 p.m. to 8 p.m. on Sunday and 4 a.m. to 8 a.m. on Monday, may be paid for 16 hours of Sunday premium pay. B-189040, July 7, 1978.

5. Work outside basic 40-hour workweek

An employee whose basic workweek is Monday through Friday from midnight to 8 a.m. and whose regularly scheduled workweek includes daily overtime from 11 p.m. to midnight of the preceding night is not entitled to Sunday premium pay for the 1 hour worked each Sunday before midnight. The fact that the FLSA requires overtime to be paid for work in excess of 40 hours in a week does not operate to change the

employee's basic workweek as established under 5 U.S.C. § 6101. 58 Comp. Gen. 536 (1979).

Employees, who performed work on Sundays in addition to their basic 40–hour workweeks and who were paid overtime compensation for the additional hours, are not entitled to premium pay under 5 U.S.C. § 5546(a), which authorizes such pay only for nonovertime hours worked on Sundays. James Barber, 63 Comp. Gen. 316 (1984).

6. First-40-hour employees

The workweek of diplomatic couriers consists of the first 40 hours of work in an administrative workweek beginning on Sunday. Although not regularly scheduled in the usual sense, work performed by couriers on Sunday falls within their basic workweek and may be compensated at Sunday premium pay rates for up to 8 hours. 57 Comp. Gen. 43 (1977).

7. Part-time employees

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

8. Leaves of absence

a. Annual leave

An employee on an 8–hour regular shift of duty, which included 2 a.m. on the last Sunday in April when standard time was advanced 1 hour to daylight savings time, who was placed on annual leave for 1 hour so 1 hour of pay would not be lost, may not be paid Sunday premium pay for the 1 hour of annual leave since 5 U.S.C. § 5546 does not authorize premium pay for a leave status during any part of a regularly scheduled tour of duty on Sunday. 53 Comp. Gen. 292 (1973). (See however, B-189113, August 2, 1977, under "Effect of daylight savings time," below.)

b. Military duty absence

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

c. Effect of daylight savings time

Daylight savings time began during the employee's regularly scheduled tour of duty from midnight to 8 a.m. on Sunday, thus shortening that tour to 7 hours. Since the collective-bargaining agreement provided that, in such case, the employee would be permitted to work the hour from 8 a.m. to 9 a.m. in order to work a full 8-hour tour of duty work for that hour is considered to be part of the employee's regularly scheduled tour of duty. The employee may be paid Sunday premium pay for the full 8-hour tour of duty rather than for the foreshortened 7 hours. B-189113, August 2, 1977. Also see 57 Comp. Gen. 429 (1978).

d. Employees in Moslem countries

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

D. Standby Premium Pay

1. Statutory authority

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

2. Administrative approval requirement

Employee claimed premium pay for standby duty at his home. Although an employee's home may be designated as his duty station for standby purposes and although the employee in question was on call after normal duty hours, since the head of his agency never authorized, nor

did CSC (now OPM) approve, the payment of annual additional compensation as required by 5 U.S.C. § 5545(c)(1), he is not entitled to any premium pay under that provision. B-182207, January 16, 1975. See also Richard F. Briggs, B-215686, December 26, 1984.

3. Basic compensation determinations

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

4. Regularly recurring

It would be appropriate to pay standby premium pay for fire dispatchers even though the duty is performed only from June 15 to October 20 of each year. Under 5 C.F.R. § 550.143(a)(2), the tour of duty must be established on a regularly recurring basis over a substantial period of time, "generally at least a few months." Moreover, 5 C.F.R. § 550.162(b) provides that where the standby duty is seasonal, the premium pay will be paid only during the period that the employee is subject to these conditions. B-189742, December 27, 1978.

5. Excused absence from standby duty

Although the rates of premium compensation established at 5 C.F.R. § 550.144 are determined on the assumption that employees will in fact work on holidays falling within their regularly scheduled tours of duty, employees receiving premium compensation under 5 U.S.C. § 5545(c)(1) may nonetheless be excused from such duty on holidays without charge to leave where it has been administratively determined that their services are unnecessary. 56 Comp. Gen. 551 (1977).

The practice of withholding premium compensation for standby duty absences, whether or not the absence is for personal reasons, and of substituting unscheduled overtime as "fill-in" time for the lower rate standby duty absences may be changed to provide for the payment of all unscheduled overtime duty at applicable overtime rates, thus eliminating the substitution of unscheduled overtime duty for unserved scheduled standby duty. Also it may be provided that regardless of agency need employees will receive compensation for regularly scheduled standby services, except when during an absence for personal reasons there is a specific need for their standby services. The regulations require no strict adherence to a fixed weekly or other periodic standby

schedule if it is predictable in advance that the standby tours are unnecessary. However, percentage rates of premium compensation should be determined from weekly average standby hours and any question as to an appropriate percentage rate should be submitted to CSC (now OPM). 42 Comp. Gen. 426 (1963).

6. Duty officers entitlement

Where an employee's residence was not designated as his duty station, a Defense Supply Agency employee who was required to be available by telephone either at his home or within 30 minutes of port to perform inspections, is not entitled to standby premium pay. His activities were not so severely limited as to make his time compensable under 5 U.S.C. § 5545(c)(1). B-188025, July 21, 1977. To the same effect, see B-190369, February 23, 1978, involving a VA employee required to be available by telephone or "beeper" at his home or within 25 miles of the VA hospital. Compare B-189742, December 27, 1978, indicating that it would be appropriate for the Forest Service to designate the employees' homes as their duty stations under 5 C.F.R. § 550.141, during the fire season of each year when the two or three employees at each protection unit rotate duty scheduled to provide 24-hour fire dispatcher service at their residences. See also B-173783.116, April 1, 1975.

7. Sunday work defined

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

E. Premium Pay for Administratively Uncontrollable Overtime

1. Statutory authority

Title 5 of the U.S. Code, § 5545(c)(2) provides that the head of an agency, with the approval of OPM, may provide that an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular,

unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of Chapter 55, Subchapter V, of Title 5 of the United States Code, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty.

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

An employee may be paid for regularly scheduled overtime under 5 U.S.C. § 5542 and for administratively uncontrollable overtime under 5 U.S.C. § 5545(c)(2) but not for the same work. Payment under both laws is not precluded, as premium compensation for administratively uncontrollable overtime and compensation for regularly scheduled overtime relate to independent, mutually exclusive methods for compensating two distinct forms of overtime work. 52 Comp. Gen. 319 (1972).

Surveillance work authorized and assigned in advance to recur on successive days at specific 12–hour intervals was predictable and followed a discernible pattern. Since it was not administratively uncontrollable but was regularly scheduled, it is compensable at regular overtime rates even though the employees involved were receiving premium pay for administratively uncontrollable overtime under 5 U.S.C. § 5545(c)(2). B-191512, October 27, 1978. See also B-192727, December 19, 1978.

3. Payment not possible under 5 U.S.C. § 5542 where overtime not regularly scheduled

When overtime is not "regularly scheduled," agents may not be compensated for regularly scheduled overtime under 5 U.S.C. § 5542 in addition to annual premium pay for administratively uncontrollable overtime pursuant to 5 U.S.C. § 5545(c)(2). B-196563, September 3, 1980. See also B-196550, June 5, 1980.

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

In the case in which an employee has been improperly paid premium compensation under 5 U.S.C. § 5545(c)(2) for overtime work found to be regularly scheduled and not administratively uncontrollable, the employee may be paid overtime compensation under 5 U.S.C. § 5542. However, if the administratively uncontrollable duties which the

employee has performed are then found upon reexamination either not to qualify for a premium compensation under 5 U.S.C. § 5545(c)(2) or to justify a lower rate of premium pay than that which has been paid, the resulting excess amounts received as compensation for administratively uncontrollable overtime should be set off against regular overtime compensation which is found payable. 52 Comp. Gen. 319, 325 (1972). See also B-196328, April 22, 1980.

5. Substantial amount of irregular unscheduled overtime duty

Title 5 of the C.F.R., § 550.153(b), sets forth the requirements for a substantial amount of irregular or occasional overtime work.

6. Employee on extended leave with pay

Although OPM regulations provide that an agency shall continue to pay an employee premium pay on an annual basis, this should not be interpreted as requiring payment of premium compensation to an employee on leave with pay unless there are present all essential requirements to entitlement, including a reasonable expectancy that the need for his overtime service will continue in the future. 43 Comp. Gen. 376 (1963). Accordingly, when this reasonable expectancy ceases to exist, due to the employee taking extended sick or other leave with pay, the annual premium pay also ceases. B-175788, June 1, 1972 and B-152061, May 4, 1982. See also 5 C.F.R. § 550.162.

7. Suspended employee

An employee who normally qualified for premium pay for administratively uncontrollable overtime under 5 U.S.C. § 5545(c)(2) is not entitled to such premium pay for the period he is suspended without pay, since OPM regulations require that an employee be in a basic pay status in order to receive premium pay for administratively uncontrollable overtime. B-184981, August 20, 1976.

8. Discretionary authority

Considering whether CSC (now OPM) has authority to provide by regulation that Customs Security officers (about 2,000 assigned as security guards aboard aircraft) shall receive annual premium pay under 5 U.S.C. § 5545(c)(2) for overtime services incident to flight assignments under federal "Anti-Skyjacking Program," this Office sees no basis for objection, assuming determination is made and approved pursuant to section

5545(c)(2) which gives head of agency responsibility for determining whether hours of duty of position are uncontrollable for premium pay purposes, subject to CSC approval. B-151168, April 6, 1971.

F. Hazardous Duty Differential

1. Statutory authority

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

2. Administrative approval—GAO review

The determination of whether refrigeration mechanics met the qualifications for payment of environmental differential for cold work is for the agency concerned. In the absence of clear and convincing evidence that the agency determination was arbitrary or capricious, GAO will not substitute its judgment for the VA's determination that the employees did not meet those qualifications. B-194289, June 27, 1979. B-202182, January 18, 1982. See also William A. Lewis, B-216575, March 26, 1985, and Robert F. Birks, B-217860, August 14, 1985. See also Robert J. Michels, B-214205, July 17, 1984. See also "5. Administrative determination," below.

3. Irregular or intermittent duty

Under 5 U.S.C. § 5545(d) hazardous duty differential may be paid only for irregular or intermittent exposure to a hazard. Thus, INS pilots who performed low level, low speed flight duty for 4 hours per day may not be paid hazardous duty differential even though the hazard involved was not a factor considered in classifying their positions. B-189645, December 21, 1977. See also B-202182, January 18, 1982.

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

4. Hazards defined by regulations

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

5. Administrative determination

Since the Canal Zone government has the authority to fix the compensation of its employees, claims by leprosarium employees for hazardous duty pay should have been considered by Canal Zone government prior to adjudication by GAO. Accordingly, settlement issued by GAO is vacated and the matter is referred to the Canal Zone government. Claimants may have the agency action reviewed by GAO if dissatisfied with the agency determination. B-180962, May 14, 1975.

Employees claim hazardous duty differential for a period prior to arbitration award. The entitlement to hazardous duty differential is a decision vested primarily in the employing agency, and this Office will not substitute its judgment for that of agency officials unless that judgment was clearly wrong or was arbitrary and capricious. The claims are denied. AFGE Local 2413, 67 Comp. Gen. 489 (1988). See also Samuel Pavone and Robert Wilgus, B-222948, January 9, 1987.

6. Retroactive pay

General Schedule employees were performing duties which were subsequently determined to be compensable under the hazardous duty differential provided for in 5 U.S.C. § 5545(d) (1982), and filed claims with the employing agency for retroactive payment of the differential. Agency requested an advance decision as to the propriety of making retroactive payment of the hazardous duty differential. Held, where General Schedule employees engage in a duty which is subsequently determined by the employing agency as a hazardous duty, and there is an adequate record of the days and hours during which the duty was performed, payment therefor may be granted retroactively. Ronald V. Bell, et al., B-221749, July 28, 1986.

7. Premium pay in lieu of

An Air National Guard technician assigned to a 24–hour tour of duty at a National Aircraft Control and Warning Site who receives the 12 percent annual premium pay under 32 U.S.C. § 709(g) prescribed for unusual tours of duty, irregular duty, or additional duty, and work on days not normally workdays, when exposed to duty in a hazardous category, is not entitled to environmental differential pay since the 12 percent premium pay is authorized in lieu of additional compensation, including differential and overtime compensation. 50 Comp. Gen. 847 (1971).

8. Environment pay—arbitration

Where an arbitrator failed to take jurisdiction of an issue that was a matter of interest and not grievance arbitration, we will consider the claims under 4 C.F.R. Part 31 (1988). A grievance was not filed in this case, and the employees' rights to environmental differential pay for the period of time prior to implementation of the new collective-bargaining agreement are based on statutes and regulations which exist independently from the collective-bargaining agreement. AFGE Local 2413, 67 Comp. Gen. 489 (1988).

G. Overtime Compensation for Specifically Named Groups of Employees

1. Generally

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

2. Immigration and Naturalization Service (INS)

a. Statutory authority

INS employees also receive overtime compensation under 8 U.S.C. § 1353a.

b. Part-time employees

Part-time immigration inspectors who are employed on an intermittent basis at hourly rates regardless of the day or time of day they are required to perform service and who are paid overtime compensation for work performed in excess of 8 hours in a day under 5 U.S.C. § 5542(a)

having no regular hours of duty, are not eligible for the extra compensation prescribed by 8 U.S.C. § 1353a for work between 5 p.m. and 8 a.m. However, the inspectors are entitled to 2 days' extra pay for Sunday and holiday duty pursuant to section 1353a, but since they have no regular tour of duty, they may not receive their regular pay in addition to the extra pay. 49 Comp. Gen. 577 (1970).

Decision B-197533, July 1, 1980, did not change rule set forth in 49 Comp. Gen. 577 (1970) that part-time immigration inspectors are entitled to 2 days' extra pay under 8 U.S.C. § 1353a for Sunday and holiday work. Statement in B-197533, July 1, 1980, that part-time inspectors with a regularly scheduled administrative workweek should be compensated for overtime on Sundays and holidays under the Federal Employees Pay Act of 1945 was referring to hours of work in excess of 8 hours on such days. B-197533, April 3, 1981.

c. Port of entry

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

d. Standby and traveltime

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

e. Computing overtime

An immigration inspector who was entitled to overtime pay under 8 U.S.C. § 1353a for 3.25 hours worked on Sunday morning and 3 hours

worked Sunday night outside his 8–hour Sunday shift was properly paid 1–1/2 days' pay for time on duty of 6.25 hours, computed as an aggregate of the two periods of overtime work. The Attorney General did not exceed his broad authority to determine what constitutes overtime services under 8 U.S.C. § 1353a in prescribing computation on an aggregate basis with a midnight-to-midnight cutoff for Sundays and holidays. 59 Comp. Gen. 110 (1979).

3. Customs Service

a. Statutory authority

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

b. Part-time employees

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

c. Aggregating separate periods of overtime

Customs Service requests decision whether an inspector's overtime assignments from 9:30 p.m. to 10:30 p.m. Sunday, and from 12:45 a.m. to 1:45 a.m. Monday, may be considered continuous so as to limit his overtime entitlement to 1/2 day's pay for each assignment. We conclude that under current Customs regulations the Monday assignment is not a continuation of the Sunday assignment, and the inspector is entitled to 1–1/2 days' pay for the Monday assignment. Customs Inspectors, B-210442, September 2, 1983.

d. Duties not inspectional

(1) Air piracy prevention—Customs inspectors who conduct predeparture inspection of air passengers bound for overseas as a deterrent to

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

(2) Investigative duties—Customs dog handlers are not entitled to 2 extra days' overtime pay for work performed on Sundays and holidays under provisions of 19 U.S.C. §§ 267, 1451, where duties assigned are investigative in nature and not directly related to Customs services required by law. Agency has historically drawn distinction between enforcement duties and required Customs inspection functions. Determination to pay overtime based on position classification when duties are not clearly inspectional is within discretion of the Secretary of the Treasury. Murphy and Doud, B-194568, February 15, 1980.

Customs Service employees are entitled to overtime compensation under 19 U.S.C. §§ 267 and 1451 rather than the rate paid under the Federal Employees Pay Act of 1945 if they actually performed "inspectional services" as specified in the Customs statute. The employees' job descriptions need not call for the performance of such inspectional services, nor must the employees work in the primary search area. Kenneth J. Corpman, B-214845, April 12, 1985, clarifying Murphy and Doud, B-194568, February 15, 1980.

e. Holidays

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

Certain Customs Service employees, who are not within the purview of the holiday pay provisions of 19 U.S.C. § 267, worked their regular tour of duty from 12:01 a.m. to 8 a.m. on December 24, 1946, when most federal employees were excused from duty for one-half day pursuant to Executive Order No. 9810. They are entitled, under 5 U.S.C. § 5546, as amended, to premium pay for holiday work during the latter half of the

assigned tour of duty on that day only if proper administrative action had been taken to close the particular offices during the latter half of such tour of duty. 26 Comp. Gen. 848 (1947).

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

f. Computation

A Customs Service employee claimed overtime pay under 19 U.S.C. §§ 267 and 1451 for work performed in addition to his regular tour of duty and between the hours of 5 p.m. and 8 a.m. The employee is entitled to such compensation regardless of whether he first performed 8 hours of duty on the day claimed, and any contrary interpretation of the laws or the decision in O'Rourke v. United States, 109 Ct. Cl. 33 (1947) will not be followed. 56 Comp. Gen. 310 (1977).

Customs inspectors in El Paso, Texas, who previously worked 8-hour shifts claim overtime for 26-month period they worked 8-1/2-hour shifts. Based on the record before our Office, we conclude the plaintiffs are entitled to overtime where the agency has failed to establish that plaintiffs had a duty-free lunch break which may be offset against their claims. The agency failed to meet its burden of proof that a duty-free lunch period was established during the 8-1/2-hour shift where none existed during the 8-hour shift. It appears that lunch periods were scheduled and taken in the same manner when the 8-1/2-hour shift was in effect as when the 8-hour shift was used. Jose Najar, B-213012, November 3, 1983.

g. Overtime work less than 1 hour

Under Customs overtime provision at 19 U.S.C. § 267 Customs inspector who worked 8-1/4 hours on Sunday was paid 2 days' extra compensation for Sunday work of up to 8 hours. He is not entitled to additional overtime compensation under 19 U.S.C. § 267 for 15-minute period he

worked in excess of 8 hours on a Sunday. Regulations at 19 C.F.R. § 24.16(g) require employee to perform overtime services of at least 1 hour to be entitled to overtime compensation under 19 U.S.C. § 267. 61 Comp. Gen. 33 (1981).

h. Night work

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

i. Travel

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

j. Data transcribers

The duties of Customs Service "SELECT" data transcribers only involve entering data from an entry package to a computer, and such work does not qualify as the performance of "inspectional services" under 19 U.S.C. §§ 267, 1451 (1982). These employees are entitled to overtime only under 5 U.S.C. §§ 5541 to 5549 (1982). Customs Service, B-231380, February 8, 1989.

4. Public Health Service

a. Statutory authority

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

b. Standby duty

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

c. No work to be performed

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

d. In lieu of other compensation

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

e. Duty prior to 6 a.m.

Although the time required to be spent by employees of the Foreign Quarantine Division, Public Health Service, at the barge office, prior to 6 a.m. each day to obtain instructions and assignments before proceeding to inspection points for vessel inspection services, which are performed between 6 a.m. and 6 p.m., when such service is free to the carriers, may not be considered overtime duty to make either the vessel owner or the government liable for overtime compensation under 42 U.S.C. §§ 267(c) and (d)(1), and may not be considered unscheduled or unanticipated so as to be compensable as call-back overtime under 5 U.S.C. § 5542(b), the time may be regarded as overtime under 5 U.S.C. § 5542(a), if it results in duty in excess of 40 hours a week. However, the traveltime between the

barge office and other inspection points which occurs prior to 6 a.m. may not be regarded as duty time. 38 Comp. Gen. 662 (1959).

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

5. Agriculture—meat inspectors

a. Statutory authority

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

b. Reimbursement from parties in interest

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

The long standing interpretation by the Department of Agriculture that the reference in 7 U.S.C. § 394, to reimbursement by the meat industry for the overtime costs incurred by the government, includes the cost of furnishing holiday services, is entitled to great weight in the construction of the act. Therefore, the meat establishments that were rendered inspection services on Friday, December 26, 1969, a day declared a holiday by executive order, may not be relieved of the liability to reimburse the department for the holiday premium pay that was paid to inspectors. 49 Comp. Gen. 510 (1970).

c. Sunday work

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

6. Federal Communications Commission

a. What is a holiday

Federal Communications Commission employees performed ship inspection duties on Monday, December 24, 1979, which was considered a holiday by executive order for purposes of pay and leave of specified federal employees. Express limitation of executive order to executive branch employees precludes consideration of Monday, December 24, 1979, as a holiday within the meaning of 47 C.F.R. § 83.74(a)(4) (1979), and 5 U.S.C. § 6103, which limit the term "holiday" to government recognized legal public holidays and other designated national holidays. We conclude for purposes of applying the ship inspection overtime provisions that days which are declared to be holidays for government employees by executive order are not to be considered holidays which would entitle the employee to the special pay. 61 Comp. Gen. 3 (1981).

7. Saint Lawrence Seaway Development Corporation

a. Rest periods

The Saint Lawrence Seaway Development Corporation proposes an 8–hour shift for its maintenance and marine employees including a 15–minute rest break at 9 a.m. and a paid 20–minute combination rest/meal period at 1 p.m. A noncompensable lunch period may not be extended or shortened by a paid rest period because there exists a legal distinction in both origin and effect between a rest and a meal period. Time for a meal period is not compensable if the employees are not required to perform substantial duties. On the other hand, time for brief rest periods may be authorized without decrease in compensation. Saint Lawrence Seaway Development Corporation, 65 Comp. Gen. 357 (1986).

b. Paid lunch period

A proposal to establish an 8–hour shift with a paid 20–minute combination rest/meal period may not be implemented. It is clear that the purpose of this period is to provide the employees with a duty-free period for the purpose of eating, and there is no indication of any need for a change from the current situation in which the employees are not required to perform substantial duties during the meal period. Accordingly, the employees may not be compensated for the rest/meal period. Saint Lawrence Seaway Development Corporation, 65 Comp. Gen. 357 (1986).

Subchapter III— Severance Pay and Other Allowances

A. Severance Pay

1. Statutory authority

Title 5, § 5595 of the U.S. Code authorizes severance pay. OPM regulations appear in 5 C.F.R. §§ 550.701 – 550.708.

2. Reason for separation

a. Involuntary separation required

An employee sought and received a transfer from a permanent career service position in ACTION to a time-limited appointment for 5 years in the Peace Corps, which could not be extended except for extraordinary reasons. For purposes of the severance pay statute, 5 U.S.C. § 5595 (1982), we find that she was an "employee" and that she was involuntarily separated, i.e., her separation from her position in the Peace Corps was against her will and without her consent. Therefore, the employee is entitled to severance pay. Wanda Pleasant, 67 Comp. Gen. 300 (1988).

An employee's voluntary transfer from career service to a temporary appointment may not be considered conclusive proof that the employee's ultimate separation at the expiration of the temporary appointment was voluntary so as to deny him severance pay. Rather, the issue of voluntariness is a question of fact to be resolved on a case-

by-case basis. Here, the employee is entitled to severance pay where the record shows his separation after his temporary appointment was involuntary. Sullivan v. United States, 4 Cl. Ct. 70 (1983), affirmed 742 F.2d 628 (Fed. Cir. 1984), followed. Franklin L. Musser, B-213346, March 3, 1986.

b. Scope of commuting area

Where an employee's claim for severance pay by reason of involuntary separation is based upon the contention that her position was moved to another commuting area, the employee must also establish that she was forced to relocate her residence because of that change in commuting areas. We will not question an agency's determination on commuting area or necessity of relocation unless that determination is arbitrary, capricious, or clearly erroneous. Vivian W. Spencer, B-210524, June 6, 1983.

A former employee of the Mine Safety and Health Administration who declined to accompany her activity when it moved from Princeton to Pineville, West Virginia, was allowed to resign under involuntary conditions in lieu of transferring to Pineville. She is not entitled to severance pay under the provisions of 5 U.S.C. § 5595 and the implementing regulations since the agency determined that Princeton and Pineville are in the same commuting area. We will not overturn an agency's determination on commuting area unless that determination is arbitrary, capricious, or clearly erroneous. Where the agency's determination that Princeton and Pineville were in the same commuting area is based upon the commuting patterns of other employees transferred earlier, we cannot say that the agency's determination was arbitrary, capricious, or clearly erroneous. Janice N. Addison, B-225229, November 3, 1987.

c. Valid separation

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

d. Failure to renew contract

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

e. Separation for inefficiency

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

f. Separation for misconduct

A determination based on reasonable grounds supported by the record that a National Guard member was denied reenlistment on the ground of misconduct, which caused his removal as a National Guard technician, precludes payment to him of severance pay incident to his removal as a technician. B-172682, November 20, 1978.

g. Failure to report for temporary detail

Employee is not entitled to severance pay since he was discharged for failure to report on a temporary detail of 4 weeks. Although there is entitlement to severance pay if an employee is separated because he declines "assignment to another commuting area," as provided in 5 C.F.R. § 550.705, the meaning of this term is a permanent change of station ordered by the employing agency and not a temporary detail. B-197428, June 5, 1980.

h. Resignation prior to separation

Where the agency announced a transfer of function, the employee was advised if he declined to move he could resign and receive severance pay. After the employee submitted his resignation but before its effective date, the agency canceled the transfer of function and advised the

employee he could withdraw his resignation. The employee is not entitled to severance pay since his resignation was voluntary. Thomas L. Wickstrom, B-219273, December 26, 1985. See also 45 Comp. Gen. 784 (1966).

Employee was directed by his agency to resign as soon as possible because the employing agency no longer wanted him in excepted position. He submitted his "pro forma" resignation the next day. We find he was actually involuntarily dismissed, his separation being a resignation in form only. Since he was involuntarily separated, not by removal for cause on charges of misconduct, delinquency, or inefficiency, he is entitled to severance pay. Charles D. Goldman, 66 Comp. Gen. 600 (1987).

An employee who resigned after he had received only conditional notice that he would be transferred to another commuting area is not entitled to severance pay. Entitlement to severance pay requires that the resignation occur after the employee receives definite notice not depending on the occurrence of future events, that he will be separated. There must also be compliance with all regulatory requirements, including the type of notice necessary, which does not include conditional notice. Francis H. Metcalfe, B-207614, December 9, 1982. See also B-193913, April 6, 1979.

i. Reduction in force

Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction in force (RIF) after the lifting of an injunction issued by the U.S. district court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. § 5533(a). HUD Employees, 62 Comp. Gen. 435 (1983).

Federal Trade Commission (FTC) announced that it was closing several regional offices, and employees of these offices were given specific notice that their jobs would be abolished pursuant to a reduction in force (RIF). After several employees submitted written resignations, the FTC reversed its decision, did not close the regional offices, and canceled the RIF. The employees separated from service after the RIF was canceled. Hence, they are not entitled to severance pay since their resignations were voluntary and could have been withdrawn. Civil service

regulations state that employees are not eligible for severance pay if at the date of separation they decline an offer of an equivalent position in their commuting area, and the option to remain in the same position is equally preclusive. 5 C.F.R. § 550.701(b)(2) (1982). Ivan Orton, 62 Comp. Gen. 171 (1983).

Two employees resigned following a general announcement of a proposed reduction in force (RIF) but before the agency issued specific notice of personnel actions to be effected pursuant to the RIF. The employees are not eligible for severance pay under 5 U.S.C. § 5595, because implementing regulations allow severance pay only if an employee resigns subsequent to specific notice of a RIF action (5 C.F.R. § 550.706(a)(1)) or general notice that all positions within the employee's competitive area will be abolished (5 C.F.R. § 550.706(a)(2)). The RIF notice that the employees received before resigning did not qualify as a general notice under 5 C.F.R. § 550.706(a)(2) because it did not announce the abolishment of all positions within the employee's competitive area. Carmen G. Benabe and Howell E. Bell, 66 Comp. Gen. 609 (1987). See also Fannie M. Sallie, B-227506, January 29, 1988.

3. Nature of appointment

a. To temporary agency

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

An employee was temporarily appointed to a position in the American Revolution Bicentennial Administration (ARBA) later converted to Reinstatement-Career. The employee subsequently resigned on July 1, 1976, after her name appeared on an information sheet showing a termination date for her position as August 31, 1976. ARBA was a temporary agency established in 1973 to terminate no later than June 30, 1977. Whether or not the employee's separation was voluntary is not determinative, since ARBA was an agency with a statutory termination date and therefore is subject to the 5–year limitation found in the regulations implementing

5 U.S.C. § 5595. Under the limitation the employee is not entitled to severance pay. B-188819, February 8, 1978. Distinguish B-136051, August 26, 1966, above.

An employee voluntarily sought and received a promotion from a permanent career service position in the Peace Corps to a time-limited appointment, also in the Peace Corps. By statute, the appointment was limited to 5 years and could not be extended. Upon completion of the 5 years, she was separated and claims entitlement to severance pay. The claim is allowed. Although 5 U.S.C. § 5595(a)(2)(ii) excludes employees serving under an appointment with a definite time limitation from entitlement to severance pay, the claimant comes within the statutory exception for one so appointed for full-time employment (without a break in service of more than 3 days) following service under an appointment without time limitation. Since she was separated at the end of the 5-year period without her consent, she is entitled to severance pay. Susan E. Baity, B-223115, April 9, 1987.

Severance pay statute, 5 U.S.C. § 5595, is intended to provide a cushion for federal employees who are unexpectedly terminated from their positions, but not for those employees who had an expectation of separation at the time of their appointments. Consistent with this intent, a regulation, 5 C.F.R. § 550.704(b)(4)(iii), which denies severance pay to employees of agencies scheduled to expire within 5 years of the employee's date of appointment is valid as applied to agencies which perform an inherently temporary mission and have not been extended. However, the regulation cannot properly be applied to the United States Commission on Civil Rights, which, while literally covered by the regulation, had been in continuous existence for over 20 years at the time the employees seeking severance pay were appointed. Such employees are within the zone of protection intended by the statute since they cannot reasonably be viewed as having an expectation of separation at the time they were appointed. Frances (Goldberg) Zucker, B-188819, February 8, 1978, distinguished. Sylvia J. Eastman and Ann H. Meadows, 65 Comp. Gen. 753 (1986).

b. To temporary position

Where, after involuntary separation from an appointment without time limitation, an employee is appointed without a break in service of more than 3 days to a full-time temporary or other time-limited position, the employee's coverage under the severance pay provisions is determined upon the termination of the temporary position. With regard to the

requirement that the appointment after the involuntary separation have a definite time limitation, for severance pay purposes, no valid distinction may be drawn between "term" or "temporary" appointments. 56 Comp. Gen. 750 (1977).

Upon voluntary separation from a permanent GS-13, step 4, position, employee was appointed without break in service to a GM-14 full-time temporary position with another agency. Record shows his separation after temporary appointment was involuntary, and he is therefore entitled to severance pay. Once eligibility to receive severance pay has been found, the amount due must be computed in accordance with the formula prescribed a 5 U.S.C. § 5595(c) and 5 C.F.R. § 550.704. This formula provides that while the employee's entitlement is determined upon the termination of the temporary position, the amount of the severance pay fund is computed based on employee's basic rate at the time of the separation from the permanent position, in this case GS-13, step 4. Robert G. Joyce, 66 Comp. Gen. 164 (1986). Sustained in Robert G. Joyce, 67 Comp. Gen. 344 (1988).

c. Intermittent appointment

Employees with intermittent appointments and no regularly prescribed tour of duty are not entitled to payment of severance pay incident to their involuntary separation from their intermittent positions. Georgia and Leonie Mallory, B-209349, April 9, 1984.

4. Effect of entitlement to annuity

a. Generally

An employee who is eligible for a civil service retirement annuity on the date of involuntary separation from service is not entitled to severance pay under 5 U.S.C. § 5595 (1970). For the purposes of that section, the term "employee" does not include individuals who are eligible for an immediate annuity on the date of separation. 5 U.S.C. § 5595(a)(2)(iv) (1970). Claim for severance pay is denied. B-207872, August 16, 1982.

b. State retirement system

A National Guard technician who, at the time of his involuntary separation due to his loss of military membership, was immediately eligible for a retirement annuity from the state retirement system in which he had elected to participate, is precluded from receiving severance pay since

the phrase "any other retirement statute or retirement system applicable to an employee" contained in 5 U.S.C. § 5595 does not limit "retirement system" to a federal or federally administered system. 54 Comp. Gen. 905 (1975).

A National Guard technician separated in lieu of reduction in force, had previously become eligible for and had begun receiving a retirement annuity from the state retirement system in which he had elected to participate in lieu of the federal Civil Service Retirement System. Despite his subsequent participation in the federal retirement system and the fact that he is not entitled to an immediate annuity thereunder, the technician may not receive federal severance pay under 5 U.S.C. § 5595 (1970) since concurrent receipt of the retirement annuity and severance pay are incompatible. It is the fact of the employee's eligibility for an immediate retirement annuity under either a state or federal retirement system which precludes his receipt of federal severance pay. B-187854, February 24, 1977.

c. Disability retirement pending

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

d. Retired military members

Upon a reduction in force, a civilian employee of the United States who is a retired member of the uniformed services eligible for or in receipt of military retired pay, may not be paid severance pay. This prohibition is applicable without regard to whether the employee was entitled under the Dual Compensation Act, 5 U.S.C. §§ 5531 – 5534, to receive military retired pay concurrently in whole or in part with the compensation of his civilian office or position. 50 Comp. Gen. 46 (1970).

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

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

5. Reemployment of separated employee

a. By nonappropriated fund activity

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

b. By private organization

OPM properly exercised its authority to implement 5 U.S.C. § 5595 when it promulgated 5 C.F.R. § 550.701(b)(6) which excludes from entitlement to severance pay employees who are involuntarily separated when their agency contracts with a private organization to perform the responsibilities previously performed by such employees and the employees are offered comparable employment with that private organization. B-189394, February 10, 1978. Compare B-188634, December 16, 1977, below.

c. By successor nonfederal corporation

Just prior to the date on which a public nonfederal organization assumed the functions of the programs administered by the Office of Legal Services, Community Services Administration (CSA), an employee of CSA received a reduction-in-force notice. He was not offered a job with the successor organization at that time. More than 90 days after the successor organization assumed its responsibilities the employee accepted an offer of employment with the new organization. The employee is entitled to severance pay since under 5 U.S.C. § 5595(d) employment with the successor organization was not employment with either an agency or an instrumentality of the federal government or the

government of the District of Columbia. Also, entitlement to severance pay is not affected by 5 C.F.R. § 550.701(b)(5) because comparable employment was not offered or accepted within 90 days of the succession date. B-188634, December 16, 1977.

6. Contract employment

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

Claim of Bolivian national for additional severance pay under personal services contract with Agency for International Development Mission to Bolivia may be settled by the contracting officer under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 - 613. Enrique Garcia, B-206352, October 1, 1982.

7. Separation was an unjustified personnel action

The retroactive reinstatement and award of backpay under 5 U.S.C. § 5596 incident to an erroneous separation precludes the award of severance pay for the same period since the reinstated employee is deemed, for all purposes, to have performed services during the period covered by the erroneous personnel action. B-178551, January 2, 1976.

8. Computation of severance pay

a. Based on pay immediately preceding separation

Under 5 U.S.C. § 5595(c), severance pay is computed on the basis of the rate of pay received immediately before an employee's separation. Thus, an employee whose temporary promotion to a higher position was terminated 1 day prior to the day of his separation from government service is entitled to have his severance pay computed on the basis of the rate of pay received in his permanent position, not on the basis of the rate of pay received in his temporary promotion. 61 Comp. Gen. 529 (1982).

Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction in force (RIF) after the lifting of an injunction issued by the U.S. district court. During the period of

the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Since individuals must be actually separated from United States government service to receive severance pay, those employees were not entitled to severance pay until they were actually separated after the lifting of the injunction. They are entitled to severance pay beginning on the date of actual separation, with years of service and pay rates based on the originally intended date of the RIF, assuming that the retroactivity of the RIF is upheld by the Merit Systems Protection Board. HUD Employees, 62 Comp. Gen. 435 (1983).

b. Period of entitlement or amount

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

c. "One year's pay" limitation

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

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

d. Reemployment—second separation

If an employee receiving severance pay is reemployed once and thereafter again is separated under conditions entitling the employee to severance pay, 52 weeks with no additional days would be credited a second time and the number of days and weeks for which he had previously received severance pay would be deducted. 46 Comp. Gen. 664 (1967).

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

e. Interest not allowable

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

f. From what time years of service and age element are computed

If the employee is found eligible to receive severance pay, the amount of severance pay is computed upon the employee's basic pay at the time of the separation from the appointment without time limitation, but his years of service and age adjustment are computed as of the time of the involuntary separation from the full-time temporary or time-limited appointment. 56 Comp. Gen. 750 (1977).

9. Effect of military service

Military service which does not interrupt an employee's creditable civilian service is not taken into consideration when computing an employee's length of service for purposes of severance pay. B-187184, March 2, 1977.

B. Uniforms

1. Statutory authority

Employees who are required by regulation or statute to wear a prescribed uniform in the performance of their duties may be paid an allowance or furnished such uniforms in accordance with applicable regulations. The allowance or cost of uniforms may not exceed $125 a year, except as otherwise stated therein. 5 U.S.C. §§ 5901 – 5903.

2. Promotion to position requiring new uniform

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

3. Successive temporary appointments

While it has been administratively determined that a park ranger employed on temporary appointment for the summer months is entitled to a uniform allowance for the uniform items required for summer employment, the regulations are not clear regarding succeeding summer. Certainly the employee is not entitled to a second allowance prior to the expiration of 1 year from the date of the first appointment. However, since that year has now expired, we have no objection to reimbursement now for the amount actually expended for uniforms for the second period of summer employment. B-170772, November 6, 1970.

4. Administrative determination of necessity

Where the head of an executive agency or department, or an official designated by him, determines that certain items of equipment or clothing are required to protect employees' health or safety, the agency or department may expend its appropriated funds to procure such items. However, before appropriated funds may be used to purchase uniforms, the agency or department head must make a determination that a group of employees is required to wear uniforms. 57 Comp. Gen. 379 (1978).

5. Retroactive increase in allowance

In 1968 certain employees of the Merchant Marine Academy were granted a uniform allowance of $26.60 per year. In 1978 that allowance was increased by $46.60 to $68.20 per year under a new administrative directive designed to upgrade the quality and quantity of their uniform articles. The $41.60 increase in the allowance that the employee received in 1978 may not be applied retroactively to increase their allowances for the years between 1968 and 1978. It is a well established rule that administrative directives may not be given retroactive application. B-195075, February 13, 1980.

C. Quarters

1. Employee on temporary duty

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

2. Permanent duty personnel

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

3. Floating duty stations

The quarters and subsistence authorized by 5 U.S.C. § 5947 to be furnished aboard vessels without charge to employees of the Corps of Engineers engaged in floating plant operations, may not be procured by

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

4. Housing discrimination

Under the authority of the Equal Employment Opportunity Act of 1972 and 5 C.F.R. § 713.219 an agency may reimburse an employee for additional living expenses if it finds that, but for a discriminatory housing assignment, the employee would not have incurred such expenses. B-187598, May 6, 1977.

5. Possessory interest tax on government quarters

An employee died without paying a possessory interest tax levied upon his tenancy interests in a dwelling he rented from his employer, the National Park Service. Reimbursement may not be made to his widow who paid for the tax since the agency policy was to allow reimbursement in the form of waiving payroll deductions for rent and prohibited the issuance of a government check or cash for payment of the taxes. Since no compensation is due the employee, no further payroll deductions can be made. B-191232, June 20, 1978.

D. Overseas Differentials and Allowances

1. Statutory authority

Title 5, U.S. Code, §§ 5921 - 5942, provides the authority for the payment of the overseas differentials and allowances discussed below to employees officially stationed in foreign areas.

2. Definitions (5 U.S.C. § 5921)

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

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

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

3. Quarters allowance

a. Local hires

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

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

In order to obtain quarters allowance an employee who is hired at an overseas post must have been temporarily in the foreign area for travel or formal study prior to being hired. An agency's determination for travel or formal study will be reviewed only if it is found to be unreasonable, arbitrary, or capricious. B-168161, November 7, 1977. The mere fact that a person was not present in a country at the time of his selection for a position there may not form the basis for a redetermination of his eligibility for a living quarters allowance. B-189463, November 23, 1977. An agency determination of non-entitlement will be sustained, notwithstanding that the employee's presence in the foreign area may have been prompted by an agency's letter indicating that vacancies, to be filled locally, might open up. B-195743, September 17, 1979.

An employee of the Overseas Dependents School who, at the time of employment overseas, did not meet the requirements for granting of a

quarters allowance is not entitled to that allowance by reason of having been advised at the time of employment that she would be entitled to "full benefits" of an Army civilian employee. B-168161, December 15, 1977.

An employee of the United States government appointed overseas is not entitled to a quarters allowance in the absence of evidence clearly establishing that he was recruited in the United States by a firm for employment overseas. B-187098, January 3, 1979.

Employee does not dispute that as a local hire he is not entitled to living quarters allowance under 5 U.S.C. § 5923. However, he claims allowance under DOD regulation providing for entitlement when management requests relocation. Employee states that "local management" determined he was entitled to allowance. Claim is denied since DOD regulations provide that determinations of entitlement are to be made by Headquarters, USAF, not "local management." B-194024, July 31, 1980.

b. Employee residing in government-furnished lodging

A civilian employee of the military who was stationed in Teheran, Iran, may not receive temporary living allowance while residing in a hotel room furnished at government expense. He did not incur any lodging costs and temporary lodging allowance under section 121 of Standardized Regulations does not cover costs of meals and food. B-196258, June 6, 1980.

c. Agency determination

The governing law and regulations give agencies considerable discretion concerning payment of the living quarters allowance and there is no basis for overturning the administrative determination, required by Army regulations, which fixed approved rent ceilings for employee's overseas private quarters at an amount below the rent he was actually paying and disqualified him for payment of the living quarters allowance. 58 Comp. Gen. 738 (1979).

4. Cost-of-living allowances

a. Post allowance

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

(2) Limitations—To accommodate 25 percent statutory limitation on nonforeign differential and allowance payable under 5 U.S.C. § 5941, Navy paid 25 percent nonforeign differential for Guam to employee who was eligible for that differential as well as 15 percent nonforeign cost-of-living allowance for Hawaii. Absent regulation directing payment of nonforeign cost-of-living allowance first, Navy was not obligated to pay employee 15 percent nonforeign cost-of-living allowance and reduced 10 percent nonforeign differential even though that combination of nontaxable allowance and taxable differential would result in greater tax benefit to employees. B-194368, November 12, 1980.

Air traffic controllers request that cost-of-living allowance (COLA) in Molokai, Hawaii, be computed under private housing category, since, although they occupy federal housing, they do not do so as a condition of their civilian employment. Even though Federal Personnel Manual (FPM) Letter 591-29, October 30, 1978, defines federal housing category as applying only to those who occupy federal housing as a condition of their employment, the FPM Letter's interpretation is erroneous since it misinterprets Executive Order No. 12,070, as amended, which refers to federal housing as that occupied as a result of civilian employment. Therefore, the manner in which the Federal Aviation Administration has been computing the COLA is correct. 61 Comp. Gen. 266 (1982).

b. Transfer allowances

(1) Hotels in U.S.—Hotel or other temporary lodging expenses incurred in the United States by an employee incident to a transfer abroad may not be reimbursed as part of the transfer allowance authorized under

5 U.S.C. § 5924(2). Temporary lodging expenses payable to employees incident to assignments abroad are those authorized by 5 U.S.C. § 5923(1). 53 Comp. Gen. 861 (1974).

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

(3) Recoupment not required—The former Director of the Commerce Department's U.S. Trade Center, Argentina, whose Foreign Service Reserve appointment terminated when he returned to his regular Commerce position in the United States may be paid a home service transfer allowance, since it is anticipated that he will be reassigned to a post in a foreign area. B-180852, October 23, 1974.

c. Separate maintenance allowance

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

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

A separate maintenance allowance could be paid to an employee whose wife could not be accepted on base because the medical facilities were inadequate to treat his wife's cancer. The regulations permit payment of allowance whenever the head of an agency determines that the

employee is compelled to maintain a dependent elsewhere because of lack of adequate medical facilities. B-175980, November 28, 1972.

The Army's policy to deny separate maintenance allowance where an employee is not joined by his dependent due to the dependent's unique medical condition is at variance with the Standardized Regulations. Therefore, an employee may be granted a separate maintenance allowance where the chief medical officer and commander determined that he was required to maintain his wife elsewhere because of inadequate medical facilities in Pusan, Korea, to treat his wife's condition. B-188979, July 24, 1978.

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

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

(5) Breach in domestic relations—An employee's claim for a separate maintenance allowance on behalf of his wife was denied by the agency for the period during which the employee and his wife were allegedly separated, even though no separation agreement had been signed and neither spouse had instituted legal action, since, at that time, the Standardized Regulations prohibited the payment of the separate maintenance allowance where there existed a "breach in domestic relations."

The employee may be paid the separate maintenance allowance for his wife because the Standardized Regulations have been clarified so as to prohibit the allowance only where either legal action had been instituted or a formal separation agreement had been reached. B-178490, July 2, 1975.

Under regulations providing that a separate maintenance allowance cannot be paid when there was a breach in domestic relations, a separate maintenance allowance for the employee's wife was properly terminated as of the date she filed for divorce even though her petition for divorce was placed on the inactive court calendar for several months before a final divorce decree was granted. Where there has been no action for separate maintenance, the date of "voluntary legal separation" referred to in the regulations is the date of filing for divorce. B-191819, March 23, 1979.

(6) Change of station—Under section 264.2 of the Standardized Regulations, a separate maintenance allowance terminates when an employee is transferred as of the date he relinquishes his quarters. On April 6 an employee assigned to Saigon and receiving a separate maintenance allowance was sent to the Philippines and then to California under temporary duty orders that did not provide for return to Saigon. His separate maintenance allowance was properly terminated April 6 since it was clear that a permanent change of station was intended even though permanent-change-of-station orders had not been issued and inasmuch as the employee relinquished his quarters. B-186478, June 15, 1977.

d. Education allowance

(1) Applicable rate—An employee transferred from the Hague to Hong Kong elected to let his daughter attend her last year of high school at the Hague. The employee is entitled to an education allowance for his daughter at the $2,500 per annum rate for Hong Kong rather than the $3,300 rate for the Hague since section 267.44 of the Standardized Regulations provides that the rate of the last previous post may continue only until the child finishes the grade being attended. B-186275, November 2, 1976.

(2) Employee may not contract with school—An employee of the Department of the Army stationed in Korea who entered into a private arrangement with a private school for the education of his daughter may not be reimbursed for the costs he incurred prior to DOD's contractual arrangement with the school. Authority for DOD to provide for the

schooling of dependents of employees stationed overseas expressly provides that appropriations therefor are for expenditure in accordance with 10 U.S.C. § 7204. That provision contemplates that needed arrangements for schooling are to be made by the department concerned and that a parent has no authority to obligate the government by a private agreement. 59 Comp. Gen. 581 (1980).

5. Post differential

a. Entitlement

(1) Administrative authorization—The change in the status of an employee from an alien to a U.S. citizen does not automatically entitle the employee to differentials and allowances. The Standardized Regulations require specific approval and the authorizing official specifically refused approval of the claimed differentials and allowances. GAO is without authority to overrule the administrative decision. B-179972, February 22, 1974.

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

Under section 450 of the Standardized Regulations, post differential which is payable from the date of arrival at an authorized post upon transfer, is not, however, payable until the 42nd day of a detail. A proposal to transfer rather than detail National Science Foundation employees to the Antarctic for brief periods so they can be paid post differential upon arrival may not be implemented. Although post differential is not payable for details of less than 42 days, there is no statutory restriction on retroactively paying post differential for the first 42 days of a detail that extends for more than 42 days. Accordingly, if the Secretary of State determines such payment will alleviate problems of assigning personnel to the Antarctic, and amends the regulations, the retroactive payment may be made. B-187542, March 16, 1977.

(3) Full days—An employee on temporary duty in Vietnam is entitled to payment of a post differential allowance under 5 U.S.C. § 5925 at the 25

percent rate. The Standardized Regulations at that time provided entitlement to a post differential upon 42 consecutive calendar days' service in one or more places in Vietnam. The computation of an employee's entitlement shall be based on full days (as indicated in the regulation, that is, midnight to midnight). B-169294, June 11, 1970.

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

b. Computation

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

(2) Biweekly basis—AID properly computed the post differential ceiling on a biweekly, rather than an annual, basis inasmuch as section 552 of the Standardized Regulations requires implementation of the ceiling by reduction in the per annum post differential rate to a lesser percentage of the basic rate of pay than otherwise authorized. The rule that the method of computation prescribed for basic pay by 5 U.S.C. § 5504(b) shall be applied as well in the computation of aggregate compensation payments to officers and employees assigned to posts outside the United States who are paid additional compensation based upon a percentage of their basic compensation rates thus applies to post differential payments. 57 Comp. Gen. 299 (1978). See also B-173815, August 29, 1973 and B-50870, November 17, 1958.

An employee of the Air Force qualified for payment of 20 percent post differential while on extended detail in Saudi Arabia. Since post differential is based on a percentage of basic pay, the post differential payment after acquiring eligibility is computed on the basis of the days entitled to basic pay rather than on the basis of every calendar day which would include weekends and other nonworkdays. Robert B. Mellen, B-215449, December 26, 1984.

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

E. Miscellaneous Allowances

1. Territorial cost-of-living allowances

a. Effect of local voter registration

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

b. Headquartered in CONUS

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

c. Alaska Railroad employees

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

d. Conversion to General Schedule

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

e. Temporary duty

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

f. Concurrent with temporary quarters allowances

Payments for subsistence while occupying temporary quarters, which have been withheld because they were considered to duplicate, in whole or in part, amounts concurrently paid as territorial cost-of-living allowances may be allowed. B-168411, July 9, 1970.

g. Effect of commissary privileges

An employee's argument that his cost-of-living allowance was improperly phased out and eventually discontinued based on his entitlement to commissary and post exchange privileges is rejected. Discontinuance of the allowance based on the availability of commissary and post exchange privileges as provided for at 5 C.F.R. § 591.208 was proper and in accordance with Executive Order No. 10,000, which contemplates appropriate deductions in fixing the cost-of-living allowance when quarters, subsistence, commissary, or other purchasing privileges are furnished at a cost substantially lower than the prevailing local cost. B-189055, November 30, 1977. Also see B-189031, March 31, 1978.

h. Absence from duty post

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

2. Tropical differential

a. Statutory authority

Pub. L. No. 85-590, approved July 25, 1958, 72 Stat. 405, authorizes an overseas differential for Canal Zone employees who are citizens of the United States. A tropical differential is set at 15 percent of the applicable base wage or salary. 35 C.F.R. § 251.31(a).

b. Delay in civilian appointment of discharged service member

Certain employees in Panama are entitled to tropical differential pay if they continuously occupy a position in Panama after discharge from military service. Under agency practice and interpretation of its regulations this requirement was satisfied despite a few days delay after military discharge before civilian employment. Evidently such delay was sometimes administratively unavoidable. However, tropical differential is denied a claimant who delayed his civilian appointment for 22 days to return to the United States for discharge and to transact personal business after military discharge. Richard W. DuMas, B-212352, December 23, 1983.

3. Remote-duty-site allowance

The remote-duty-site allowance authorized by 5 U.S.C. § 5942 is payable for dates the employee commuted round trip between his residence in Las Vegas and his permanent duty station at the Nevada Test Site. However, since the employee maintained a room there on a continuing basis for his own convenience, 5 C.F.R. § 591.306(c) precludes payment of the remote-duty-site allowance for dates he remained overnight at the test site. B-188436, March 15, 1978.

4. Transfer—international organization—equalization allowance

An employee who exercised his reemployment rights with the U.S. Customs Service after a transfer to an international organization is not entitled to additional payment for an equalization allowance where the record shows the computation was made in accordance with the governing statute and regulations. Joseph P. Moss, B-230401, August 23, 1989.

5. Notary Public commission expenses

a. Cost of commission

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

b. Surety bonds

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

c. Seals, stamps, etc., professional dues

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

6. Membership fees

a. Individual membership

In view of the prohibition in 5 U.S.C. § 5946 against payment from appropriated funds of membership fees of officers and employees in societies and associations, the annual membership fees of employees of the New

York Ordnance District for the Society for Advancement of Management, the primary purpose of which is to increase the knowledge of the personnel involved with respect to problems encountered in the course of their employment, may not be paid from appropriated funds. 32 Comp. Gen. 15 (1952).

b. Annual dues

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

c. Library association dues for use of facilities

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

d. Agency membership

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

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

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

7. Attendance at meetings

See Title III—Travel, Chapter 3, pp. 16 – 17, of the CPLM, concerning expenses reimbursable for attendance at meetings. See also GAO's publication Principles of Federal Appropriations Law, second edition (now in preparation).

Payroll Deductions and Withholding, Debt Liquidation, Waiver of Erroneous Payments of Compensation

Subchapter I—Payroll Deductions and Withholding

A. Statutory Authorities

Statutory provisions governing withholding of pay are found at 5 U.S.C. §§ 5511 – 5520. Statutory provisions governing the advancement, allotment, and assignment of pay are found at 5 U.S.C. §§ 5521 – 5527. Other specific statutory authorities are cited in appropriate sections below. For general guidance concerning the forms and procedures used in preparing payrolls, see part III of the Department of the Treasury Financial Manual.

B. Taxes

1. Federal income taxes

a. Statutory authority

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

b. Backpay

GAO withholds federal income tax in settlement of claims for backpay under the authority of 31 U.S.C. § 3702. However, federal income tax may not be withheld in settlement of claims for backpay based on final judgments of the Court of Claims, unless so directed by the court, since certified judgments must be for payment in accordance with the terms of the judgment. B-124720, B-129346, August 1, 1961. See also Georgia and Leonie Mallory, B-209349, April 9, 1984.

c. Overtime

Employee successfully claimed overtime for work performed over period of several years. Federal income tax must be withheld from overtime compensation determined to be due, since withholding of federal income tax on all remuneration for services performed by an employee for his employer is required and any adjustments resulting from excess

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

d. Relocation expenses

(1) Generally—See Treasury Financial Manual, section 3-4080.10.

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

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

2. State and District of Columbia income taxes

a. Authority to withhold

Title 5 of the U.S. Code, §§ 5516 and 5517 and Executive Order No. 11,997, dated June 22, 1977, provide for withholding state and District of Columbia income taxes from the compensation of federal employees if an agreement has been entered into between the Secretary of the Treasury and the proper official of the state, or the District of Columbia. See also District of Columbia Code 47-1812.8 (1987 replacement volume).

b. Delinquent tax liability

Pursuant to Executive Order No. 11,997, June 22, 1977, no agreement between the Secretary of the Treasury and the proper official of the state shall require the collection by an agency of delinquent tax liability of an employee or member of the Armed Services.

c. Nonresident of state

The Maryland state income tax is required to be withheld from the compensation of a federal employee who is regularly employed in Maryland, even though he is not a resident of that state. 35 Comp. Gen. 486 (1956). See also Annotated Code of Maryland, Tax General, 10-901 to 911.

Nonresident federal employee who will not return to duty station in Philadelphia upon termination of sick leave status, at which time disability retirement becomes effective, is subject to Pennsylvania income tax imposed on federal employees by agreement between federal and state governments, pursuant to 5 U.S.C. § 5517, and Executive Order No. 10,407 (current Executive Order No. is 11,997), for period of sick leave, July 19, 1972, until December 1973, during which time he will remain on agency rolls, since sick leave payments constitute wages for taxation purposes. Accordingly, withholding of Pennsylvania income tax is proper. 52 Comp. Gen. 538 (1973).

d. Lump-sum payments

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

e. Severance pay

See Treasury Financial Manual, section 3-5015.30.

f. Fees—voluntary allotments

Voluntary salary allotments for state and District of Columbia income taxes by employees who are not subject to mandatory tax withholding may be permitted by regulation issued by OPM, provided that in accordance with 5 U.S.C. § 5525, the salary withholding is based upon the written request or authorization of the employee. While a fee or charge for the cost of withholding the tax may not be exacted from the state or District of Columbia, a charge against the employee may be, but is not required to be, made depending on the policy of the employing agency under 31 U.S.C. § 9701, or on whether a uniform fee is imposed by Presidential action. 42 Comp. Gen. 663 (1963).

3. City or county income or employment taxes

Title 5, U.S. Code, § 5520 and Executive Order No. 11,997, dated June 22, 1977, authorize the Secretary of the Treasury to enter into an agreement with the proper official of any eligible city or county for withholding city or county income or employment taxes from the compensation of federal employees who are subject to the tax and whose regular place of federal employment is within the city with which the agreement is made. Title 31, Chapter II, Subchapter A, Part 215 of the Code of Federal Regulations governs the agreements between the Secretary of the Treasury and qualified cities. See Treasury Financial Manual, section 3-5015.10. Notwithstanding the fact that an employee of a government activity physically located in New York City is not a resident of New York City, city income tax must be withheld from his salary, since he is a resident of New York state and 5 U.S.C. § 5520 requires the United States to agree to withhold city income tax from salaries of employees who are residents of the state in which the city is located if the city requests the United States to do so. B-171878.07, December 5, 1974.

4. Social security tax

a. Statutory authority

Title 26 of the U.S. Code, §§ 3102 and 3121(a)(1) require each federal agency to deduct and withhold FICA tax from wages paid to those employees covered by the Federal Insurance Contributions Act. Federal employees hired after December 31, 1983, are covered by the act.

b. Appropriation availability

Appropriations and funds made available by any act for salaries, wages, or compensation shall also be available for payment of tax imposed on instrumentalities of the United States, on an employer, by the provisions of the Social Security Act Amendments of 1950. 31 U.S.C. § 1309.

c. Severance pay

Two employees, who were separated from their positions, were paid severance pay. The agency properly deducted FICA from their severance pay where they later became subject to FICA withholding as a result of their reemployment in intermittent positions. Georgia and Leonie Mallory, B-209349, April 9, 1984.

5. Medicare tax

a. Statutory authority

Medicare was extended to federal employees by the Tax Equity and Fiscal Responsibility Act of 1982. That act subjects federal employment to the hospital insurance portion of the FICA and provides for use of the newly covered employment in determining eligibility for medicare hospital insurance.

b. Final paycheck

Agency properly deducted Medicare tax from the final paycheck of an employee who retired in December 1982, but received the paycheck in January 1983, even though the employee is not eligible for Medicare benefits based on federal service. Section 278 of the Tax Equity and Fiscal Responsibility Act of 1982 provides that the tax applies to all remuneration received after December 31, 1982, but provides credit for pre-1983 federal employment only to individuals who performed service both during January 1983 and before January 1, 1983. Although under these provisions some employees subject to the tax will not be eligible for Medicare benefits, there is nothing in the statute or its legislative history which permits a different result. Edward J. Compos, 63 Comp. Gen. 61 (1983).

C. Retirement

1. Statutory authority

On June 6, 1986, a new Federal Employees' Retirement System (FERS) was enacted. 5 U.S.C. §§ 8401 – 8479. See OPM regulations on that system in 5 C.F.R. §§ 841.101 – 841.1008. See also "2" of Subchapter I of this title, above. FERS coordinates federal retirement benefits with Social Security coverage for federal employees hired after December 31, 1983. Federal employees already under the Civil Service Retirement System (CSRS), 5 U.S.C. §§ 8331 – 8351, who did not elect to participate in FERS remain under the CSRS. See OPM regulations, 5 C.F.R. §§ 831.101 – 831.2208.

2. United States General Accounting Office responsibility

The responsibility of the United States General Accounting Office is to provide procedures so that the amounts deducted for retirement shall be deposited in the Civil Service Retirement and Disability Fund. 5 U.S.C.

§ 8334(a), 11 Comp. Gen. 464 (1932), and 18 Comp. Gen. 955 (1939). See also Title 6, ch. 5, GAO Manual for the Guidance of Federal Agencies.

Under 5 U.S.C. § 8334(d) payment of interest is required upon redeposit of contributions to the Civil Service Retirement Fund which were refunded to an employee. However, since the Office of Personnel Management has full authority to administer Civil Service Retirement Act, any question regarding the conditions under which service may be credited for retirement purposes should be referred to that Office. Juan S. Griego, B-207176, January 6, 1983.

3. Salary computation for deductions

a. Period of suspension or removal

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

b. Position conversion

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

c. Leave effect

During 5-day week, employee worked 4 10-hour days and was in leave-without-pay status on fifth day. Deduction for retirement should be made at basic rate of pay for 40 hours worked, since time in excess of 8 hours per day should be substituted for time lost during same workweek in leave-without-pay status to the extent of applying the straight time portion of pay for overtime hours against the leave without pay. 42 Comp. Gen. 429 (1963).

d. Night work

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

e. Overtime effect

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

f. Gradual retirement plan

A regularly scheduled full-time employee participated in one of his agency's gradual retirement plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 (1977) and B-206655, May 25, 1982, distinguished. Richard A. Wiseman, B-210493, August 15, 1983.

4. Deductions from retirement fund for debt liquidation

a. Generally

Title 5 of the U.S. Code, § 5511 provides that if an employee indebted to the United States is removed for cause, the pay accruing to him shall be applied in whole or in part to the satisfaction of any claim or indebtedness due the United States. Further, it is well settled that the final salary, retirement deductions, and other funds due employees from the government may be set off against debts due the government by employees upon their separation from service. 39 Comp. Gen. 203 (1959) and B-178595, June 27, 1973. Moreover, although 5 U.S.C. § 8346(a) provides that civil service retirement annuities are not subject to execution, levy, attachment, garnishment, or other legal process, such annuities are subject to set off for debts due the United States and for counterclaims filed by the government. 39 Comp. Gen. 203 (1959) and B-177789, January 26, 1973. However, the government may not set off general debts against an employee's retirement account until the employee withdraws his contributions or claims an annuity. 58 Comp. Gen. 501 (1979). See Pub. L. No. 97-365, approved Oct. 25, 1982. Also, see Subchapter II of this chapter.

b. Effect of dismissal of criminal charges

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

c. Co-obligors

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

d. Relocation expenses

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

e. Nonappropriated fund activity

Employee was removed for cause for involvement in robbery of officers club, a nonappropriated fund activity. Since contracts of such activity do not bind the government, debts due such activity are not debts due the United States and no authority exists to set off such debts against unpaid compensation due former employee nor against amount to employee's credit in retirement fund. B-170400, September 21, 1970 and B-170400, February 2, 1971.

f. Payment by agency of employee's share of contribution

An employee's change in appointment from a reemployed annuitant to a permanent Senior Executive Service position was incorrectly implemented by his employing agency, and no deduction was made from his salary for his contribution into the retirement fund for nearly 4 years. The agency is advised that there is no authority for the agency to pay the employee's share of his retirement contribution so that he may receive additional service credit. Congress has provided the employee with a solution in 5 U.S.C. § 8344(a)(B), which provides that he can attain additional service credit by voluntarily making a deposit in the retirement fund. See Sakran v. United States, 176 Ct. Cl. 831 (1966). Chris Roggerson, B-226425, January 4, 1988.

D. Federal Employees' Group Life Insurance

1. Statutory authority

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

2. Premium contributions

Where retired federal employee elected to continue his optional life insurance coverage but, through administrative error, premiums were not deducted, later collection of premium is proper since employee continued to be covered by insurance and law requires collection of premium during period of coverage. See 34 Comp. Gen. 257 (1954).

3. Premiums erroneously withheld

Employee, who was serving under temporary appointment and who was ineligible for Federal Employees' Group Life Insurance under the provisions of 5 C.F.R. § 870.202(a)(1), may be refunded insurance premiums which were withheld from his salary due to administrative error. Employee was never covered by life insurance and could not have received any benefits. B-198115, October 21, 1980.

E. Federal Employees Health Benefits

1. Statutory authority

See 5 U.S.C. §§ 8901 – 8914. See also 5 C.F.R. §§ 890.101 – 890.113.

2. Election of coverage and withholding

Any employee, may at such time, in such manner, and under such conditions of eligibility as OPM may by regulation prescribe, elect to enroll in an approved health benefits plan provided by the act either as an individual or for self and family. 5 U.S.C. § 8905. The act authorizes withholding from the salary of an employee the amount specified by OPM as the individual's contribution. When an employee elects such coverage the government also contributes an amount specified by OPM. See Title 6, ch. 5, GAO Manual for the Guidance of Federal Agencies.

3. Employee organization health plans

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

various employee organizations in package plans together with health benefits. 39 Comp. Gen. 573 (1960).

4. Tobacco inspectors

Seasonal tobacco inspectors employed by the Department of Agriculture are "employees" for the purposes of the Federal Employees Health Benefits Act (FEHBA). OPM requires contributions to the program for each pay period of coverage, whether the employees are in pay status or nonpay status. See 5 C.F.R. §§ 890.501(e) and 890.502(b). We hold that these revised regulations comply with the law and are reasonable. In addition, we hold that the Department of Agriculture may not utilize the tobacco user fee fund to pay the employee share of the federal health insurance for tobacco inspectors while they are in nonpay status. Tobacco Inspectors, 63 Comp. Gen. 285 (1984).

F. Savings Bonds

1. Generally

Executive Order No. 9135, dated April 16, 1942, established the Voluntary Payroll Savings Plan for purchase of United States savings bonds by federal employees by means of payroll allotments. See generally Treasury Financial Manual, section 3-6010.

2. Series EE bonds

Incident to introduction of Series EE savings bonds to replace Series E bonds being purchased by payroll allotment, the Department of the Treasury's proposal to substitute Series EE bonds based on a negative-response system—whereby the EE bonds will be substituted unless the employee affirmatively acts to stop their issuance—is appropriate. Since the Series EE bonds are a continuation without major substantive change of the Series E bonds, the negative-response method of conversion is a proper means of continuing the employee's voluntary allotment under the Payroll Savings Plan. 58 Comp. Gen. 681 (1979).

G. Allotments and Assignments of Compensation

1. Statutory authority

Title 5 of the U.S. Code, §§ 5525 – 5527 authorize the head of each department to establish procedures to permit each civilian employee of the department to make allotments and assignments of amounts out of his compensation for such purposes as the head of the department

deems appropriate, subject to the regulatory authority given the President which has been delegated to CSC (now OPM) by section 2(b) of Executive Order No. 10,982 of December 25, 1961. Also, see Title 6, ch. 5, GAO Manual for the Guidance of Federal Agencies. OPM has prescribed regulations governing allotments at 5 C.F.R. §§ 550.301 - 550.381.

2. Union dues

a. Generally

Title 5 of the U.S. Code, § 7115 states that if an agency receives from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular union dues, the agency shall honor the assignment and make an appropriate allotment.

b. No service charge

An allotment made under 5 U.S.C. § 7115 shall be made at no cost to the exclusive representative or to the employee.

c. Agency erroneously failed to withhold allotment

If an employee authorizes the deduction of union dues from his pay, a federal agency is obligated to withhold the amount from the employee and pay it over to the union. The payment of the dues is a personal obligation of the employee, and where the agency wrongfully fails to withhold the dues and later reimburses the union pursuant to the settlement of unfair labor practice charges, the agency must either collect the dues from the employee or waive collection of the debt. 60 Comp. Gen. 93 (1980).

d. Termination of allotment

Union dues allotments under section 7115(b) must terminate when an employee is no longer in the bargaining unit. Neither the agency nor the union should knowingly continue or permit dues withholding for an employee who is no longer in the bargaining unit. Local 3062, AFGE, 63 Comp. Gen. 351 (1984).

When an employee transfers out of the bargaining unit, the right to have his union dues paid through allotment ceases. If the agency continues to withhold the dues, the employee is not entitled to repayment of that

amount if the employee fails to take steps necessary to cancel the allotment. In addition, agencies are cautioned not to take recoupment action against the union in such circumstances. If the amount is collected from the union, such collection may be waived under 5 U.S.C. § 5584. Local 3062, AFGE, 63 Comp. Gen. 351 (1984). See also 59 Comp. Gen. 710 (1980) and B-195406, May 11, 1981.

e. Deduction of union dues from backpay

An employee had a voluntary allotment for union dues in effect prior to the time he was erroneously separated. Since the voluntary allotment was automatically terminated upon his separation, the termination remained in effect even though the employee was reinstated and awarded backpay. Since at the time of his restoration he did not consent to the deduction of union dues from his backpay award, the agency's refusal to deduct union dues from his backpay was proper. B-180095, November 15, 1976.

f. Erroneous overpayment to union—waiver

Employee requests refund of $364.50 in union dues which were erroneously deducted from his pay, instead of pay of employee with similar name, between 1969 and 1977. Employee may be reimbursed for those deductions the refund which is not barred by statute of limitations. Repayment by union may be waived in whole or part under 5 U.S.C. § 5584, if after reviewing the record, the Department of the Air Force determines that waiver is appropriate. B-192050, July 13, 1981.

g. Allotment revocation

The Department of the Army received from an employee a signed authorization to have union dues allotted directly to a union. The employee then requested that the authorization be returned to her before any dues had been allotted to the union and the agency agreed. The union filed a grievance and the agency settled the grievance in favor of the union and the dues were allotted to the union. Under 5 U.S.C. § 7115(a), an agency must honor a written authorization for allotment of union dues when it is received and the employee may not have the union dues returned to her. 59 Comp. Gen. 666 (1980).

h. Allotment revocation—proposed FLRA settlement

Federal Labor Relations Authority issued complaint charging Department of Labor with unfair labor practice in wrongfully terminating 40 dues allotments for AFGE Local 12 from March to June 1979. The department proposes to settle by reimbursing the union for the amount of dues it should have received. Federal Labor Management Relations Statute, 5 U.S.C. Chapter 71, provides for dues allotments to unions and authorizes authority to remedy unfair labor practices, including failure to comply with statute. We have no objection to settlement, if approved by the Regional Director of the Authority. 60 Comp. Gen. 93 (1980).

3. Banking-savings facilities for deposit

a. Financial organizations

The option for federal civilian employees and military personnel to be paid by credit to accounts in financial organizations is made available pursuant to 31 U.S.C. § 3332. (See 3 Treasury Financial Manual section 3-9010.)

b. Savings accounts

The option for an allotment of pay for savings to federal civilian employees, in the form of a recurring payroll deduction, is made available pursuant to 31 U.S.C. § 3332. Regulations governing these payments appear in Treasury Department Circular No. 1076 (second revision), dated October 23, 1973. (See also Treasury Financial Manual, Chapter 3, sections 9010 – 9095.)

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

For more detailed information concerning operational policies and procedures, see Treasury Financial Manual, Chapter 3, sections 9010 – 9095 and 5 C.F.R. § 550.361.

4. Charity and health funds

See 5 C.F.R. §§ 550.341 – 550.342.

5. Alimony and/or child support

See 5 C.F.R. § 550.371.

H. Government-Furnished Quarters

1. Statutory authority

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

2. Necessity to accept

In enacting 5 U.S.C. § 5911, Congress clearly intended that civilian employees on temporary duty should not be required to occupy government-furnished quarters, whether furnished with or without charge, unless the head of the agency determines that the necessary service cannot be rendered or that property of the United States cannot otherwise be adequately protected. 44 Comp. Gen. 626 (1965). See also 5 U.S.C. § 5911(e).

3. Proportionate costs

a. Meals

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

b. Absences from duty

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

c. Failure to consider value of quarters

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

I. Liability for Government Property Lost or Damaged

1. Administrative regulations

When the head of a federal department or establishment—in order to protect the interests of the United States—has issued regulations pursuant to law which provide for the charging of government losses occurring under certain circumstances to an employee found to be responsible therefor, such regulations may be regarded as a part of the contract of employment. 25 Comp. Gen. 299 (1945). In the absence, however, of a regulation which would impose liability on individuals, there is no authority for the assessment of charges against employees for losses sustained by the government as a result of neglect or errors in judgment. The usual means of disciplining for errors is by adjustment of efficiency rating or by demotion. 25 Comp. Gen. 299, above and 52 Comp. Gen. 964, 967 (1973).

2. Nonavailability of retirement fund

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

J. Garnishment

1. Generally

Under 42 U.S.C. § 659, the United States and its agencies are treated as if they are private persons with regard to garnishment for child support and alimony. See 55 Comp. Gen. 517 (1975).

2. Order of state tax board

The United States Supreme Court has ruled that the U.S. Postal Service must honor a state tax board order garnishing the wages of Postal Service employees. The Court held that where the state tax board's orders are identical to the judgment of a court, the issuance of such orders constitutes a lawsuit against the Postal Service within the meaning of 39 U.S.C. § 401(1) which authorizes the Postal Service to sue and be sued. Franchise Tax Board of California v. United States Postal Service, 467 U.S. 512 (1984).

This Supreme Court opinion noted that the Postal Service abandoned the argument that 5 U.S.C. § 5517 prohibited the issuance of an order to collect delinquent tax liabilities by garnishment. The Court's opinion, however, did not decide the case on the basis of 5 U.S.C. § 5517 but rather on the Postal Service's statute, 39 U.S.C. § 401(1), which permits the Postal Service to sue and be sued.

3. Child support

Where the wife of a former employee seeks to garnish for child support money due the employee for accrued annual leave and the former employee's whereabouts and/or continued existence is unknown, payment may be made without determination of the status of the employee since in this case under 5 U.S.C. § 5582, the wife would also receive any money due the employee if he is deceased. Wesley E. Pitts, B-207015, December 14, 1982.

Where the wife of a former employee seeks to garnish for child support money due the employee for accrued annual leave, payment must be in accordance with the limitations contained in section 303(b) of the Consumer Protection Act, 15 U.S.C. § 1673(b), since under Office of Personnel Management regulations, those limitations also apply to garnishment of payments in consideration of accrued leave. Wesley E. Pitts, B-207015, December 14, 1982.

Subchapter II—Debt Liquidation

A. Federal Claims Collection Act of 1966 and Debt Collection Act of 1982

These acts are to be found at 31 U.S.C. §§ 3701 – 3720A and Pub. L. No. 96-418, 96 Stat. 1749 (1980), respectively. Regulations implementing the 1966 act are found at 4 C.F.R. Parts 101 – 105.

Detailed coverage of the collection acts are set forth in Chapter 13 of the GAO manual Principles of Federal Appropriations Law, second edition (now in preparation).

B. Accountable Officers

1. Liability and debt collection

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

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

2. Availability of civil service and disability retirement fund

Under 5 U.S.C. § 5512, which prohibits payment to employees who are in arrears to the United States, the salary and the contributions the employee makes to the civil service retirement and disability fund are available for setoff to satisfy the debt. 38 Comp. Gen. 731 (1959).

C. Removal for Cause

1. Statutory authority

Under 5 U.S.C. § 5511(a) the earned pay of an employee removed for cause may not be withheld or confiscated, except as provided in 5 U.S.C. § 5511(b).

2. Generally

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

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

3. Commission of criminal offense

a. Employee not separated

Where government employees were administratively suspended subsequent to their arrest as a result of sworn complaint by FBI charging them with theft of government property and final action has not been taken by federal grand jury, salary checks issued but not delivered to employees may not be withheld, since current salary payments may not be withheld without consent of officers or employees concerned. However, if prompt action is taken to finally separate employees, amounts due could be set off against employees' debts under 5 U.S.C. § 5511. B-156356, April 13, 1965.

b. Other acts

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

4. Political activities

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

D. Erroneous Payments

1. Authority to collect

a. Failure to report for administratively required duty

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

b. Refusal to work

Employee, after attending brief memorial services, including 30–minute film run during services between noon and 1 p.m., took 1/2–hour lunch period at desk, refusing to work, notwithstanding it was understood 1–hour period included usual lunch hour. After refusal to sign for 1 hour of annual leave, employee was charged with being absent from

duty without permission for 1/2 hour and Department of Housing and Urban Development deducted $1.93 for time covered by refusal to work, designating it leave without pay. Fact that employee is at work site when refusal to work occurs is not material. Deduction was not improper. B-170566, October 12, 1970.

c. Unauthorized reimbursement of relocation expenses

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

d. Employee as third-party tortfeasor

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

2. Collection procedure

a. Generally

See discussion of Debt Collection Act of 1982, in Chapter 13 of the GAO manual Principles of Federal Appropriations Law, second edition (now in preparation).

b. Erroneous payment by other than collecting agency

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

c. Bankruptcy proceedings

A transferred employee received a travel advance that was not completely liquidated. Prior to the submission of any more claims relating to the transfer, the employee filed for bankruptcy. The unliquidated portion of the travel advance was scheduled as a debt in the bankruptcy proceeding, and was discharged with the remainder of his debts. After receiving the discharge, the employee sold his residence at his former duty station, and filed a claim for reimbursement of appropriate real estate expenses. The claim should be paid in full because the discharged debt may not be set off against a claim that arises subsequent to the discharge. B-194360, February 15, 1980.

d. Physicians—professional loans

The Health Professions Loan Repayment Program authorized financial assistance for physicians in repaying debts incurred in medical school as an inducement for them to enter into agreements committing themselves to serve in physician shortage areas for extended periods after the agreements were executed. The program was not designed to provide payments as a gratuity for past services. Hence, no payment may be allowed to a physician on an application submitted after the program was phased out for benefits predicated on his past service in a shortage area. Dr. William R. Bartley, B-226466, February 25, 1988.

e. FICA taxes

An agency erroneously deducted FICA taxes instead of civil service retirement from an employee's salary. In the prior Comptroller General decision regarding this matter it was held that the erroneous FICA deductions should be recovered and paid into the civil service retirement fund. The agency never received the employee's letter authorizing the refund of the FICA amount from the Internal Revenue Service (IRS). Inasmuch as the IRS is bound by a 3–year statute of limitations when acting on claims submitted by federal agencies for refunds of erroneously paid FICA taxes, and more than 3 years have passed, the agency is now unable to recover the FICA taxes erroneously deducted from the employee's salary. Sidelle Wertheimer, 68 Comp. Gen. 86 (1988).

E. Alimony and Child Support

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

Under 42 U.S.C. § 659 the United States and its agencies are treated as if they are private persons with regard to garnishment of child support and alimony and may be found liable for negligent failure to withhold specified amounts pursuant to a proper writ of garnishment. 56 Comp. Gen. 592 (1977).

Where the wife of a former employee seeks to garnish for child support money due the employee for accrued annual leave and the former employee's whereabouts and/or continued existence is unknown, payment may be made without determination of the status of the employee since in this case under 5 U.S.C. § 5582, the wife would also receive any money due the employee if he is deceased. Wesley E. Pitts, B-207015, December 14, 1982.

Where the wife of a former employee seeks to garnish for child support money due the employee for accrued annual leave, payment must be in accordance with the limitations contained in section 303(b) of the Consumer Protection Act, 15 U.S.C. § 1673(b), since under Office of Personnel Management regulations, those limitations also apply to garnishment of payments in consideration of accrued leave. Wesley E. Pitts, B-207015, December 14, 1982.

Subchapter III—Waiver of Erroneous Payments of Compensation and Allowances

A. Statutory Authorities

Title 5 of the U.S. Code, § 5584 provides authority for the waiver of a claim of the United States against a person which arises out of an erroneous payment, made on or after July 1, 1960, of pay and allowances, including travel, transportation, and relocation expenses and allowances. This authority may be exercised by the Comptroller General of the United States, or by the head of an agency where the claim is less than $500 ($10,000 for judicial branch) and is not the subject of an exception by the Comptroller General in the account of an accountable officer. That section defines "agency" coverage.

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

Regulations implementing this provision and prescribing standards for waiver are found at 4 C.F.R. Parts 91 – 93.

Although 5 U.S.C. § 5584 authorizes waiver only of erroneous payments of pay and specified allowances, there are other statutory waiver

authorities that may be applicable to a particular overpayment. See Chapter 13 of the GAO manual Principles of Federal Appropriations Law, second edition (now in preparation).

B. Persons Deemed Employees

1. Generally

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

2. Unions

Overpayments of union dues made to unions may be considered for waiver. B-201817, January 27, 1982; B-195406, May 11, 1981. See also Local 3062, AFGE, 63 Comp. Gen. 351 (1984).

3. Emergency appointments

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

4. Aliens

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

5. Civil service annuitant

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

6. Unidentified employees

Overpayments made to unidentified employees are not subject to waiver under 5 U.S.C. § 5584 since there is no authority to waive unknown debts owed by unknown persons. However, as to overpayments to unknown individuals, collection action may be terminated under the Federal Claims Collection Act, 31 U.S.C. §§ 951 – 953, since the cost of collection would exceed the amount of recovery. B-188000, October 12, 1977, and B-184947, March 21, 1978.

C. What Constitutes Compensation and Allowances

1. Generally

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

2. Post differential

An employee's request for waiver of erroneous overpayment of post differential has been duly considered and denied by employee's agency and General Accounting Office under 5 U.S.C. § 5584. Although 5 U.S.C. § 5592(b) contains standards for waiver of overseas differentials similar to those in 5 U.S.C. § 5584, employee may request agency to waive overpayment under 5 U.S.C. § 5922(b) since agency's views concerning waiver under latter statute have not been expressed. B-195322, November 27, 1979.

3. Continuation-of-pay payments

The claim of the government against an employee for overpayments of continuation-of-pay payments under 5 U.S.C. § 8118 resulted from the denial by the Office of Workers' Compensation Programs of her claim for a work related injury. That part of the overpayments which could not be offset by charges against the employee's leave was waived. Waiver action was proper since it was determined that employee's claim was made in good faith and offset against the employee's outstanding leave balances was made pursuant to the requirement to consider the interest of the government as well as that of the employee. B-198567, July 22, 1980.

4. Leave

a. Generally

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

b. Positive leave balance

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

Employee's annual leave account was erroneously overcredited due to agency's error in calculating service computation date and, thus, the number of hours of leave she was to accrue each pay period. Waiver of the government's claim to the overcredited annual leave is denied since there was a positive balance remaining in employee's leave account after agency adjusted the account to correct its administrative errors. Although agency erred in overcrediting leave and in delaying correction of the error, employee was also at fault for failing to inquire as to status of the correction. Bessie P. Williams, B-208293, August 15, 1983, affirming, B-208293, January 26, 1983. See also Carl H. L. Barksdale, B-219505, November 29, 1985.

c. Negative leave balance

An employee who was credited excess annual leave because of administrative error must restore that leave to the extent that repayment does

not result in a negative leave balance at the end of any leave year. If the employee used erroneously credited leave, repayment of the resulting overpayment of pay may be waived if it appears he did not know, or have reason to know, of the error. If records sufficient to establish the employee's leave record are not available for any period of time, it may not be assumed that he used excess leave for purposes of establishing a debt and considering waiver. Thomas C. James, B-211881, December 9, 1983.

Where the agency's error in computing an employee's service computation date caused him to be incorrectly credited with additional annual leave, his leave balance should be reconstructed for each separate year to arrive at a proper balance. If, after adjustment each year, there is a positive leave balance, there is no overpayment to be waived. However, if the reconstruction of the employee's leave balance each year shows he used leave in excess of that to which he was entitled, the waiver authority may be exercised. Lester L. Jefferson, B-219000, October 9, 1985. See also B-169088, March 20, 1970 and B-180010.12, March 8, 1979.

d. Lump-sum payments

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

An employee, who was separated from his position due to a RIF, was later reinstated retroactively. In computing his backpay entitlement of over $21,000, the agency deducted his refunded retirement contributions (over $34,000), severance pay (over $20,000), and lump-sum annual leave (over $7,000). His indebtedness for the lump-sum leave payment may be waived where there is no indication of fault by the employee in accepting the payment. Angel F. Rivera, 64 Comp. Gen. 86 (1984).

An employee who is retroactively restored to duty and awarded backpay may not retain a lump-sum payment for annual leave even though the settlement agreement of her discrimination complaints failed to consider deduction of this amount from her backpay award. This lump-sum payment from the backpay award does not result in a net indebtedness to the government. Cassandra B. Wyatt, B-231943, July 14, 1989.

e. Home leave

The term "pay" as used in 5 U.S.C. § 5584 includes home leave and therefore an erroneous grant of home leave is subject to consideration for waiver. Whereas annual leave is subject to waiver only where adjustment of the employee's leave accounts results in a negative balance, home leave—which is a separate leave system—is subject to waiver even when the employee has outstanding leave to which his absence from duty could be charged. 56 Comp. Gen. 824 (1977).

f. Advance sick leave

Civilian employee who was advanced 6 weeks' sick leave but, before outstanding sick leave was liquidated, submitted resignation and was required to reimburse government for advance sick leave is not eligible for relief from indebtedness under 5 U.S.C. § 5584, since at time sick leave was granted there was no erroneous payment of pay, because salary payments made during period covered by advance were legal and proper at that time. B-165989, February 5, 1969.

5. Equipment maintenance

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

6. Refund of civil service retirement deductions

An employee, who was separated from his position due to a RIF, was later reinstated retroactively. In computing his backpay entitlement of over $21,000, the agency deducted his refunded retirement contributions (over $34,000). His net indebtedness resulting from this deduction

may not be waived under 5 U.S.C. § 5584 since the refund did not constitute an erroneous payment of "pay or allowances" within the meaning of section 5584. Only OPM may waive erroneous payments from the civil service retirement fund. Angel F. Rivera, 64 Comp. Gen. 86 (1984).

7. Military retired pay

An Army officer is liable to refund overpayments of military retired pay he received when that pay was not properly reduced under the dual compensation laws on account of his civilian government employment. However, he is eligible to apply for a waiver of his indebtedness under the statute which authorizes the Comptroller General to waive the collection of overpayments of military pay and allowances. 10 U.S.C. § 2774. Lieutenant Colonel Robert E. Frazier, USA (Retired), 63 Comp. Gen. 123 (1983).

A reemployed retired federal annuitant was erroneously informed that he could be returned to federal employment at full federal salary, have his civil service annuity halted, and have his former military retired pay reinstated. Properly, however, he was entitled to his full civil service annuity but his federal salary should have been reduced by the amount of the annuity. His military retired pay could be reinstated because he had waived it to qualify for the civil service annuity. Erroneously the agency failed to reduce his federal salary while the employee continued to receive his full annuity, but his military retired pay correctly was not reinstated. The employee recognized a problem, knew that he was being overpaid and tried to have it corrected, but spent the overpayment of $25,900.40. Because the employee was erroneously advised he would be entitled to military retired pay, waiver of the amount of the debt equal to the expected retired pay, $9,758.55, is appropriate. However, since he clearly knew he was being overpaid, waiver may not be granted for the remainder of the debt, $16,141.85. Edward W. Allen, B-232219, October 28, 1988.

8. Tax liability

An employee asserted that because of changes in tax laws, his tax liability was increased due to his agency's error in overpaying him in 1986 for which he made refund in 1987, and that should be a basis for waiving the overpayment. The application of the tax laws to individual cases is a matter for the revenue authorities and is not a basis for waiving an erroneous payment of pay pursuant to 5 U.S.C. § 5584. Richard C. Clough, 68 Comp. Gen. 326 (1989).

9. Medical treatment and examination

Payment of medical expenses for dependents of AID employees is a form of allowance. Therefore, erroneous payment of medical expenses made on behalf of an AID employee's mother who did not meet the regulatory definition of a "dependent" is waived where there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or his mother. B-173783.156, April 11, 1977. Compare B-186565, January 27, 1977, holding that the cost of medical examinations erroneously given to IRS employees under age 40 is primarily an expense of management and not an allowance that may be considered for waiver.

10. Scholarship payments

Overpayments to IRS scholarship recipients for salary, personnel benefits, tuition and books and supplies are overpayments of pay and may be considered for waiver under 5 U.S.C. § 5584. As remedial legislation, the waiver statute should be construed broadly to include such allowances. B-186565, January 27, 1977.

11. Housing

A locally hired Liberian employee of the Peace Corps was provided with a residence, even though, as a locally hired employee, he was not eligible for quarters. Although there was no prohibition against the host country paying for the quarters, the payments were improperly made by the Peace Corps out of the Liberian government's contribution. The erroneous payment, in the nature of a housing allowance, may be waived. B-186238, February 8, 1977.

12. Payments owed personally by employee

Upon transfer to a United Nations agency, an employee discontinued his coverage in the Federal Employees Health Benefits Plan and enrolled in a United Nations insurance program. After returning to his federal employment and upon his retirement shortly thereafter, the employee's coverage in the Federal Employees Health Benefits Plan was canceled since he had not been enrolled in it for 5 years immediately prior to his retirement. Because the employee was not properly advised by his agency in this regard, he was ultimately permitted to continue his coverage upon retirement, provided that he pay his share of the cost of the

Federal Employees Health Benefits Plan for the period of his employment with the United Nations. The employee's indebtedness for the health benefits premiums cannot be waived since such payments, if they had been properly made, would not have come from federal salary, but from his own personal funds. B-188058, January 31, 1978.

D. Effect of Employee's Fault

1. Generally

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

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

Further, the conditions set forth in 4 C.F.R. § 91.5 require more than freedom from fault—they impose on the employee an affirmative obligation to bring to the attention of the proper officials any unexplained increase in pay. B-171891, March 23, 1971. This obligation is not discharged by mere inquiry. See discussion in D. of this subchapter below, "19. Effect of employee inquiry."

A provision in a collective-bargaining agreement that requires the agency to notify the employee within 5 days of any overpayment or to waive the overpayment may not be implemented. The provision is inconsistent with the standards for waiver of overpayments set forth at 4 C.F.R. Part 91 in that it does not restrict waiver of overpayments to those situations in which an employee is free from fault in the matter, but imposes a burden upon the agency to notify the employee within 5 days of the mistaken payment or lose its right to collect the overpayment. 58 Comp. Gen. 721 (1975).

A Public Health Service officer who failed to seek approval for outside employment and who apparently took steps to conceal his employment will not receive waiver of the erroneous payments from his outside employment since he was not without fault and did not act in good faith in the matter. Public Health Service Officer, 64 Comp. Gen. 395 (1985).

Due to administrative error, an employee received a within-grade increase 1 year before it was expected. In the absence of any mitigating factors, we conclude that the employee knew or should have known the correct waiting period, and we deny his request for waiver. Daniel J. Rendon, 68 Comp. Gen. 535 (1989).

2. Actual knowledge

An employee requests waiver of cost-of-living allowance overpayments arising due to payroll error. Waiver is denied since the employee had actual notice of the error and called it to the attention of his payroll office. Guy Cloutier, B-231019, January 26, 1989. See also Hawley E. Thomas, B-227322, September 19, 1988; Steven P. Bell, B-228661, August 18, 1988; and Lawrence D. Morderosian, B-156482, February 19, 1986.

Waiver of an employee's debt is denied where the employee was aware that he was being overpaid after receiving duplicate salary payments from his old and new duty stations. Although the employee immediately notified the agency of the error and the overpayments continued after notification, waiver is not appropriate because when the employee is aware of an error, the employee cannot reasonably expect to retain the overpayments. The amount the employee is obligated for includes both the amounts he received directly and other amounts paid on his behalf such as for insurance, retirement and taxes. Charles R. Ryon, Sr., B-234731, June 19, 1989.

After an employee was officially notified that she had been overpaid because her pay had been set at an incorrect step of her grade in connection with her promotions, waiver of the erroneous payments must be denied. Under 5 U.S.C. § 5584 waiver of the erroneous payments would not be in accordance with equity and good conscience and in the best interest of the United States because the overpayments at issue were made after she had been notified of the incorrect salary rates. She, therefore, could not have expected to retain the overpayments, and should have made provision for their repayment. Judith E. Brinker, B-228669, March 4, 1988.

3. Imputed knowledge—employment history

a. Position

Waiver of overpayments is denied for an employee who, after promotion to grade GS-6, was then promoted to grade GS-7 only 3 months later. The employee was a former payroll clerk, a position which required knowledge of various pay entitlement laws and regulations, and she should have known she was not entitled to a second promotion after 3 months. Carolyne Wertz, B-217816, August 23, 1985.

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

An employee who served as Chief, Management and Budget Division, GS-15, was erroneously given a within-grade step increase 38 weeks prematurely. Since it would appear that the incumbent of such a position would necessarily have a knowledge of federal pay systems, the employee, by failing to make inquiry concerning the premature increase, was not without fault and his indebtedness may not be waived. B-189935, November 16, 1978. Compare B-186562, March 11, 1977, waiving the indebtedness of a reemployed annuitant arising from the failure to deduct his annuity from his pay, notwithstanding that his position was that of "financial manager," inasmuch as his specialty was supply rather than personnel. See also B-168823, February 17, 1970.

b. Lengthy experience

Employee was overpaid by reason of premature granting of within-grade increase. Waiver of overpayment was properly denied in view of employee's lengthy service history (20 years), position of responsibility (GS-12), and receipt of payroll change slip indicating the nature of the action. B-174301, October 22, 1971. See also B-168506, March 20, 1970.

General Schedule (GS) employee, a Public Contact Assistant with 11 years of federal service, was promoted to GS-6, step 5, on May 15, 1983. After a desk audit which upgraded her position, and due to administrative error, a violation of the 1-year time restriction on promotions, she was promoted to GS-7, step 4, effective August 21, 1983. This action resulted in an overpayment of salary. There is no evidence of fraud, misrepresentation, or lack of good faith on the part of the employee. Although claimant had 11 years of federal service, she did not possess any specialized knowledge of the federal pay system. While she should have been generally aware of the 1-year time restriction on promotions, the upgrading of her position to GS-7 and certain ambiguous notations on her Standard Form 50s caused her to reasonably conclude that she was entitled to her promotion to GS-7 at the time she received it. Thus, she was not at fault in the overpayment of salary. Waiver of the overpayment is granted. Joyce G. Cook, B-222383, October 10, 1986. See also B-175584, June 1, 1972.

c. Demonstrated knowledge of pay matters

An employee transferred to Bangkok was erroneously paid post differential at his former 25 percent rate rather than at the correct 10 percent rate. In view of the employee's demonstrated knowledge of pay matters, as evidenced by correspondence in which he exhibited a precise knowledge of his earnings and deductions for each pay period and indicated each pay period for which he had not received earnings statements, and since he was advised that he would be paid post differential at 10 percent, a brief examination of his earnings statement should have apprised him of the fact that his post differential payments had not been reduced from 25 percent. B-188802, December 30, 1977.

d. Within-grade increases

Waiver of collection of salary overpayments resulting from premature within-grade increase is granted in the case of a foreign national who had been hired overseas with no prior federal experience and had only 2 years of federal service at the time the erroneous action occurred. As a general rule, federal employees are expected to know the appropriate waiting periods for within-grade increases and to make inquiry about increases which do not conform to those waiting periods. However, in the present case, the employee's limited exposure to the federal personnel system warrants an exception to this general rule. Richard G. Anderegg, 68 Comp. Gen. 629 (1989).

e. Quality increase

Employee was erroneously granted a quality step increase to step 6 from step 4, resulting in salary overpayments. Request for waiver under 5 U.S.C. § 5584 (1982) is denied since employee is not without fault in failing to question the increase. Patricia A. Santoro, B-229446, April 7, 1988.

4. Reasonable and prudent person standard

A reasonable and prudent person should have questioned the correctness of receipt of salary payments for the same period from two different agencies, his former agency and the agency to which he transferred. Since the employee did not, the overpayment cannot be waived. B-186092, March 25, 1977. See also B-191772, December 19, 1978; and B-192283, November 15, 1978; and B-194740, August 24, 1979.

Waiver is denied to a retired Coast Guard officer who received full civilian and retired military pay in violation of the dual compensation prohibitions. Although he advised the agency and the military of his status, he knew of the dual compensation restrictions and when he received $900 per month in excess of his entitlement, he should have known he was being overpaid. Commander George W. Conrad, B-217241, April 9, 1985.

An employee received overpayments of pay because the agency erroneously deducted only 7 percent for retirement instead of 7.5 percent for retirement as applicable for law enforcement officers. The error occurred when the employee was promoted, and, as a result of a promotion, the employee was taken off administratively uncontrolled overtime and his gross pay per pay period decreased. The employee expected his retirement withholding to decrease, and he states that he did not notice the $10.53 difference in his retirement deduction. Given that this is such a minor discrepancy in his withholding and that the deduction, which decreased simultaneously with his decrease in gross pay, appeared reasonable on its face, we are aware of no reason to expect or require the employee to audit the amount shown. The overpayments are waived since the employee is not at fault and could not reasonably have been expected to question the accuracy of this pay. Phillip C. McGuire, 66 Comp. Gen. 509 (1987).

5. Constructive notice—receipt of documents

a. General rule

Where an employee has necessary records, which, if reviewed, would indicate overpayment, and employee fails to review such documents for accuracy or otherwise fails to take corrective action, he is not without fault and waiver will be denied. B-184480, May 20, 1976.

b. Employee on notice of error

Employee was overpaid salary due to the agency's mistake in setting step within his grade upon his promotion from one position to another. Waiver is not granted, however, because the employee was furnished with a personnel record which on its face showed the existence of the error which led directly to the incorrect step placement. Therefore, the employee is partially at fault for the overpayment. Kenneth E. Sullivan, B-232454, September 1, 1989.

An employee whose position was reclassified from prevailing rate to the General Schedule (GS), was entitled to pay retention and should have received 50 percent of the annual comparability increases paid to GS employees. The agency erroneously paid the claimant the full prevailing rate comparability increases for 2 years, resulting in an overpayment of salary. Under 5 U.S.C. § 5584 (1982), repayment of that portion of the overpayment which occurred on or before June 27, 1984, when he made a written request for waiver of the overpayment, is waived since there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee. However, waiver is denied for the overpayment of pay occurring after June 27, 1984, when the employee became aware that he was being overpaid. Steven P. Bell, B-228661, August 18, 1988.

c. Failure to terminate saved pay

An employee reduced in grade in a reduction in force was entitled to saved pay for 2 years, but through administrative error, he continued to receive saved pay for more than 2 years. Since the employee knew that the permitted period was 2 years and since the Standard Forms 50 issued him indicated the inception date of his grade reduction, the employee should have known his saved pay would terminate 2 years from that date. Since he is not without fault, waiver cannot be granted. B-192485, November 17, 1978.

d. Conversion-wage rate to General Schedule

A Wage Grade employee employed in Alaska by the Federal Aviation Administration who converted from a Wage Grade position to a General Schedule position had his pay set erroneously based upon the highest Wage Grade rate earned in a Wage Grade position held outside Alaska rather than the appropriate Alaska Wage Grade rate. The error continued through subsequent pay increases including employment with the Bureau of Land Management. Waiver was allowed for the period the employee accepted the overpayments in good faith, but the denial of waiver is sustained for pay periods the employee received overpayments after being notified an error had been made. Malcolm J. Clark, B-221670, July 29, 1986.

e. Failure to deduct premiums

(1) Life insurance premiums—Waiver of employee's overpayments received after his agency erroneously stopped deducting life insurance premiums is denied because the employee was partially at fault. The employee had the responsibility of reviewing his earnings statements to ascertain whether his life insurance premiums were being properly deducted. Michael J. Smith, 67 Comp. Gen. 610 (1988). See also Frederick D. Crawford, 62 Comp. Gen. 608 (1983).

Employee received overpayments of pay because agency failed to deduct full insurance premiums from his pay. Employee is not held at fault for overpayments where premiums stated on leave and earnings statements did not appear unreasonable and employee was unaware that premiums should have been $200 higher per pay period. If the deduction appears reasonable on its face, we are aware of no reason to expect or require an employee to audit the amount shown. Overpayments are waived since the employee could not have been expected to question the correctness of his pay. Hollis W. Bowers, B-219122, January 22, 1986.

(2) Health insurance premiums—Where an employee enrolled in the Health Benefits Plan, but the agency failed to make appropriate payroll deductions for nearly 5 years, waiver was denied in view of the employee's fault in failing to verify the correctness of his compensation as indicated by his earnings statements. B-189385, August 10, 1977. Also see B-188822, June 1, 1977, denying waiver where the employee enrolled in a high-option Health Benefits Plan, but the agency deducted premiums at the low-option rate. Compare B-197632, August 6, 1980.

f. Failure to deduct annuity

A reemployed retired federal annuitant was erroneously informed that he could be returned to federal employment at full federal salary, have his civil service annuity halted, and have his former military retired pay reinstated. Properly, however, he was entitled to his full civil service annuity but his federal salary should have been reduced by the amount of the annuity. His military retired pay could not be reinstated because he had waived it to qualify for the civil service annuity. Erroneously the agency failed to reduce his federal salary while the employee continued to receive his full annuity, but his military retired pay correctly was not reinstated. The employee recognized a problem, knew that he was being overpaid and tried to have it corrected, but spent the overpayment of $25,900.40. Because the employee was erroneously advised he would be entitled to military retired pay, waiver of the amount of the debt equal to the expected retired pay, $9,785.55, is appropriate. However, since he clearly knew he was being overpaid, waiver may not be granted for the remainder of the debt, $16,141.85. Edward W. Allen, B-232219, October 28, 1988. See also Richard W. DeWeil, B-223597, December 24, 1986.

g. Failure to reduce post differential

An Air Force employee continued to receive post allowance and living quarters allowance after his transfer from England to West Germany even though a post allowance is not payable in Weisbaden and he moved into government quarters, which would terminate his living quarters allowance. Waiver is denied since he should have expected a decrease in his pay and he failed to examine his record of bank deposits. Frank A. Ryan, B-218722, December 17, 1985. See also B-189200, July 20, 1977.

6. Overpayment of overtime

After leaving government service in August 1982, an employee received payment for 2 hours of overtime and 90 hours of lump-sum leave. Due to an administrative error, the employee received another check in October 1982, representing an overpayment of 80 hours of regular pay. When the employee brought this overpayment to the attention of proper authorities, she was told the payment was correct and represented additional payment for leave not taken. Waiver is granted since employee, who had no special knowledge of personnel law or payroll processes, reasonably relied on information provided her and was not advised that

the payment was erroneous until nearly 2 years later. Joanne B. Fuesel, B-229394, February 2, 1988.

By failing to properly reduce a lump-sum overtime award, the Air Force erroneously overpaid one of its employees. Waiver is granted because the erroneous overpayment was compounded by subsequent confusion resulting in a 6-month delay in seeking its collection. Furthermore, the record does not establish knowledge sufficient to support a finding of fraud, misrepresentation, or lack of good faith on the part of the employee. Aria Nalley, B-232480, June 2, 1989.

7. Overpayment of quarters allowance

At the time of his appointment, an overseas employee was told that he was not eligible for a quarters allowance. Nonetheless, he was paid a quarters allowance of over $70 per pay period for several years. Although there was no specific code on the leave and earnings statement designated as a foreign quarters allowance, the statement did show a nontaxable item of a substantial amount which, upon examination and inquiry, would have revealed the erroneous overpayment. Because the employee was not without fault in the matter for not examining his leave and earnings statement and reporting the overpayment, waiver may not be granted, notwithstanding the financial hardship posed by the requirement to repay the amount due. B-195647, September 21, 1979.

8. Cost-of-living allowance

Employee of the Department of the Interior received erroneous payments for a cost-of-living allowance in Alaska after he had been converted to a Wage Grade employee. The employee was on notice from his Notification of Personnel Action Form and should have otherwise known that Wage Grade employees were not eligible for the allowance. Since his leave and earnings statements for the period reflected that he was being paid the allowance, he is not without fault in the matter and the debt may not be waived. Erik Brett Sager, B-218981, March 24, 1986.

9. Employee not on notice of error

As a result of administrative error in implementing federal employees' pay raise of 1972, an employee was paid at a rate of GS-14, step 7, rather than GS-14, step 6, with an overpayment totaling $994.40. Overpayment

was waived since erroneous increase was not so significant as to put employee on notice of error and there is no evidence that leave and earnings statements showed grade and step. Therefore, it cannot be said that receipt of those documents constituted constructive notice of error. B-182188, January 22, 1975. See also B-177046, December 15, 1972.

Employee erroneously received step increase from grade GS-13, step 8 to step 9 following two reductions in grade to grade 12 and grade 11. Overpayment is waived since the employee may not reasonably be expected to have been aware of regulation governing step increases and retained rates of pay. Alfred P. Feldman, B-212361, February 13, 1984.

An employee, who received severance pay following separation due to a reduction in force, was later granted a retroactive disability retirement. Payment of the retroactive retirement annuity resulted in an erroneous overpayment of the severance pay. Repayment of the total amount of severance pay is waived under 5 U.S.C. § 5584 (1982) where there is no evidence the employee knew or should have known of the overpayment either when he received the severance payments or when he received the retroactive annuity payments. B-166683, May 21, 1969, distinguished. Henry B. Jenkins, 64 Comp. Gen. 15 (1984). See also Ronnie C. Sutton and John W. McKenzie, B-206385, December 6, 1982.

An employee who was separated from his position pursuant to a reduction in force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Deductions from backpay for payments of severance pay and a lump-sum leave payment resulted in a net indebtedness which is subject to waiver under 5 U.S.C. § 5584. Waiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper. Angel F. Rivera, 64 Comp. Gen. 86 (1984). Compare Alton L. Hawkins, B-221605, May 19, 1986.

10. Periodic step increase

Due to administrative error, an employee received a within-grade increase 1 year before it was expected. In the absence of any mitigating factors, we conclude that the employee knew or should have known the correct waiting period, and we deny his request for waiver. Daniel J. Rendon, 68 Comp. Gen. 573 (1989). Compare B-180454, October 18, 1974.

11. Temporary promotion

Civilian employee of the Navy who was temporarily promoted to grade GS-13 was erroneously overpaid when she continued to receive grade GS-13 salary after being returned to her former grade GS-12 position. Since employee may reasonably have believed that her temporary promotion had been extended, this portion of the debt may be waived. Employee was subsequently erroneously overpaid a second time due to an erroneous step increase. Waiver of this resulting debt is also allowed since employee acted properly in notifying the agency of overpayments and the employee may reasonably have assumed that such an increase was a result of the merit pay system put into effect in October 1981. Violet M. Whited, B-222763, February 24, 1987.

12. Failure to deduct premiums

a. Life insurance premiums

In view of totality of circumstances, employee who received erroneous payments from February 1968, to April 1976, when premiums were not deducted from her pay for life insurance coverage is granted waiver of government's claim against her. Employee is not held at fault for overpayments, even though she selected regular coverage on life insurance form in 1968, and subsequently received four SF-50s indicating she had coverage. The insurance form indicates confusion on her part as to choice, and she had waived all coverage before 1968, and waived it again after notice of overpayments. The SF-50s employee subsequently received were issued to reflect unrelated personnel actions, and she received no other confirmation of coverage after completing form. Also, she verified a computer printout on her personnel record in 1975, which showed no insurance coverage. B-203037, August 4, 1981. B-204680, February 23, 1982.

b. Social security deductions

An employee who was covered by social security received overpayments of pay because the agency deducted only the medicare portion and not the full Federal Insurance Contributions Act (FICA) premiums from his salary. The overpayments may not be waived under the provisions of 5 U.S.C. § 5584 (1982 & Supp. IV 1986) where the record shows that the employee was not without fault in this matter since he failed to effectively examine earnings statements and tax statements that would

have alerted him to the error. Malcolm C. McCormack, B-233047, February 22, 1989.

c. Health insurance premiums

The claim of the government against a new employee arising out of overpayments he received when no health benefits premiums were deducted from his pay is waived. Employee is without fault for failing to take corrective action since comparison of pay data by employee would not have put him on notice that he was enrolled in Federal Health Benefits Plan or that erroneous overpayments had been made. Also, he maintained private coverage in good faith belief that he was not enrolled. Under these circumstances reasonable person could not have been expected to make inquiry concerning correctness of his pay. B-197632, August 6, 1980.

An employee was overpaid when the correct amount was not deducted from his salary for health insurance premiums. Upon the employee's transfer to a new agency, the premiums for a less expensive health plan were deducted from his salary. The employee seeks waiver of his debt to the government under 5 U.S.C. § 5584 (1982). Waiver may be granted where the amount of the overpayment was small each pay period, the employee's salary fluctuated at the time of the error, and employee continued to be covered by and file claims under the same health insurance plan. Richard W. Teixeira, B-229187, July 12, 1988.

An employee who transferred from a full-time to a part-time position received overpayments of salary for approximately 6–1/2 years because the agency failed to increase her deductions for health insurance upon her conversion to part-time status. Waiver of the overpayments is granted because there is no evidence that the employee was aware that her conversion to part-time status required an increase in her insurance deductions. Furthermore, although the agency deducted insurance premiums at the proper rate for an interval of 10 pay periods, the temporary change in deductions was not accompanied by any notification to the employee and she reasonably may not have noticed the slight difference in her pay. Marlene A. Busick, B-226620, June 8, 1987.

Waiver under 5 U.S.C. § 5584 of erroneous salary payments resulting from the agency's failure to increase an employee's health insurance deduction is inappropriate where it is determined that the employee concerned had notice of the error and failed to bring it to the attention of appropriate officials. Cathy A. Clark, B-230464, December 12, 1988.

13. Final pay and leave

An employee was erroneously retained on the payroll by his agency for 2 days beyond his retirement resulting in an overpayment for final pay and leave. Waiver of the overpayment is denied, notwithstanding the employee's lack of fault, since the agency promptly notified the employee of the error and requested repayment. In these circumstances it is not against equity and good conscience, as provided by the waiver statute, to require repayment. Richard C. Clough, 68 Comp. Gen. 326 (1989).

14. Retained pay

Transferred employee erroneously received retained pay for about 18 months. Personnel action effecting transfer reflected correct rate but second one effective same date adjusted pay to erroneous rate. Several subsequent personnel actions perpetuated error. Employee alleges he was told by his former personnel office he would be entitled to retained pay upon transfer. His inquiry about termination of pay retention led to discovery of error. Agency finds no fraud or misrepresentation, but cannot confirm what employee says he was told and finds him at fault for not questioning pay adjustment. We think record supports employee's contention that he in good faith believed he was entitled to pay retention. In addition, there is insufficient evidence of fault to deny waiver. B-198263, March 30, 1981.

15. Highest previous rate

The government's claim against an employee for salary overpayments is waived under the authority of 5 U.S.C. § 5584, since collection action would be against equity and good conscience and not in the best interest of the United States. Overpayments resulted from an administrative error in fixing the employee's salary in his new position at the highest previous rate of his old position. Contrary to regulations, the special pay rate of his old position was included in the highest previous rate without permission of the Office of Personnel Management. The employee was not on notice of the error and not at fault for the overpayments. David C. Starkie, B-229316, April 18, 1988.

Former Panama Canal Company employee, a Pharmacist, NM-11, step 6, applied for and was selected to fill a career development position, Management Analyst, NM-9, step 10. He erroneously continued to receive pay at the NM-11, step 6, grade level although precluded from pay

retention by the provisions of 5 U.S.C. § 5363(c)(3), since he was demoted at his own request. There is no evidence of fraud, misrepresentation, or lack of good faith on the part of the employee. The employee was informed by agency officials that he was entitled to "saved pay" and was not counseled as to the financial consequences of his voluntarily requesting a reduction in grade. Thus, employee reasonably believed he was entitled to continue to receive salary at the NM-11, step 6, grade level, and an increase in salary based upon the comparability pay increase. Accordingly, he was not at fault and waiver of the overpayment of salary is granted. Michael A. Uhorchak, B-223381, April 28, 1987.

16. Fluctuations in pay

Employee received excess foreign living quarters allowances through administrative error. Though allowances owed the employee fluctuated, the employee should have been on notice of possible overpayment when he received allowance approximately four times the amount he had been receiving. Request for waiver is denied for all overpayments received after large overpayment since his failure to make an inquiry indicates that he was partially at fault. Waiver is granted for smaller overpayments made prior to large overpayment. B-199800, August 12, 1981; B-200295, April 28, 1981.

17. Totality of circumstances

Former employee of HEW was erroneously paid for 80 instead of 8 hours on final salary check and was advised by agency officials to retain check. When she later received her lump-sum leave payment in a much smaller amount than she anticipated, she assumed overpayment had been deducted. Agency failed to respond to her telephone inquiries and did not give her a Leave and Earnings Statement for the leave check until 14 months later. We find she was justified in her assumption and in paying her income taxes on that basis. Accordingly, employee was not at fault and collection would be against equity and good conscience. Waiver of the overpayment is granted. B-197886, June 24, 1981.

18. Documents other than those furnished by the government

Upon raise in salary, employee was erroneously paid on the basis of 144 hours per pay period rather than 80 hours, plus premium pay. Even though paycheck was mailed directly to the employee's bank, since the employee received statements from his agency and his bank, he should

have had notice of overpayment in excess of $100 per pay period credited to his bank account. Failure to notice error constituted fault, precluding waiver. B-173565, October 27, 1971.

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

19. Effect of employee's inquiry

a. Mere inquiry

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

A transferred employee informed his agency that his earnings statements indicated no payroll deductions had been made for insurance premiums. Waiver was properly denied because when corrections were not made after a reasonable time, the employee should have been aware that the error was more than a routine disruption of paperwork attending an interagency transfer and he should have actively pursued the matter further. B-172117, May 12, 1971. B-171944, March 23, 1971. See also B-171487, January 26, 1971.

b. Reliance on agency assurance that payment is correct

Where, upon inquiry the employee is assured by the proper official that the payment received was not erroneous, and the employee reasonably relies on such assurance, waiver, in a proper case, may be granted. See B-182311, November 7, 1974, and B-186262, June 28, 1976. See also B-203186, December 29, 1981.

Reemployed annuitant was overpaid due to administrative error in calculating payroll deductions. Part of erroneous overpayment resulted from initial lump sum payment supposedly due employee on account of

earlier over-deductions from salary. Employee brought this overpayment to attention of proper authorities and subsequently reasonably relied on their assurance of correctness. Balance of erroneous overpayments resulted from administrative failure to fully deduct annuity payments from employee's pay, and employee failed to review pay records or take corrective action. Waiver with respect to initial lump sum payment is granted pursuant to 5 U.S.C. § 5584; waiver with respect to subsequent under-deductions is denied since employee is not without fault in failing to review documents indicating overpayments. Garnette F. Miller, B-221672, October 16, 1986.

c. Subsequent official notice of incorrectness of payment

A Wage Grade employee employed in Alaska by the Federal Aviation Administration who converted from a Wage Grade position to a General Schedule position had his pay set erroneously based upon the highest Wage Grade rate earned in a Wage Grade position held outside Alaska rather than the appropriate Alaska Wage Grade rate. The error continued through subsequent pay increases including employment with the Bureau of Land Management. Waiver was allowed for the period the employee accepted the overpayments in good faith, but the denial of waiver is sustained for pay periods the employee received overpayments after being notified an error had been made. Malcolm J. Clark, B-221670, July 29, 1986. See also B-186262, June 28, 1976.

20. Equitable considerations

a. Lack of reliance on overpayment

An employee was overpaid $600.80 in a single pay period by checks credited directly to his American Express account. Before he received his bank statement reflecting the overpayment, he received a memorandum from his agency notifying him of the error. Even if the employee had no knowledge of the overpayment at the time it occurred, waiver is not warranted in these circumstances. Since the employee had no reasonable basis to rely on the overpayment, it would not be against equity and good conscience to require repayment. B-188492, February 16, 1978, and B-189677, March 28, 1978.

b. Temporary promotion

Civilian employee of the Navy who was temporarily promoted to grade GS-13 was erroneously overpaid when she continued to receive grade

GS-13 salary after being returned to her former grade GS-12 position. Since employee may reasonably have believed that her temporary promotion had been extended, this portion of the debt may be waived. Employee was subsequently erroneously overpaid a second time due to an erroneous step increase. Waiver of this resulting debt is also allowed since employee acted properly in notifying the agency of overpayments and the employee may reasonably have assumed that such an increase was a result of the merit pay system put into effect in October 1981. Violet M. Whited, B-222763, February 24, 1987.

c. Employee's receipt of benefits

Where an employee elected optional life insurance coverage but the agency failed to make proper deductions of the premium, it is not inequitable to require repayment because the employee was covered by the optional life insurance even though premiums were not deducted from his pay. B-188948, June 15, 1977, and B-190175, September 27, 1978. Since his beneficiaries would have collected the insurance if the employee had died during the period involved, it is not inequitable to require repayment. B-193831, July 20, 1979.

E. Evidence Required

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

Denial of waiver was proper when an employee's statements that he was unaware of the error and that he did not understand his leave and earnings statements were refuted by evidence that he had a working knowledge of the entries on his leave and earnings records. B-176889, December 21, 1972.

F. Statutes of Limitation

1. Generally

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

whether a request for waiver is timely filed. B-152040, B-158422, December 26, 1968.

The 3-year statute of limitation established by 5 U.S.C. § 5584(b)(2) for filing of waiver requests does not preclude reconsideration of applications for waiver which had been previously considered by this Office. B-188492, February 16, 1978.

In a prior decision we held that the erroneous overpayment representing the difference between FICA and civil service retirement deductions from an employee's salary may be subject to waiver under 5 U.S.C. § 5584 and remanded the question to the agency for waiver determination on the merits. The agency took no action since it did not receive the employee's letter requesting waiver. The prior decision in this case may be considered as initiating the waiver process, thus tolling the 3-year limitation period in 5 U.S.C. § 5584, and waiver consideration may proceed under 4 C.F.R. § 92.1. Sidelle Wertheimer, 68 Comp. Gen. 86 (1988).

2. Effect of agency inquiry

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

3. Application for refund

Employee has 2 years from date of waiver to file a claim for refund of amounts paid to the government. 5 U.S.C. § 5584(c) and 4 C.F.R. § 92.5.

G. Determination by Agency or by GAO

Cases with aggregate overpayments not exceeding $500 (other than judicial branch, which has a $10,000 agency limit) are for determination by the employing agency; cases in amounts exceeding $500 are to be referred to GAO for disposition. See 5 U.S.C. § 5584(a); 4 C.F.R. § 92.3.

H. Appeal From Administrative Determination

GAO will consider appeals from employees of an agency's action on their requests for waiver under 5 U.S.C. § 5584. Our Office has adopted the policy, however, of not reversing an agency's determination under such law except to the extent that the agency action is contrary to the statute or the implementing Standards for Waiver, 4 C.F.R. §§ 91.1 – 91.4 as interpreted by our Office, or unless the agency's action is found to be arbitrary or capricious. B-167497, October 7, 1969.

I. Validation Effect of Waiver

1. On erroneous payments

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

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

2. Adjustment of accounts

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

3. On erroneous personnel actions

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

Although upon waiver of the collection of an erroneous payment resulting from a promotion in violation of the Whitten Amendment, the

payment is deemed validated, the erroneous personnel action that gave rise to the overpayment is not validated. Therefore, an employee whose erroneous promotion on June 2, 1968 from a GS-7 to a GS-9 position is corrected January 26, 1969, and who is properly promoted to GS-9 on March 23, 1969, may only count the period of service from June 2, 1968, to January 26, 1969, for within-grade increase purposes in the same manner and to the same extent as if the premature promotion had never been processed, and the service for the period of the erroneous promotion may be counted as GS-7 service and not GS-9 service for step increase purposes. 49 Comp. Gen. 18 (1969).

J. Effect on Accounts of Accountable Officers

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

K. Setoff of Underpayments

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

L. Overpayment of Backpay

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

M. Waiver Entitlement as Basis for Payment

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

Similarly, an Army officer, assigned as executive assistant to Ambassador at Large, retired from the Army in anticipation of a civilian appointment to that position. After retirement he continued to serve as executive assistant for 7 months before the Department of State determined he could not be appointed. Claimant was a de facto officer who served in good faith and without fraud. He may be paid the reasonable value of his services despite the lack of appointment, in view of the fact that if compensation had been paid, claimant could retain it under de facto rule or recovery could be waived under 5 U.S.C. § 5584. Although he was not paid, administrative error arose when claimant, in good faith, entered on duty with understanding of government obligation to pay for services. 55 Comp. Gen. 109 (1975).

Likewise, an employee of Bureau of Mines retired, effective December 31, 1974, after being advised by local personnel office that he had been appointed as a reemployed annuitant, effective January 1, 1975. Appointment was not effective until approved by Bureau of Mines headquarters on January 23, 1975. Claimant worked during January 1 through January 22, 1975, but was not paid. He may be paid the reasonable value of services despite lack of appointment, in view of the fact

that had compensation been paid, collection thereof could have been waived under 5 U.S.C. § 5584. B-183850, March 18, 1976.

N. Group Overpayments

Several thousand military Reserve technicians received overpayments of compensation between December 1981 and December 1982 as the result of an error in the application of a statute limiting their combined military and civilian compensation to the rate payable for level V of the Executive Schedule. It is also reported that several thousand Army members have been overpaid because of minor errors made in fixing the constructive date to be used in determining their length of federal service. No collection action is necessary since the individual overpayments are small, the administrative costs of attempted collection would be excessive, and all overpayments would be eligible for waiver on an individual case basis. B-206699.1, B-206699.2, September 15, 1988.

Restrictions on Payment of Compensation by the United States and on Acceptance of Compensation From Sources Other Than Federal Funds

Subchapter I— Restrictions on Payment of Compensation by the United States

A. Miscellaneous Statutory Provisions

1. Holding two positions

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

When an employee holding one position is appointed to another position in violation of dual compensation laws, a rebuttable presumption arises that the employee intended to give up his first position. The agency must determine from which position the erroneous payments arose. In any event, the indebtedness is owed to the United States, the collection of which is subject to waiver under 5 U.S.C. § 5584 and 4 C.F.R. Parts 91 and 92. Fort Benjamin Harrison, B-208336, April 22, 1983.

2. Overseas teachers

A full-time teacher in the DOD Overseas Dependents' Schools may receive compensation for attending a meeting of the Advisory Council on Dependents' Education under the Department of Education. Members of the Advisory Council "who are not in the regular full-time employ of the United States" may receive compensation for attending Council meetings. See 20 U.S.C. § 929(d). Full-time overseas teachers are not "full-time employees" for purpose of this Advisory Council statute. H. S. Shutleff, B-215834, January 28, 1985.

The pay caps on wage increases for prevailing rate employees during fiscal years 1982, 1983, and 1984 are applicable to such employees in a

wage area where the pay increases are based on wage rates from another area under the Monroney Amendment. Barksdale AFB, 64 Comp. Gen. 227 (1985).

3. Office must be authorized

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

4. Extra compensation

a. Authorization requirement

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

b. Prohibition

The acceptance by Navy medical officers under a fee-splitting arrangement with civilian physicians of a portion of the fees paid from "Medicare" funds under the Dependents' Medical Care Act of 1956, 10 U.S.C. §§ 1071 – 1090, for medical services furnished dependents of Navy and Marine Corps members in civilian hospitals is the acceptance of additional compensation for the same work and duties which the medical officers were required to perform and for which they received pay as naval officers. Therefore, the acceptance of the additional compensation violates 5 U.S.C. § 5536, and the fact that the medicare funds are placed in the checking accounts of the civilian doctors before payment to the Navy medical officers does not change their character as government funds nor cure the illegality of the fee-splitting arrangement. 41 Comp. Gen. 741 (1962).

The practice of the Canal Zone government in furnishing living quarters rent free to the district judge, district attorney, and the marshal, whose salaries have been fixed without regard to the free quarters, is contrary

to 5 U.S.C. § 5536, which prohibits the receipt of compensation or prerequisites beyond the salaries allowed by statute. 34 Comp. Gen. 445 (1955).

Members of the Advisory Committee on Reactor Safeguards, Nuclear Regulatory Commission, a Committee established by the Atomic Energy Act, are appointed pursuant to said statute. The Nuclear Regulatory Commission is therefore without authority to enter into employment contracts with Committee members granting them monetary benefits beyond those provided by existing law and regulations. Advisory Committee on Reactor Safeguards, B-207515, October 5, 1982.

c. Exceptions to prohibition

The prohibition of 5 U.S.C. § 5536 does not apply to the payment of compensation on a fee basis when the fees are payable under separate and distinct employments. It does not prohibit a person from holding and receiving the compensation of two distinct compatible offices, positions, or employments not otherwise forbidden, the pay of each of which is fixed by law or regulation. 4 Comp. Gen. 84 (1924) and 19 Comp. Gen. 751 (1940). For example, section 5536 does not prohibit the engagement of a full-time employee paid on a salary basis fixed by statute by another government agency to render lecturing services which are separate and distinct from his full-time duties and do not interfere with the performance thereof, or the payment to him for the lecture services of fees fixed by regulation. 28 Comp. Gen. 459 (1949). The Dual Compensation Act, 5 U.S.C. §§ 5531 - 5537, does not apply since a person serving on a fee basis does not hold an office to which compensation is attached and a fee does not constitute salary. 31 Comp. Gen. 566 (1952). Nor would the prohibition apply to the allowance for the expense of obtaining a notary commission. 36 Comp. Gen. 465 (1956).

5. Concurrent military and civilian service

a. Incompatibility

A person who holds two incompatible offices is entitled to receive the salary of only one. It has been held that military service is incompatible with federal civilian service. 18 Comp. Gen. 213 (1938) and 33 Comp. Gen. 368 (1954). There is no right to receive the compensation of a civilian position rather than military pay where a person is employed in a civilian office or position and also in active military service of the

United States during the same period of time, as the obligation under the military service is paramount. 37 Comp. Gen. 255 (1957).

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. Sergeant Richard P. Stevenson, USAF, B-207034, November 4, 1982.

An active duty Public Health Service commissioned officer who provided medical consulting services to the Social Security Administration on an hourly basis under personal services contracts may not retain such compensation for services since it was incompatible with his status as a commissioned officer and a violation of the statutory prohibition. Public Health Service Officer, 64 Comp. Gen. 395 (1985).

b. Members of the Reserves and National Guard

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

See the statutory provision limiting the combined military and civilian compensation in 1981 and 1982 to the rate payable for level V of the Executive Schedule. The limitation must be applied on a biweekly pay period basis. Military Reserve Technicians' Pay, 65 Comp. Gen. 78 (1985).

6. Extra pay for details prohibited

An officer performing the duties of another office during a vacancy, as authorized by:

(1) 5 U.S.C. § 3345—temporary filling of vacancies in office of department heads,

(2) 5 U.S.C. § 3346—vacancies in subordinate offices, or

(3) 5 U.S.C. § 3347—discretionary authority of the President to fill vacancies,

is not by reason thereof entitled to any other compensation than that attached to his proper office. 5 U.S.C. § 5535(a).

7. Employment of aliens—appropriation act restrictions

a. Citizens of allied countries

The decision as to whether a Swedish national is a citizen of a country allied with the United States in a current defense effort, so as to authorize his appointment by the Smithsonian Institution without regard to prohibition in section 502 of Pub. L. No. 87-880, October 24, 1962, 76 Stat. 1227, 1228, against the use of appropriated funds for payment of compensation to a noncitizen of the United States, is matter of political nature for determination by the agency involved, with the possible assistance of the Department of State. GAO is not in a position to state whether employment is prohibited; however, an administrative determination predicated upon reasonable grounds will not be questioned in GAO audit. B-151064, March 25, 1963. See also B-139667, June 22, 1959.

The 1976 Treasury, Postal Service and General Government Appropriation Act prohibited the use of appropriated funds to pay compensation of noncitizens, but excepted from that prohibition nationals of those countries allied with the United States in the current defense effort. Since it is commonly accepted that Canada is so allied, the appropriation act restriction on compensation would not apply to an individual who was in fact a Canadian national at the time of his employment by the Department of the Interior. B-188852, July 19, 1977.

b. Effect of dual citizenship

The 1979 Treasury, Postal Service and General Government Appropriation Act's restriction on payment of compensation to noncitizens does not apply to nationals of Poland and certain other countries lawfully admitted to the United States for permanent residence. That exception is not negated when the alien has dual nationality status. Therefore, a citizen of Poland who is also a citizen of Israel may be appointed and paid by St. Elizabeth's Hospital. B-194929, June 20, 1979. Also see 57 Comp. Gen. 172 (1977).

c. Exclusion for DOD personnel

See Pepe Iata, B-216285, January 24, 1985, where the Merit Systems Protection Board held the appointment of an alien by the Navy was not in violation of the absolute statutory prohibition on employing aliens in view of the appropriation act exclusions from this rule for DOD personnel as well as the statutory authority of the Secretary of the Navy to employ noncitizens contained in 10 U.S.C. § 7473 (1982). See also B-188507, December 16, 1977.

d. Supreme Court review of prohibition

In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the Supreme Court struck down the prohibition against hiring aliens found in 5 C.F.R. § 338.101. However, Civil Service Rule VII (5 C.F.R. Part 7), was amended by adding section 7.4, which imposes a new citizenship requirement for appointment to competitive service positions. Also, the Hampton decision did not invalidate the restrictions on hiring aliens found in various appropriation acts. B-188507, December 16, 1977.

B. Limitation on Dual Compensation From More Than One Civilian Office

1. Statutory authority

Title 5 of the U.S. Code, § 5533 prohibits an employee from receiving basic pay from more than one position for more than an aggregate of 40 hours in 1 week. For exceptions to the application of the above provision, see 5 U.S.C. § 5533(d). See also 5 U.S.C. § 5531 for definitions.

a. Computation of 40–hour period

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

when in fact he worked more than 40 hours in such position. 44 Comp. Gen. 690 (1965).

Individual, who was working for nonappropriated fund activity, accepted a temporary full-time appointment in appropriated fund position and worked two jobs in excess of 40 hours per week. Employee has violated Dual Compensation Act, 5 U.S.C. § 5533(a), by working more than 40 hours per week in two "positions" as defined under section 5531(2). The test is not whether the positions are paid from appropriated funds, but whether the employee worked in "positions" as defined by the statute which expressly includes positions in a nonappropriated fund instrumentality of the armed forces. Fort Benjamin Harrison, B-208336, April 22, 1983.

b. Employment by Congress and District of Columbia

Employee was employed by Doorkeeper of House of Representatives from February 1, 1955, to April 1, 1973, when he transferred to Office of the Architect of the Capitol and worked on the night shift until separated January 2, 1979. Concurrently from February 12, 1973, he was also employed by District of Columbia Public Schools. Latter employment violated 5 U.S.C. § 5533(c)(1) which prohibits pay from more than one position when aggregate gross pay of positions exceeds $7,724. Pay which employee received from District of Columbia Public Schools for period of dual employment was erroneous payment for which he is indebted to District of Columbia government. B-195783, October 2, 1980.

c. Employee as athletic coach by nonappropriated fund activity

The test to determine whether the restrictions of the Dual Compensation Act apply to the head basketball coach employed by the Army Athletic Association, United States Military Academy, a nonappropriated fund instrumentality, is whether the coach occupies a "position" as defined by 5 U.S.C. § 5531(2). In light of the organization and supervision of the Army Athletic Association under the Superintendent of the Academy, and the fact that the Director of Intercollegiate Athletics has the right to supervise the head basketball coach, the coach is an employee who occupies a "position" and is, therefore, subject to the Dual Compensation Act regardless of the fact that the terms and conditions of employment are provided by contract rather than being the general terms applicable to other employees under regulations. B-200240, May 5, 1981.

d. Severance pay

An employee who was receiving severance pay was awarded two consulting contracts. He would not be considered to be receiving dual pay within the meaning of 5 U.S.C. § 5533(a). In order to receive severance pay, an individual must be separated, and an individual who has been separated does not hold a position with the United States during the period covered by his severance pay. B-178446, May 4, 1973.

2. Dual compensation restrictions under 5 U.S.C. § 5532

a. Generally

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 employment 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 government, 5 U.S.C. § 5532. Lieutenant Colonel Robert E. Frazier, USA (Retired), 63 Comp. Gen. 123. However, this case was overruled by Denkler v. United States, 782 F.2d 1003 (1986).

A retired Coast Guard officer who was employed by the National Transportation Safety Board may not receive both his full civilian pay as well as his full retired pay in view of the dual compensation prohibitions in 5 U.S.C. § 5532. Commander George W. Conrad, B-217241, April 9, 1985.

A temporary officer who became entitled to retired pay after 1948 is not entitled to the exemption from the dual compensation provisions for Reserve officers in effect at the time of his retirement. Major John E. Doyle, B-136167, June 25, 1985.

b. National Credit Union Association

A retired Air Force officer employed in a civilian position with the National Credit Union Administration is not exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531, 5532, on the basis of the court's decision in Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986). There the court found that positions with the Federal Reserve Board are

not covered by the dual compensation restrictions because the Federal Reserve Board is a "nonappropriated fund" instrumentality and the only such instrumentalities covered by the law are those of the armed forces. The National Credit Union Administration is an executive agency of the federal government which assesses member credit unions for funds which it uses to pay its expenses and its employees' salaries. Although these funds are collected as assessments from credit unions, they are required by law to be deposited in the Treasury and are spent by the Administration under statutory authority constituting a continuing appropriation; therefore, they are considered "appropriated funds," and the Administration is not a nonappropriated fund instrumentality for purposes of the dual compensation restrictions. Captain Larry A. Fields, USAF (Retired), 67 Comp. Gen. 433 (1988).

C. Whitten Amendment

1. Generally

The time-in-grade restrictions on promotions imposed by the Whitten Amendment (Section 1310 of the Act of November 1, 1951, as amended, printed as a note following 5 U.S.C. § 3101 (1976)), were terminated on September 14, 1978, by Section 101 of the National Emergencies Act, Pub. L. No. 94-412, September 14, 1976, 90 Stat. 1255. However, since the time-in-grade requirements in Part 300, subpart F, of OPM's regulations (5 C.F.R. §§ 300.601 – 300.605) are based on other authority granted OPM, rather than the Whitten Amendment, they will not be affected. Since these regulations do not apply to excepted positions, the expiration of the Whitten Amendment means that General Schedule positions in the excepted service are no longer subject to time-in-grade requirements beyond those imposed by the classification system and the agency itself.

2. Decisions prior to expiration of Whitten Amendment

a. Failure to complete service-in-grade requirement

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

The appointment of veterans to higher grades under the Classification Act of 1949, from a noncivil service register established for attorneys by the Federal Trade Commission, prior to the completion of at least 1 year's service in the next lower grade is not authorized under the provisions of the Whitten Amendment. Thus, offers of such appointments to veterans may be withdrawn without violating the provisions of the Veterans Preference Act of 1944. 31 Comp. Gen. 205 (1951).

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

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

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

b. Hardship cases

Action by CSC (now OPM) purporting to authorize or approve retroactive promotions contrary to the time-in-grade promotion restrictions of Whitten Amendment, under the authority of its hardship proviso, which authorizes OPM to grant exceptions to time-in-grade provisions in meritorious cases, may not be accepted by GAO as authorizing payment of

increased compensation for any period prior to date of action by OPM. 33 Comp. Gen. 140 (1953) and 55 Comp. Gen. 539 (1975).

D. Reemployment of Annuitants

1. Statutory authority

Title 5, U.S. Code § 3323(b) provides that retired annuitants under the Civil Service Retirement Act may be reemployed to serve at the will of the appointing officer. Pursuant to 5 U.S.C. § 8344, no deductions from their pay are required for further annuity credits, but the annuity allocable to the period of actual employment should be deducted, except from any payment for lump-sum leave. Annuitants who have served on a full-time basis for at least 1 year, in employment not excluded from coverage by 5 U.S.C. § 8331, shall have their annuity increased and computed in accordance with 5 U.S.C. § 8339. See also FPM Supp. 831-1, subchapter S-15.

2. Failure to appoint

A civil service annuitant who claims entitlement to full compensation, in addition to his annuity, for temporary full-time duties allegedly performed after his retirement, may not be paid since he was not appointed to a position following retirement. Nathaniel C. Elie, 65 Comp. Gen. 21 (1985).

3. Withholding of annuity from compensation earned

a. Period of actual employment

The provision in 5 U.S.C. § 8344, requiring that the salary of a civil service annuitant who is reemployed be reduced in a sum equal to the retirement annuity allocable to the "period of actual employment," has reference to the actual period during which an annuitant holds the position in which he is reemployed, including all periods of leave without pay as well as all regular nonworkdays forming a part thereof. 28 Comp. Gen. 693 (1949).

b. Deduction of sum equal to retirement annuity

(1) Mandatory requirement—Title 5 of the U.S. Code, § 8344 requires the deduction from the salary paid an annuitant for a position in which he is reemployed of "a sum equal to the retirement annuity allocable to

the period of actual employment." The total annuity payable to a reemployed annuitant must be deducted from the annual salary for the position, and the remainder thereof represents the total salary authorized to be paid for a full year of employment, or the maximum rate of compensation payable for any period of less than 1 year. 28 Comp. Gen. 693 (1949) and B-165430, October 3, 1975.

A retired annuitant who is a member of the Technology Assessment Advisory Council is not exempt from the requirements of 5 U.S.C. § 8344(a) that an amount equal to the annuity allocable to a period of employment be deducted from the pay of an annuitant. That provision covers all positions not specifically exempted, and Congress has not exempted Council members. 53 Comp. Gen. 654 (1974).

Subsection 309(b) of the Disaster Relief Act of 1974 provides for appointment of temporary personnel without regard to the provisions of Title 5, governing appointments in the competitive service. This exemption, limited to the laws and regulations governing appointment to federal employment, does not extend to other requirements or provisions of Title 5, such as the annuity set-off provisions of 5 U.S.C. § 8344(a). Therefore, the salary of a retired civil service annuitant temporarily reemployed under the Disaster Relief Act is required to be reduced by the amount of his annuity. B-188520, April 21, 1977.

(2) Computation of annuity deduction

(a) Reemployed upon per diem or hourly basis—The holding to the effect that the annuity payable to a reemployed annuitant must, in consonance with 5 U.S.C. § 8344, be deducted from the annual salary of the position to determine the total salary payable is applicable in cases where annuitants are reemployed upon a per diem or hourly basis. To determine the per diem or hourly rate properly payable, the rates of such pay should be converted to their per annum equivalent, which equivalent rate should be reduced by the total annuity received, and the remainder thereof to a per diem or per hour rate. 28 Comp. Gen. 693 (1949). See also 32 Comp. Gen. 146 (1952).

(b) WAE consultants and experts—The standard employment year for civil service annuitants who are reemployed as consultants or experts on a when-actually-employed basis is now established at 260 days for the purpose of computing the annual compensation from which the annuity is deducted and for converting the remainder to a per diem rate. 36 Comp. Gen. 186 (1956).

(3) Additional compensation

(a) Overtime—In view of the requirement in 5 U.S.C. § 8344 that a reemployed annuitant must have his per annum salary rate reduced by the annuity received to determine the total salary payable, overtime compensation may be paid upon the same basis and at the same rate authorized by law to be paid other employees who occupy similar positions. 28 Comp. Gen. 693 (1949). See also 32 Comp. Gen. 146 (1952). In computing the aggregate rate of pay for determining maximum limitation on premium pay under 5 U.S.C. § 5547, the regular salary rate of the position, without deduction of the annuity, is to be used. 54 Comp. Gen. 247 (1974).

(b) Cost-of-living allowance—In computing the aggregate amount of compensation payable to an annuitant who is reemployed for duty outside the continental United States, for which additional compensation in the form of a cost-of-living allowance is payable, the reduction required to be made from the salary of said annuitant under 5 U.S.C. § 8344 is not to be regarded solely as a reduction in the basic rate of compensation for the position, but, rather, is to be regarded as a deduction from the amount of "compensation otherwise payable" to the annuitant, which includes basic compensation as well as additional compensation. 29 Comp. Gen. 119 (1949).

(4) Exceptions to deduction requirement

(a) Lump-sum leave payment—In view of the provisions of 5 U.S.C. § 8344(a) and (b), the lump-sum leave payment due on the final separation of an employee who is immediately reemployed after mandatory retirement for age is not to be reduced by the amount of the retirement annuity. 36 Comp. Gen. 209 (1956).

(b) Reemployment without regard to civil service laws—A retired civil service annuitant who is reemployed under an act which authorizes employment, "without regard to the civil service laws or regulations, the Classification Act of 1949 * * * or any other law or regulation relating to either employment or compensation," may have the reemployment conditions prescribed in 5 U.S.C. §§ 3323(b) and 8344, relating to annuity deductions, regarded as within the meaning of the above-quoted phrase and, therefore, the annuity deduction is not required to be made from the salary of the employee. 38 Comp. Gen. 850 (1959). The authority of the Lincoln Sesquicentennial Commission to procure "supplies, services and property" without regard to the laws and procedures applicable to

federal agencies does not have reference to personal services. Additionally, in the absence of any indication of any intent to invoke the above authority to exempt a civil service retired annuitant who was employed under contract by the Commission from the annuity deduction provisions in 5 U.S.C. §§ 3323(b) and 8344, together with the fact that such deductions were made, the employee's compensation must be regarded as subject to annuity deduction. 39 Comp. Gen. 681 (1960).

(c) Independent contractor versus employer-employee relationship—Title 5, U.S. Code, § 8344(a) only applies when an employer-employee relationship exists. See CPLM Title I—Compensation, Chapter 10, for a detailed discussion of this subject matter.

A contract which results in a direct employer-employee relationship between a federal agency and the contractor's personnel is prohibited under current civil service directives. Hence, a federal agency may not properly contract with a commercial firm for the assignment of contractor personnel to the agency's offices to act, for all practical purposes, as duly appointed federal employees in performing personal services for the agency. Office of Revenue Sharing, 66 Comp. Gen. 420 (1987).

(d) Retired judges—A retired territorial judge who receives an annuity under 28 U.S.C. § 373 is not precluded by 5 U.S.C. §§ 5532 and 5533 from accepting employment or an office with the United States, since the office of judge was relinquished upon his retirement and the annuity is not considered salary under the dual salary prohibition of 5 U.S.C. § 5533. However, annuity payments may not be made under 28 U.S.C. § 373 while the judge serves in a fixed salary position in the federal service, because concurrent payments would be inconsistent with policies regarding dual payments of annuity and salary. Also, an appointment which provides for payment of travel and living expenses is not prohibited since authorized travel expenses, which ordinarily would include living expenses, do not constitute salary or compensation. B-144579, February 1, 1961.

(e) Foreign Service annuitants—Subsection 1112(a) of Title 22, United States Code, provides a limitation on the amount of annuity a Foreign Service annuitant may receive while reemployed by the federal government. The annuity, when combined with the salary the employee is entitled to receive in any calendar year, may not exceed the annuitant's salary at retirement. The department asks how the limitation with regard to salary earned in 1 year but not received until the next year should be applied. Our view is that the limitation should apply to the

year when the salary would normally be paid in the usual course of actions. B-195062, January 10, 1980.

E. Statutory Ceilings of Compensation

1. Limitation on pay adjusted under 5 U.S.C. §§ 5301 – 5308

Under 5 U.S.C. § 5308, pay may not be paid by reason of any provision of Chapter 53, Subchapter I, at a rate in excess of the rate of basic pay for level V of the Executive Schedule.

Compensation of Staff Director, U.S. Sentencing Commission, is authorized to be fixed at a rate not to exceed the highest rate prescribed for grade 18 of the General Schedule pay rates. Such compensation may not exceed the rate for level V of the Executive Schedule, since the effect of 5 U.S.C. § 5308 is to limit the maximum scheduled rate of the General Schedule to the level V rate for anyone whose rate of pay is derived from the General Schedule. Higher amounts shown on the General Schedule are merely projections of what the rates would be without this limitation. U.S. Sentencing Commission, 66 Comp. Gen. 650 (1987).

2. Rates of pay fixed on the basis of the General Schedule

a. Deputy Governors of the Farm Credit Administration

The Farm Credit Act authorizes the pay of Deputy Governors to be set by administrative action at rates not to exceed the maximum scheduled rate of the General Schedule. Since the pay of Deputy Governors is paid "by reason of" a provision of Chapter 53, Subchapter I, it is limited to the rate for level V of the Executive Schedule. 56 Comp. Gen. 375 (1977).

b. Land commissioners

Land commissioners appointed by the federal district courts pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure and paid at daily rates not to exceed the highest rate payable under the General Schedule are not limited in the amount they may be paid on a biweekly basis under 5 U.S.C. § 5504. They are, however, subject to the maximum annual limitation contained in 5 U.S.C. § 5308 which prohibits payment of compensation in excess of that allowable in level V of the Executive Schedule. Land Commissioners, B-193584, May 1, 1984.

c. Experts and consultants

The limitation of 5 U.S.C. § 5308 is imposed not only upon individuals paid under the statutory pay systems, but upon individuals whose pay is set by administrative action and subject to adjustment under 5 U.S.C. § 5307. Since the pay of an expert or consultant hired pursuant to 5 U.S.C. § 3109 is fixed by administrative action and is subject to adjustment under 5 U.S.C. § 5307, it is within the scope of the limitation on pay imposed by 5 U.S.C. § 5308. As in the case of most employees, the limitation applies on a biweekly pay period basis. Thus, an expert or consultant may only be compensated an amount which does not cause his total compensation for any biweekly pay period to exceed the biweekly rate of pay for level V of the Executive Schedule. 58 Comp. Gen. 90 (1978).

d. Limitation on prevailing rate employees

Supervisors of prevailing rate employees who negotiate their pay increases are subject to statutorily imposed pay limitation which applies to most prevailing rate employees. These supervisors are within the express terms of the pay increase limitation and are not covered by the specific exclusion from the limitation. 60 Comp. Gen. 58 (1980), distinguished. Voice of America, 64 Comp. Gen. 100 (1984).

The pay caps on wage increases for prevailing rate employees during fiscal years 1982, 1983, and 1984 are applicable to such employees in a wage area where the pay increases are based on wage rates from another area under the Monroney Amendment. Barksdale AFB, 64 Comp. Gen. 227 (1985).

e. Limitation by appropriation act

Section 205 of Pub. L. No. 94-462, 20 U.S.C. § 964 (1982), provides that the Director, Institute of Museum Services, will be compensated at the rate provided for Executive level V positions. However, each appropriation act funding the Institute since it was created in 1976 has prohibited the use of its funds to compensate Executive level V or higher positions. We hold that the appropriations restriction does not apply to the Institute Director's position. Statutes in apparent conflict are to be harmonized whenever possible. Executive level V positions are only those listed in 5 U.S.C. § 5316 or established by the President under 5 U.S.C. § 5317. Since the Institute Director's position is on neither list, it is not an Executive level V position and the statutes are deemed harmonious.

Therefore, the Director may be paid at rate of $63,800 annually, effective December 17, 1982, and $66,400 annually, effective in January 1984. Institute of Museum Services, B-213786, May 18, 1984.

f. Reemployed annuitant

Under special legislation, enacted in response to the air traffic controller strike, a retired air traffic controller who was reemployed part-time by the Federal Aviation Administration (FAA) is entitled to his entire combined salary and annuity payments per pay period as long as the aggregate amount does not exceed the gross amount authorized for level V of the Executive Schedule. The FAA's more stringent pay cap on an hourly basis is incorrect in view of the clear language of 5 U.S.C. § 8344, as amended, that provides for a cap on the aggregate rate of pay for a pay period. Herman J. Halper, 67 Comp. Gen. 424 (1988).

3. Limitation on senior executive service awards

a. Performance awards

See Elizabeth Smedley, 64 Comp. Gen. 114 (1984), digested above at Chapter 1, "C. Senior Executive Service," "3. Performance awards," of this title.

See Senior Executive Service, 62 Comp. Gen. 675 (1983), digested above at Chapter 1, "C. Senior Executive Service," "3. Performance awards," of this title.

b. Meritorious and distinguished executive awards

See Senior Executive Service, 62 Comp. Gen. 675 (1983), digested above at Chapter 1, "C. Senior Executive Service," "4. Meritorious and distinguished executive awards," of this title.

4. Judicial branch positions

Salaries of the Directors of the Administrative Office of the United States Courts and Federal Judicial Center and the Administrative Assistant to the Chief Justice are by statute linked to the salary of a federal district judge. Under Article III of the Constitution, as interpreted by the Supreme Court, federal district judges have received several recent pay increases, notwithstanding the enactment of pay caps limiting pay increases for executive, legislative, and judicial branch officials. Since

district judges' salaries have increased, these three officials are entitled to the same increases, despite pay caps. B-207501, September 27, 1982.

Question presented is entitlement of federal judges to 4 percent comparability adjustment granted to General Schedule employees in October 1982. Section 140 of Pub. L. No. 97-92 bars pay increases for federal judges except as specifically authorized by Congress. Since section 140, a provision in an appropriations act, constitutes permanent legislation, federal judges are not entitled to a comparability increase on October 1, 1982, in the absence of specific congressional authorization. Federal Judges I, 62 Comp. Gen. 54 (1982).

Question presented is entitlement of federal judges to 4 percent comparability increase under section 129 of Pub. L. No. 97-377, December 21, 1982. Section 140 of Pub. L. No. 97-92 bars pay increases for federal judges except as specifically authorized by Congress. We conclude that the language of section 129(b) of Pub. L. No. 97-377, combined with specific intent evidenced in the legislative history, constitutes the specific congressional authorization for a pay increase for federal judges. Federal Judges II, 62 Comp. Gen. 358 (1983).

Question presented is entitlement of federal judges to 4 percent comparability adjustment granted to General Schedule employees in October 1982. Section 140 of Pub. L. No. 97-92 bars pay increases for federal judges except as specifically authorized by Congress. Since section 140, a provision in an appropriations act, constitutes permanent legislation, federal judges are not entitled to a comparability increase on October 1, 1982, in the absence of specific congressional authorization. Federal Judges III, 63 Comp. Gen. 141 (1983).

Federal judge requests reexamination of prior decisions concerning effect of section 140 of Pub. L. No. 97-92, an amendment which bars pay increases for federal judges except as specifically authorized by Congress. Although the sponsor of section 140 now says that the amendment was not intended to be permanent legislation but was to expire with the appropriation act to which it was attached, we hold that section 140 is permanent legislation in view of congressional intent expressed at the time of passage of section 140 and subsequently. Prior decisions are affirmed. Federal Judges IV, 65 Comp. Gen. 352 (1986).

5. Limitation on pay fixed by administrative action

a. Statutory authority

Under 5 U.S.C. § 5373, the head of an executive agency or military department who is authorized to set pay by administrative action may not fix the annual rate of basic pay at a rate more than the maximum rate for GS-18.

b. Crews of vessels

Under 5 U.S.C. § 5348, the pay of officers and members of crews of vessels is to be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry. Since the pay for crews of vessels is fixed by administrative action, such pay is subject to section 5373 and may not exceed the rate for GS-18. 56 Comp. Gen. 270 (1977).

c. Bureau of Engraving and Printing

Bureau of Engraving and Printing craft employees whose pay is set administratively under 5 U.S.C. § 5349(a), "consistent with the public interest," were properly limited to a 4 percent wage increase for fiscal year 1983. Although the pay increase limitation in the 1983 Appropriation Act did not apply to these Bureau employees, agency officials properly exercised their discretion by limiting pay increases consistent with the public interest in accordance with guidance issued by the Office of Personnel Management. Bureau of Engraving and Printing, B-211956, October 21, 1983.

Subchapter II—Restrictions on Acceptance of Compensation From Sources Other Than Federal Funds

A. Prohibition Against Acceptance

1. Statutory authority

Title 18 of the U.S. Code, § 209(a) provides:

"(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

"Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

"Shall be fined not more than $5,000 or imprisoned not more than one year or both."

Title 18 of the U.S. Code, § 209 is not applicable to employees detailed to international organizations pursuant to 5 U.S.C. § 3343(d).

2. Contributions from private sources

a. Rockefeller public service award

A Defense Department employee who receives a Rockefeller Public Service Award is prohibited by 18 U.S.C. § 209 from receiving any expenses (tuition, fees, professional materials, travel, and living expenses) under the grant. However, the authority in the Defense Department appropriation acts for training civilian employees permits the payment of compensation and expenses, including tuition, during the employee's period of study abroad. 36 Comp. Gen. 155 (1956). See also 35 Comp. Gen. 639 (1956).

b. Acceptance of travel expenses

Although the prohibition in 18 U.S.C. § 209 against supplementing the salary of government employees for official services precludes direct payments of cash by private sources to employees of the National Bureau of Standards for travel accommodations, meals, and travel expenses, the furnishing of services in kind (hotel accommodations, meals, and travel accommodations) by private sources may be accepted and utilized, providing the per diem payable by the government to the employee is reduced on the basis of the services furnished. 36 Comp. Gen. 268 (1956) and 55 Comp. Gen. 1332 (1976).

An employee of the Bonneville Power Administration attended a meeting sponsored by a non-profit electric utility corporation and was provided lunch and dinner without cost to the government. Since the corporation is tax-exempt under 26 U.S.C. § 501(c)(3), the employee may accept the meals, as permitted under 5 U.S.C. § 4111(a). Walter E. Myers, 64 Comp. Gen. 185 (1985).

Editor's note: Section 302 of the Ethics Reform Act of 1989, 31 U.S.C. § 1353, permits acceptance of travel expenses from outside sources in some situations (to be prescribed by GSA) regardless of whether the paying company has a 501(c)(3) exemption.

c. Payment by air carrier for failure to provide reserved space

Where an air carrier becomes liable for liquidated damages for failure to provide a government employee on official travel with confirmed reserved space, the government is regarded as damaged by the carrier's default and, since the employee is precluded from accepting payments from private sources as a result of the performance of official duties, the payment should be made to the government and deposited into miscellaneous receipts. 41 Comp. Gen. 806 (1962). See also Chapter 4, Subchapter III, "F. Unused Tickets or Accommodations," in CPLM Title III—Travel.

B. Emoluments From Foreign Governments

1. Annuity payments as damages for injuries

The acceptance of annuity payments made by the German government to a United States employee as damages for injuries inflicted by the Nazi regime while he was a citizen and public official of Germany does not violate Article I, section 9, clause 8 of the United States Constitution

which prohibits the acceptance by government employees of any present, emolument, etc., from a foreign state. 34 Comp. Gen. 331 (1955).

2. World War II pension

An individual who is in receipt of a World War II pension from the British government and who is appointed as a court crier in a United States district court with regularly prescribed duties and compensation fixed by law and payable from appropriated funds is regarded as receiving an emolument from a foreign government and is a person holding an office of profit or trust within the meaning of Article I, section 9, clause 8 of the United States Constitution, so as to preclude the payment of compensation concurrently with the receipt of pension payments from the British government without the consent of Congress. 37 Comp. Gen. 138 (1957).

3. Corporations

Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of federal officers or employees by a foreign government without the consent of Congress in Article I, section 9, clause 8 of the Constitution and the approvals required by section 509 of Pub. L. No. 95-105 (37 U.S.C. § 801 note) in order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government. Lieutenant Colonel Marvin E. Shaffer, USAF, Retired, 62 Comp. Gen. 432 (1983).

Two retired Marine Corps officers who are employed by or are "of counsel" to a law firm incorporated as a professional corporation may not serve as legal counsel for an instrumentality of a foreign government without obtaining the consent of Congress as provided by Article I, section 9, clause 8 of the U.S. Constitution and 37 U.S.C. § 908. The existence of the professional corporation does not affect the application of the constitutional prohibition. Retired Marine Corps Officers, B-217096, March 11, 1985.

Employee Make-Whole Remedies

A. Statutory Authorities

1. Generally

There are a number of remedies provided under law and regulations that are designed to make an employee whole when he has been deprived of compensation or benefits as a result of improper action by an agency official. The single most comprehensive statutory make-whole remedy for federal employees who have been wrongfully deprived of pay, allowances, differentials, or benefits is the Back Pay Act of 1966, 5 U.S.C. § 5596. See James B. Ruch, B-215626, January 7, 1985, as to training expenses. OPM administers this law and has promulgated implementing regulations in 5 C.F.R. Part 550, Subpart H, and in the Federal Personnel Manual Chapter 550, Subchapter 8. Other make-whole remedies include the reinstatement of health insurance under 5 U.S.C. § 8908 to improperly separated employees who are subsequently reinstated. Similarly, life insurance may also be restored to such employees as a make-whole remedy in accordance with 5 U.S.C. § 8706(e). Discrimination in government employment on grounds of race, color, religion, sex, or national origin may be corrected under 42 U.S.C. § 2000e-16(b). For a discussion of labor-management relations and decisions made under Title VII of the Civil Service Reform Act of 1978, see Introduction, Part I of the CPLM.

2. Waiver

Another make-whole remedy is the waiver of claims against employees for overpayments of pay and allowances, including, in appropriate cases, excess leave credited through administrative error. Waiver of such claims is authorized under 5 U.S.C. § 5584, as implemented by regulations promulgated by GAO at 4 C.F.R. Parts 91, 92, and 93, where collection would be against equity and good conscience. See also CPLM Title I—Compensation, Chapter 5, Subchapter III.

3. Restoration of leave

Under provisions of 5 U.S.C. § 6304(d), excess leave that is forfeited may be restored to an employee, where certain agency actions were in part responsible for the forfeiture. See also CPLM Title II—Leave, Chapter 2.

4. Foreign Service

Under 22 U.S.C. § 4137(b), if the Foreign Service Grievance Board finds that the grievance is meritorious, the Board shall have the authority to direct the Department—

(1) to correct any official personnel record relating to the grievant which the Board finds to be inaccurate or erroneous, to have an omission, or to contain information of a falsely prejudicial character;

(2) to reverse a decision denying the grievant compensation or any other prerequisite of employment authorized by laws or regulations when the Board finds that such decision was arbitrary, capricious, or contrary to laws or regulations;

(3) to retain in the Service a member whose separation would be in consequence of the matter by which the member is aggrieved;

(4) to reinstate the grievant and to grant the grievant backpay in accordance with section 5596(b)(1) of Title 5;

(5) to pay reasonable attorney fees to the grievant to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board under section 7701(g) of Title 5; and

(6) to take such other remedial action as may be appropriate under procedures agreed to by the Department and the exclusive representative (if any).

B. Back Pay Act

1. Statutory authority

Title 5, U.S. Code, § 5596 states that

"(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

"(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

"(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

"(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

"(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

"(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

"(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

"(2)(A) an amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest."

Editor's note: Note that several decisions which follow overrule arbitration awards. This was proper before the passage of the Civil Service Reform Act of 1978, but Title VII of that act does not permit GAO to review arbitrator's awards. The decisions are still valid as to the specific holding of entitlement, but we would not apply these decisions to reverse arbitration awards.

2. Effect of MSPB jurisdiction and decisions

General Services Administration requests an advance decision as to whether it may honor a final decision of Merit Systems Protection Board (MSPB) retroactively reinstating individual to position in agency with backpay. This Office will not review final decision of MSPB ordering corrective action under 5 C.F.R. § 330.204 (1978) for violation of individual's reemployment rights under 5 U.S.C. § 8151 (1976). Accordingly, MSPB decision is legal basis upon which individual's backpay entitlements in connection with retroactive reinstatement must be certified for payment. B-206617, May 18, 1982.

Veterans Administration employee's claim for backpay for period of suspension incident to arrest on criminal charges is denied. Although charges were eventually dismissed, agency's indefinite suspension had been affirmed by final order of the Merit Systems Protection Board.

Since there has been no finding under 5 U.S.C. § 5596 by appropriate authority that suspension was unjustified or unwarranted, and since this Office will not review decisions and orders of MSPB, there is no legal basis to consider claim for backpay. Arthur Drake, B-213690, April 16, 1984.

The Merit Systems Protection Board (MSPB) is an "appropriate authority" under the Back Pay Act, and GAO has no authority to review decisions and orders of the Board. Therefore, the Navy must reinstate and pay backpay to an individual whom the Navy removed from employment upon learning that the individual was an alien and not a citizen of the United States. Pepe Iata, B-216285, January 24, 1985.

Employee, whose temporary position expired, charges improper break in service caused her to lose the benefit of the highest previous rate rule when she was later reemployed at only step 1 of her prior grade. Our Office has no jurisdiction to consider her allegations that she was improperly denied appointment to another position or that her reemployment rights were violated. Such matters may be appealed to her employing agency or the Merit Systems Protection Board. Irene Sengstack, B-212085, December 6, 1983.

3. Grievances

Employee filed two grievances with Department of the Army alleging improper rating, ranking, and certification in connection with vacancies for higher grade positions. He was ultimately promoted, and he alleges that the agency violated its own grievance procedures by not rendering a decision within 90 days from the date the grievance was filed. He seeks retroactive promotion and backpay. Matters relating to grievances are within the jurisdiction of the agency and the Office of Personnel Management and normally will not be reviewed by the General Accounting Office. 5 C.F.R. §§ 771.301 - 771.304. Section 771.302, Title 5 of the Code of Federal Regulations, which states that the agency shall require a grievance decision within reasonable time limits, is not a non-discretionary regulation and violation by the agency is not an unjustified or unwarranted personnel action under 5 U.S.C. § 5596. B-202098, April 22, 1982.

This Office will not inquire into matters relative to a grievance since such matters are within the jurisdiction of the employing agency and the Office of Personnel Management. However, if an employee is found to have undergone an unjustified or unwarranted personnel action, we will

authorize the payment of backpay under the provisions of 5 U.S.C. § 5596. Raymond W. Leone, B-222379, April 10, 1987.

Army civilian employee is not entitled to backpay and substitution of sick leave for leave without pay on the sole basis of a favorable grievance examiner's recommendation. The recommendation was denied at a higher level, and the failure of Army officials to forward the recommendation within 8 days as prescribed by agency regulations does not take away the agency's discretionary authority to deny a recommendation since the timeframes are only procedural guidelines. Raymond W. Leone, B-222379, April 10, 1987.

4. Administrative error concept

a. General rule on retroactive pay adjustments

An administrative change in salary of a federal employee may not be made retroactively effective in the absence of a statute so providing. 26 Comp. Gen. 706 (1947); 39 Comp. Gen. 583 (1960); and 40 Comp. Gen. 207 (1960). Thus, where an employee of one regional office of an agency complained that similarly situated employees in other regions were promoted and that he would have been promoted also, had officials of his region properly construed guidance from the agency headquarters, there is no authority to award the employee a retroactive promotion, in the absence of a statute or nondiscretionary agency policy to that effect. 53 Comp. Gen. 926 (1974).

b. Exceptions

As an exception to the general rule, we have allowed retroactive salary adjustments where administrative errors or unjustified or unwarranted personnel actions have deprived an employee of a right granted by statute or regulation or have resulted in a failure to carry out nondiscretionary administrative regulations or policies. 21 Comp. Gen. 369, 376 (1941) and 34 Comp. Gen. 380 (1955).

c. Administrative error as unjustified or unwarranted personnel action

For the most part, our decisions covering administrative errors predated the enactment of 5 U.S.C. § 5596, and, although we have continued to follow the earlier decisions, we have recognized that the act provided additional authority to make retroactive salary adjustments and have recognized that the erroneous actions involved in the earlier decisions

would also constitute unjustified or unwarranted personnel actions under 5 U.S.C. § 5596 and consequently be remediable by the payment of backpay. 54 Comp. Gen. 312 (1974); 54 Comp. Gen. 435 (1974); and 54 Comp. Gen. 888 (1975). Since 5 U.S.C. § 5596 provides broad statutory authority to rectify erroneous personnel actions by providing backpay to employees injured by such actions, it effectively covers those cases which previously could only be handled under our administrative error exceptions to the prohibition against retroactive salary payments. Hence, administrative errors will in the future be treated as a form of unjustified or unwarranted personnel action.

An employee was advised, prior to being detailed to another station, that if she elected, she could be promoted temporarily but would not receive per diem while at the temporary duty station. She elected to receive per diem in lieu of a temporary promotion. Although a temporary promotion was discretionary, the agency had no right to require the employee to make such a choice. Under our decisions predating the Back Pay Act of 1966, this improper agency action would have been considered as an administrative error. However, now it is considered to be an unjustified or unwarranted personnel action. Since the agency stated that the employee would have been promoted but for the improper action, an unjustified or unwarranted personnel action occurred and the employee could be granted a retroactive promotion with backpay under the Back Pay Act for the period of the detail. 55 Comp. Gen. 836 (1976).

5. Determinations regarding unjustified or unwarranted personnel actions

a. Removal

(1) Procedurally defective—The Back Pay Act of 1966 authorizes recovery of pay, allowances, and differentials lost by an employee during a period of separation due to an erroneous personnel action by an agency. Such removals include those that are determined to be procedurally defective. Hence, where an employee resigned and subsequently claimed that his resignation was coerced, if the employee can establish that his resignation was involuntary, his removal would have been procedurally defective and he, therefore, would be entitled to reinstatement and backpay. Gratehouse v. United States, 206 Ct. Cl. 288, 512 F.2d 1104 (1975).

(2) Constructive discharge or removal—Where an applicant for employment in a position was formally notified by the agency of his selection

and the agency subsequently attempted to withdraw its selection and refused to allow the employee to serve, it was held that such action by the agency constituted a constructive removal of the employee from the position to which he was appointed. The employee was, therefore, entitled to have his appointment duly documented on a retroactive basis with backpay for the period involved. B-175373, April 21, 1972 and B-181614, February 5, 1975.

(3) Coerced resignations—A separation by coerced resignation is, in substance, a discharge effected by adverse action of the employing agency, a matter within the hearing and appeals authority of the CSC (now OPM). Two claims for backpay were denied where the claimants contended they were improperly forced to resign but where the record indicated that they had not pursued an application for reinstatement with their former agencies or, on appeal, with the CSC. B-188825, June 10, 1977 and B-187184, April 3, 1978. Also see B-191814, January 15, 1979, denying backpay where the CSC refused to consider an employee's claim that he was improperly coerced to resign by misleading statements on the grounds that his appeal was untimely.

Employee contends that she was forced to resign for fear of retaliation against her because she assisted Air Force investigators with investigation of overtime fraud. After obtaining another position with Air Force at a lower grade, employee claims backpay for period of unemployment and time at reduced grade and relocation expenses. Appropriate authority for consideration of voluntariness of resignation is Merit Systems Protection Board, and without finding of unwarranted or unjustified personnel action by that appropriate authority, there is no basis for backpay award. Roberta L. Randall, B-221623, March 24, 1986.

b. Retirement under misimpression as to annuity

A civilian employee who requested voluntary retirement was later reinstated after he refused to waive military retired pay in order to qualify for a civil service annuity. The employee is not entitled to backpay for the period he was separated since he was counseled prior to separation regarding the waiver of military retired pay. Benjamin C. Hail, B-216573, February 11, 1985. See also B-191495, April 10, 1978 and B-187891, June 3, 1977.

A civilian employee, separated for voluntary retirement, was later restored to the agency rolls because he did not meet the conditions for optional retirement under 5 U.S.C. § 8332 (c). The employee now claims

backpay for the period he was off the rolls. Under the facts of this case, the employee did not undergo an unjustified or unwarranted personnel action for which backpay is authorized since he was properly informed, prior to his separation, of the requirements for retirement. Even though the agency was aware the employee did not intend to waive his military retired pay, there was a basis for retiring him on the face of his retirement application which stated that his retired pay was for Reserve duty, thus exempting him from the waiver requirement. Therefore, the employee's claim for backpay must be denied. Howard L. Bittle, B-226946, July 16, 1987.

c. Retroactive retirements

Agency asks whether retirements may be retroactively effected where agency determined that employees' impending separations were not involuntary so as to entitle them to discontinued service retirements. Later, OPM in identical situation ruled another employee was entitled to discontinued service retirement. Agency may retroactively change employees' records to show that they were retired on February 29, 1980. Here, agency failed to submit question of involuntary separation to OPM for advance decision as required by FPM Supp. 831-1, S11-2(a). This failure constituted administrative error which justifies retroactive relief. B-199774, November 12, 1980. See also B-202274, July 15, 1981; B-200256, May 20, 1981.

Employee whose retirement application was disallowed by Office of Personnel Management after separation from General Services Administration claims backpay, alleging that disallowance and separation were due to agency error. In view of the responsibility of an agency to maintain retirement records and to counsel employees with regard to their retirement rights, where an employee's retirement was induced by administrative error and the employee is subsequently restored to the rolls of the agency, the employee is entitled to backpay for the period he was off the employment rolls. Orlan Wilson, 66 Comp. Gen. 185 (1987).

Employee chose to remain in pay status beyond February 29, 1980, due to uncertainty whether he could return to SES position as reemployed annuitant. He submitted retirement application on March 11, 1980. Agency may not make retirement date retroactively effective to February 29th in order to increase annuity. Effective date of separation is last date employee is carried on the rolls, and employee in pay status may not waive right to compensation to set back date of entitlement to annuity under 5 U.S.C. § 8345(b). Finally, no administrative error is found

to justify relief under Back Pay Act. Frank A. Fishburne, B-199667, October 7, 1980. Affirmed on reconsideration, B-199667, March 2, 1981.

An employee who chose to voluntarily retire on January 8 seeks to backdate his retirement to January 3 in order to receive an annuity payment for the month of January. The payment of annuities is within the jurisdiction of the Office of Personnel Management. As to his duty status, there is no basis to change his duty and leave status based on his assertions that he was unaware of the requirements of existing law. Antoni Sniadach, 64 Comp. Gen. 301 (1985).

d. Reinstatement after improper appointment

Employee claims backpay under 5 U.S.C. § 5596 following Civil Service Commission's grant of a variance of civil service regulations to correct inequitable situation and permit her reinstatement to a position after her previous separation which had been required by the Commission due to an improper appointment. Action by Commission did not constitute a determination that employee had undergone an unwarranted or unjustified personnel action; therefore, claim is denied. B-202318, September 29, 1981.

e. Termination of temporary promotions

Two employees were given temporary promotions not to exceed 1 year. During that period, the agency, without prior notice to the employees, terminated the temporary promotions as part of a major reorganization. They claim backpay because they were not notified of the termination until after it became effective and because they continued performing higher level duties. Since temporary promotions may be terminated at any time in the agency's discretion, and the employees knew or should have known of the terminations, the claims of the two employees for backpay are denied. B-198142, August 19, 1981.

f. Violation of reemployment rights

An individual who was appointed by the Air Force after a determination by the Merit Systems Protection Board that his reemployment rights were violated is not entitled to backpay for the period prior to his actual appointment. He did not have a vested right to employment by virtue of statute or regulation and the agency had discretion with respect to filling position. B-197884, July 15, 1980.

g. Suspension

An employee was placed on involuntary sick leave pending action on an agency-filed application for disability retirement and was continued on involuntary leave while the agency appealed the initial CSC (now OPM) denial of the application. The employee was entitled to backpay and restoration of leave from the date of initial CSC denial to the date employee was restored to active duty, because the agency was obligated either to restore employee to active duty on initial CSC determination or to take action to separate employee pending agency's appeal. B-184522, March 16, 1976.

An employee was placed on involuntary leave on the basis of medical evidence provided by his own physician and the results of a fitness-for-duty examination. The request for disability retirement was denied by OPM, but the agency failed to return the employee to duty for 4 months. The employee's claim for backpay prior to the OPM determination is denied where the agency reasonably interpreted the medical evidence as indicating the employee's incapacity to perform his duties, and OPM did not overturn the evidence. However, the employee is entitled to backpay and restoration of leave for the 4-month period following OPM's determination. Albert R. Brister, B-217171, May 28, 1985.

An employee's claim for backpay for a 4–month period of suspension after her arrest on criminal charges was denied, notwithstanding the subsequent dismissal of those charges, since the employee did not appeal her suspension to the agency or the CSC. The CSC had the function of hearing and deciding appeals of suspensions for more than 30 days and, thus, was the appropriate authority for determining whether the suspension was an unjustified or unwarranted personnel action. B-192643, July 6, 1979.

Placing an employee on involuntary leave pending OPM approval of a disability retirement is not an unjustified or unwarranted personnel action if the action is based on competent medical evidence and such evidence is not overturned by an appropriate authority. Isma B. Saloshin, 63 Comp. Gen. 156 (1984); and Memphis Defense Depot, B-214631, August 24, 1984.

h. Reductions in force

Employees who undergo improper personnel actions incident to a reduction in force may be entitled to remedial action under the Back Pay Act.

Where an agency reduced an employee from GS-15, step 5, to GS-12, step 10, in a reduction-in-force action that was subsequently determined to have been improper, the agency utilized its discretion under the highest previous rate rule to bargain with the employee to have him drop pending arbitration and litigation cases in order to be repromoted to the GS-15, step 5 level. When the employee refused to bargain, agency repromoted employee to GS-15, step 1. The Comptroller General determined that the agency's abuse of discretion was an unjustified and unwarranted personnel action and allowed retroactive correction of the step level to step 5. 54 Comp. Gen. 310 (1974).

i. Reduction in grade

(1) Appeal to MSPB untimely—Where the Merit Systems Protection Board determines employee's appeal untimely, the employee is not entitled to relief for reduction in grade incident to a reduction in force since there has been no determination by the "appropriate authority" as required by 5 U.S.C. § 5596 (1976) that reduction in grade was an unjustified or unwarranted personnel action. B-200281, February 19, 1981.

(2) Voluntary action by employees—An employee who initiates a voluntary transfer with a demotion claims entitlement to relocation expenses and backpay when his new position is abolished and he is placed in another position at the same grade. There is no basis to pay backpay since the employee has not been affected by an unjustified or unwarranted personnel action. Stephen M. Weaver, B-218966, October 3, 1985.

j. Retroactive promotions

(1) Generally—Normally, employees have no vested right to be promoted at any specific time. As a general rule, a promotion action may not be made retroactive so as to increase an employee's right to compensation. The exceptions to this rule, and the cases where backpay may be awarded for failure to earlier promote an employee, are instances in which an administrative or clerical error:

(1) prevented a personnel action from being affected as originally intended,

(2) resulted in a nondiscretionary administrative regulation or policy not being carried out, or

(3) deprived the employee of a right granted by statute or regulations.

See 58 Comp. Gen. 51 (1978); B-190408, December 21, 1977; and B-193918, September 21, 1979.

For purposes of the Back Pay Act, a nondiscretionary provision is any provision of law, executive order, regulation, personnel policy issued by an agency, or collective-bargaining agreement that requires an agency to take a prescribed action under stated conditions and criteria. See 58 Comp. Gen. 59 (1978).

(2) Failure to use adverse action procedures—An agency's regional office promoted an employee from GS-12 to GS-13, but headquarters ordered the promotion canceled for failure to comply with agency regulations requiring headquarters approval on classification actions for GS-13 and above. The CSC concluded on appeal that the employee had, nonetheless, been promoted and that the agency, therefore, had improperly failed to use adverse action procedures to reduce him in grade to GS-12. The agency must implement CSC's order to rescind cancellation of the promotion and the employee is entitled to backpay at the GS-13 level. B-187028, October 1, 1976.

(3) Court order vacating promotion—A court ordered the agency to remove two employees from GS-14 positions to which they had been promoted pending resolution of a complaint filed by a third employee who had not been selected for promotion to GS-14. The court ordered the third employee placed in one of the two vacant positions and ordered the agency to take "whatever personnel action it deems appropriate, including reinstatement at the GS-14 level" with respect to the first two employees. If the agency determines that the two employees' removal from their GS-14 positions constitutes an unjustified or unwarranted personnel action, the employees may be awarded backpay. B-191611, April 19, 1978.

(4) Personnel action not effected as intended

(a) Generally—In cases involving approval of retroactive promotions on the ground of administrative or clerical error, it is necessary that the official having delegated authority to approve the promotion has done so. Thus, a distinction is drawn between those errors that occur prior to approval of the promotion by the properly authorized officials and those that occur after such approval but before the acts necessary to effectuate the promotion have been fully carried out. The rationale for drawing this distinction is that the individual with authority to approve promotion requests also has the authority not to approve any such

request, unless his exercise of disapproval authority is constrained by statute, administrative policy, or regulation. Where the error or omission occurs before he exercises that discretion, administrative intent to promote at any particular time cannot be established. After the authorizing official has exercised his authority by approving the promotion, all that remains to effectuate that promotion is a series of ministerial acts. In that case, since administrative intent to promote is established, retroactive promotion as a remedy for failure to accomplish those ministerial acts is appropriate. 58 Comp. Gen. 59 (1978) and B-190408, December 21, 1977.

(b) Only applicant rated highly qualified for the position—A former GS-11 employee who was wrongfully separated and who seeks a retroactive promotion to GS-12 as part of his backpay award has established prima facie entitlement to promotion where (1) his former position was advertised at the GS-12 level on the day after his separation and (2) he was the only applicant rated highly qualified for the position. Since the agency has not offered any evidence to rebut the employee's prima facie showing that he would have been promoted but for his unjustified separation, backpay should be calculated at the GS-12 level. Mark J. Worst, B-223026, November 3, 1987.

(c) Equal treatment of employees—Promotion papers for three GS-13 employees were logged in by the personnel office on the same day, but the promotion of one was effective a pay period earlier than the other two. The grievance examiner's award of retroactive promotion with backpay for one employee, based on the fact that the classification officer had approved a promotion for the other individual more than a pay period earlier cannot be implemented. The grievance examiner erred in finding that approval by the classification officer provided a basis for payment of backpay since the personnel officer, who did not approve the promotion until a pay period later, was the official with the delegated authority to approve promotion and that authority had not been further delegated. 58 Comp. Gen. 51 (1978).

(d) Lost or misplaced promotion documents—Where an employee's career-ladder promotion was delayed because the original promotion request was lost in the mails, HEW may not comply with the arbitrator's award of retroactive promotion with backpay. Since the original promotion request was lost prior to its approval by the properly authorized official, the delay in processing the promotion does not constitute administrative error of a nature that will support retroactive promotion.

B-190408, December 21, 1977. To the same effect, see 58 Comp. Gen. 59 (1978).

(e) Delayed or improperly initiated promotion request—An employee's promotion was delayed because his supervisor failed to properly initiate a promotion recommendation. The supervisor was under the impression that his earlier evaluations and performance ratings were all that was necessary to initiate a promotion action. Since promotions under the Department of the Treasury's training and development programs are discretionary and since there is no evidence that discretion had been exercised at an earlier date, there is no basis for holding the employee's subsequent promotion to be retroactively effective. B-181238, December 21, 1976. The same result was reached in B-193391, December 27, 1978, and B-194989, August 8, 1979, in which the employees' office or supervisor failed to promptly initiate their promotion requests.

Employee contends that as a student trainee under the Cooperative Education Program, he was not properly counseled regarding his right to seek an entry-level, career-conditional appointment at the grade GS-7 level, and his promotion was therefore delayed. Although the agency failed to properly advise him, the delays that occurred did not deprive him of any rights granted by statute or regulation nor was there any violation of nondiscretionary regulation or policy which would be the basis for a retroactive promotion and backpay. Gregory A. Walter, B-208397, March 6, 1984, sustaining upon reconsideration Gregory A. Walter, B-208397, August 29, 1983.

(f) Delays in evaluating employee's qualifications—Where the agency's improper evaluation of an employee's prior experience delayed his promotion, the employee is not entitled to retroactive promotion with backpay since the error did not prevent a personnel action from taking effect as originally intended. B-189678, December 20, 1977.

Where a VA employee's promotion from GS-4 to GS-5 was delayed because OPM initially disagreed with the VA's determination that the employee had the necessary experience, the employee is not entitled to be promoted retroactively. The promotion delay was not an unwarranted or unjustified personnel action since it resulted from a substantial qualification question and since the employee had no absolute right to be promoted at any time. B-192434, November 21, 1978.

Because her qualifications had been incorrectly evaluated, employee was reassigned to another position in a different job series at grade GS-4 rather than the correct grade of GS-5, which she had held in her previous position. Employee is not entitled to retroactive promotion to GS-5 since the error did not prevent a personnel action from taking effect as originally intended, the employee was not deprived of a right granted by statute or regulation nor was a nondiscretionary agency regulation or policy violated. B-202296, December 29, 1981.

An employee was selected from a selection register for promotion and was told of her promotion orally, but she was not actually promoted until 1 month later due to administrative delays in processing the necessary paperwork. Her claim for a retroactive promotion is denied since the delays occurred before the authorized official approved her promotion and since there was no violation of a nondiscretionary agency regulation or policy. Agnes Mansell, 64 Comp. Gen. 844 (1985).

(g) Time-in-grade incorrectly computed—Where the regional personnel office looked at an employee's part-time status instead of the actual number of hours worked (essentially full-time), the employee's promotion was delayed 4 weeks until the error could be corrected. However, absent a nondiscretionary agency policy, the promotion may not be made retroactively effective since the delay occurred before the appropriate official could approve the promotion. Rita H. Rains, B-217831, October 23, 1985.

k. Nondiscretionary agency policy

(1) Generally—An agency may, through the promulgation of regulations or the negotiation of a collective-bargaining agreement, vest in specified employees the right to be promoted on an ascertainable date as provided by the regulations or agreement. B-181173, November 13, 1974; 54 Comp. Gen. 69 (1974); 54 Comp. Gen. 403; and 54 Comp. Gen. 538.

(2) Highest previous rate—Employee accepted grade GS-3, step 1 position with Veterans Administration (VA) but seeks retroactive salary adjustment and backpay because the VA did not allow her additional steps in grade GS-3 based on her highest previous rate (grade GS-6, step 8). The employee's claim is denied since (1) payment of the highest previous rate is discretionary with the agency, (2) applicable VA regulations do not require payment of the highest previous rate in these circumstances, and (3) the VA's determination was not shown to be arbitrary,

capricious, or an abuse of discretion. Barbara J. Cox, 65 Comp. Gen. 517 (1986).

(3) Stated agency policy—In cases of career-ladder positions, it was the IRS' policy to promote agents where the supervisor had certified to the acceptability of the agent's level of competence. Thus, eight IRS agents in career-ladder positions, whose promotions were delayed due to administrative oversight, may be retroactively promoted and given backpay based on the IRS' failure to comply with its nondiscretionary policy to promote certified acceptable employees at 1 year. B-186916, April 25, 1977. Compare B-189673, February 23, 1978, holding that an informal understanding with an employee concerning his career progression did not constitute a nondiscretionary agency policy, depriving the agency of discretion in the matter of his promotions. (Note however, "l. Provision of collective-bargaining agreement," below.)

A headquarters memorandum directing the promotion of all employees occupying Air Reserve Technician foreman positions constituted a nondiscretionary agency policy. Although the agency failed to include the employee's instrument mechanic foreman position on a list of positions to which the policy applied, the employee is entitled to a promotion with backpay retroactive to the date when other foremen were promoted. Omission of the existing and occupied foreman position from the list was an administrative error which resulted in the failure to carry out a nondiscretionary agency policy requiring the promotion. Wiley H. Stephens, 66 Comp. Gen. 114 (1986). See also Department of Agriculture, B-211784, May 1, 1984.

Agency asserts that its internal regulations which establish a policy to make temporary promotions for details mandatory after 30 days, was based on our early Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) sustained at 56 Comp. Gen. 427 (1977). Therefore, agency argues that after Turner-Caldwell III, 61 Comp. Gen. 408 (1982), which overruled prior Turner-Caldwell decisions, the agency's policy changed and its regulations did not require such temporary promotions. However, a reading of the applicable agency regulations show that no changes were made, and, therefore, we conclude on the basis of the agency's regulations that a nondiscretionary policy to grant temporary promotions for employees detailed to a high-graded position for more than 30 days existed. Accordingly, the employee may be granted a retroactive temporary promotion beginning the 31st day of the detail. Howard A. Morrison, B-210917, August 10, 1983.

Federal Aviation Administration (FAA) questions overtime entitlement of certain air traffic controllers who were fired but later restored retroactively. Although FAA contends there was no nondiscretionary policy governing the assignment of overtime, our decisions concerning overtime pay in backpay awards do not require such a policy. The overtime the controller normally would have worked during the period of separation should be determined by the FAA based upon prior overtime payments or upon overtime paid to similar employees who were not removed, and must be included in the backpay award. Ronald J. Ranieri, B-207977.2, August 23, 1983.

An employee who was assigned the duties of a vacant and high-graded position is entitled to a retroactive temporary promotion in view of a nondiscretionary agency policy to temporarily promote each employee who assumes the duties of the vacant position. Donna J. Safreed, B-216605, March 26, 1985.

l. Provision of collective-bargaining agreement

(1) Generally—An agency head may exercise his normal promotion or appointment discretion on a prospective contingent basis by providing in agency regulations or agreements that employees who satisfy stated criteria are entitled to be promoted on a fixed or ascertainable date. For example, an agency included a provision in its collective-bargaining agreement that employees in career-ladder positions would be promoted on the first pay period after 1 year in grade when certain performance criteria were met. The employees' supervisors neglected to process the promotion request timely, which violated the agreement. We held that the agency was authorized under Back Pay Act to correct this error by granting retroactive appointments with backpay. 55 Comp. Gen. 42 (1975).

While employees have no vested right to promotion at any specific time, an agency, by negotiation of a collective-bargaining agreement, may limit its discretion so that under specified conditions it becomes mandatory to make a promotion on an ascertainable date. However, the mere inclusion of a provision dealing with promotions in a collective-bargaining agreement does not establish that provision as a nondiscretionary agency policy. It must define the promotion or other action that should be taken, as well as the conditions and criteria under which that action should be taken. Thus, an arbitrator's finding that the misplacing of promotion documents that delayed an employee's promotion was "inequitable" and in violation of a provision in the collective-bargaining

agreement requiring that "promotion principles be applied in a consistent manner with equity to all employees" does not provide a basis for retroactive promotion. 58 Comp. Gen. 59 (1978).

CSC (now OPM) objected to an office's merit promotion plan and suspended its authority to classify and promote. That action resulted in career-ladder employees not being promoted in compliance with a labor-management agreement provision requiring journeyman level employees to be promoted when they have met the qualification requirements, when they have demonstrated ability, and provided there is sufficient work. The employees may be retroactively promoted. Failure to comply with that provision of the agreement may be considered an unjustified or unwarranted personnel action, notwithstanding the CSC's action, since CSC did not object to the classification of the career-ladder positions, which are noncompetitive and excepted from the merit promotion plan. B-187452, December 21, 1977.

Employee's claim for a retroactive temporary promotion and backpay incident to an overlong detail is denied pursuant to Turner-Caldwell III, 61 Comp. Gen. 408 (1982). An exception to the Turner-Caldwell rule exists where a collective-bargaining agreement prescribes temporary promotions in the case of overlong details to higher grade positions; however, the employee's claim does not fall within this exception since he had not been detailed to a higher grade position. Lee R. Schneider, B-233131, June 22, 1989. See also B-181173, November 13, 1974.

(2) Equal pay concepts—Award of retroactive promotion and backpay may not be sustained based on an arbitrator's finding that an employee whose promotion request was lost in the mail, was not earlier promoted in violation of a collective-bargaining agreement provision incorporating the principle of equal pay for equal work. The delayed promotion did not violate a nondiscretionary policy since the arbitrator did not and, in fact, could not find that the principle of equal pay for equal work mandates career-ladder promotions at a specific date. B-190408, December 21, 1977. Similarly, an arbitration award of retroactive promotion with backpay may not be implemented based on the arbitrator's finding of a violation of a collective-bargaining provision requiring "equal opportunity" in the promotion programs. B-192556, December 4, 1978.

(3) Agreement to "timely consider" for promotion—An employee whose transfer between district offices delayed her promotion for an extra month may not be retroactively promoted and given backpay based on

the union's argument that the agency failed to "timely consider" her for promotion as required by their agreement. Management's agreement "where possible to timely consider the promotion of employees when they are first eligible" does not require a promotion within any prescribed time frame or in accordance with any stated conditions or criteria. Failure to promote did not violate a nondiscretionary agency policy. B-194989, August 8, 1979. Compare B-189675, October 7, 1977.

m. Right granted by statute or regulation

(1) Generally—An agency may not retroactively promote an employee where its intent to permanently promote and reassign a GS-3 employee to a GS-4 position on August 4, 1975, was frustrated by its failure to follow merit staffing procedures. The employee had no vested right to a promotion. 56 Comp. Gen. 1003 (1977).

(2) Equal pay concepts—The failure to treat an employee in precisely identical or equal manner to other similarly situated employees does not constitute an unjustified or unwarranted personnel action, entitling an employee to retroactive promotion. B-182950, January 23, 1978. The principle of equal pay for equal work, which is the basic precept of the position classification system, does not create a vested right on the part of an employee to promotion at any particular time. B-190408, December 21, 1977.

(3) Career-ladder promotions—The Federal Election Commission is advised that there is no authority to retroactively grant career-ladder promotions withheld for budgetary reasons since their promotion policy is discretionary and a failure to promote would not violate policy, regulations, or a negotiated labor agreement. A federal employee is not entitled to the benefit of a position until he has been duly appointed to it, and the Back Pay Act would not apply where a determination could not be made that an unjustified or unwarranted personnel action occurred. Federal Election Commission, B-229290, June 10, 1988. See also B-204019, February 8, 1982; B-191392, April 20, 1978; and B-190408, December 21, 1977.

(4) Retroactive temporary promotions for details—See Chapter 8 of this title.

(5) Promotions involving classification matters—The U.S. Supreme Court in United States v. Testan, 42 U.S. 392 (1976), held that the Back

Pay Act does not afford a remedy for periods of erroneous classification, except in the case of an employee who has suffered a withdrawal or reduction of pay through an improper downgrading. Thus, an employee who was found by the CSC to have been improperly classified as GS-9 and whose position was reclassified at a higher-paying Federal Wage System position is not entitled to backpay based on the higher rate of pay for the reclassified position. 57 Comp. Gen. 404 (1978). An arbitrator's award of a retroactive promotion with backpay for the agency's failure to earlier reclassify an employee's position for GS-13 to GS-14 may not be implemented. Positions may not be retroactively reclassified except as provided in 5 C.F.R. §§ 511.701 - 511.703. B-186758, March 23, 1977.

(6) Promotion delayed due to reclassification review—Two employees claim retroactive promotions and accompanying backpay for the 5–month period that their career-ladder promotions were delayed due to a reclassification review. Generally, a career-ladder promotion is discretionary with the agency unless there is a mandatory agency regulation or policy which states otherwise. In this case, the claims are denied since the job announcement indicating a promotion potential to a particular grade for the employees' positions did not constitute a nondiscretionary administrative regulation or policy which if not carried out would constitute an "unjustified or unwarranted personnel action" by the agency under the Back Pay Act, 5 U.S.C. § 5596 (1982). Ella M. Richardson and Sharon G. Dover, B-227331, February 29, 1988.

An employee seeks backpay for the period during which she performed the duties of a position which was later reclassified to a higher grade. The employee is not eligible for backpay since a federal employee is entitled only to the salary of the position to which the employee is appointed, regardless of duties performed. Even though a position is subsequently reclassified to a higher grade consistent with the duties the employee has been performing, such action may not be made retroactively effective. United States v. Testan, 424 U.S. 392 (1976). We find that the step III grievance decision awarding backpay to the employee is in error and may not be implemented. Valerie Pannucci Reynolds, 66 Comp. Gen. 346 (1987). See also John E. Boren III, B-220786, March 3, 1986.

(7) Delayed administrative processing of promotions—Because promotion appointment authority is discretionary with the agency official granted such authority, an employee is not entitled to a promotion until such appointment authority has been exercised. For example, in a

regional office of a large federal department, approximately 350 promotion actions were delayed from one pay period to several months as a result of alleged ineffective management coupled with an unusually heavy workload which caused a breakdown in the processing of personnel actions within the agency. The agency corrected its procedure and sought authority to award retroactive promotions for the period of delay. We held that inasmuch as the official who was delegated authority to approve such promotions had not done so, there was no statutory authority under which retroactive promotions and backpay could be awarded. B-183969, B-183985, July 12, 1975.

6. Retroactive change in initial appointments

As a general rule, initial appointments, like promotion appointments, may not be administratively changed on a retroactive basis in the absence of specific statutory authority. As an exception to this rule, we have permitted retroactive adjustments when agencies have failed to carry out nondiscretionary administrative regulations, agreements, and policies. Hence, where an agency had a nondiscretionary policy to initially appoint law clerks and attorneys in grade GS-9 unless they possessed specified superior qualifications that entitled them to grade GS-11, the agency head was authorized to retroactively appoint two GS-9 law clerks in grade GS-11 and grant backpay when the agency discovered that the two had satisfied the superior qualifications requirement when they were initially appointed. B-181223, July 29, 1974.

An employee who was hired at a certain grade level may not receive backpay retroactive to the date of his appointment merely because the employing agency subsequently placed him in a higher step of the grade level and then promoted him to a higher grade level, after it had determined that his education and experience qualified him for the higher grade and step than he was given when appointed. An appointment at a higher level would have been discretionary rather than mandatory. Consequently, at the time of appointment there was no administrative error depriving the employee of a legal right to be hired above grade level in which he was appointed. Antonio O. Lee, B-229447, September 14, 1988. See also Doris J. Lindstrom, B-214531, August 24, 1984; and 60 Comp. Gen. 442 (1981).

An employee of Department of the Army was appointed at grade GS-15, step 1, where agency, through administrative oversight, did not act timely to obtain the required approval of the Civil Service Commission to appoint him at step 7 of grade GS-15. The employee may not receive a

retroactive increase in pay because, under 5 U.S.C. § 5333 (1976) and implementing regulations, "prior approval" by the Commission was required for the appointment at a rate above the minimum rate of the appropriate grade. B-197728, November 7, 1980.

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with backpay under 42 U.S.C. § 2000e-16(b). A cash award was granted to the employee under the Employee Incentive Awards Act during the period of the discriminatory personnel action. We hold that the award should not be offset against backpay since such an offset would contravene the make-whole purposes of 42 U.S.C. § 2000e-16(b). Moreover, once the cash award was duly granted in accordance with the awards statute and regulations, the employee acquired a vested right to the amount awarded. Ladorn Creighton, 62 Comp. Gen. 343 (1983).

7. Retroactive periodic step increases

Under 5 U.S.C. § 5335, employees of the General Schedule are entitled to within-grade increases when certain specified criteria are satisfied. Retroactive within-grade increases may be awarded upon a determination by appropriate authority that such increases were delayed as a result of administrative error or unjustified or unwarranted personnel action. Hence where an agency withheld within-grade increases during a Presidential wage-price freeze, and subsequently determined that the freeze did not cover within-grade increases, the agency was authorized to retroactively correct this error and provide backpay. B-173976.10, July 11, 1972. See also 37 Comp. Gen. 300 (1957) and 37 Comp. Gen. 774 (1958).

8. Retroactive quality step increase

Because an employee's supervisor insufficiently documented his recommendation for a quality step increase and used obsolete evaluation forms, her quality step increase was delayed. The granting of a quality step increase is discretionary. Because the employee did not have a vested right pursuant to statute or agency regulation to a quality step increase until the appropriate agency official approved the recommendation, the employee did not suffer an unjustified or unwarranted personnel action because her promotion was delayed beyond the date she first became eligible. 58 Comp. Gen. 290 (1979). However, where agency regulations required agency approval or disapproval of a quality step increase within 30 days of recommendation, an employee's quality step increase may be made retroactively effective under the Back Pay Act

where the approving officer's failure to act upon the recommendation for almost a year was found to be improper by the agency and hence was tantamount to an unjustified or unwarranted personnel action. B-192372, January 2, 1979.

An employee received a quality step increase in her GS-5 position subsequent to actions denying her a promotion to GS-6 for which she successfully brought a discrimination complaint. In determining her backpay entitlement incident to retroactive promotion to GS-6, the quality step increase she earned in the lower grade position may not be treated as if it had been awarded in the higher grade position to which she was retroactively promoted. Mary Ellen Casco, B-217501, March 12, 1986.

9. Retroactive adjustment of rate of pay

When an appropriate authority determines that an employee's rate of pay has been improperly set and that such agency action was an unjustified or unwarranted personnel action, a retroactive pay adjustment may be made to correct the error. For example, backpay has been allowed in a case where the step rate of a prevailing rate employee who has converted to the General Schedule was determined by appropriate authority to have been set at a lower rate than required by applicable regulations. 51 Comp. Gen. 656 (1972). Also, an employee who was denied the benefit of the highest previous rate, which the agency admits he would have received if he had been willing to drop certain grievance actions initiated by him, was awarded the rate retroactively since the agency's terms were improper and it committed an abuse of discretion in carrying out its threat to award him the lower rate if he did not drop his grievance actions. The agency's action was an unjustified or unwarranted personnel action. B-180997, October 30, 1974.

Claimant resigned his position with one agency and applied for an appointment with a different agency doing the same type of job. His application was rejected based on a determination of unsuitability following an Office of Personnel Management investigation. This negative determination was ultimately reversed by the Merit Systems Protection Board and claimant was then appointed to the position. Claimant now seeks backpay and benefits under 5 U.S.C. § 5596, for the period of the delay caused by the improper suitability determination. Claim for backpay is denied. Since the claimant was not a federal employee at the time of his application and had no vested right to employment, he was not eligible for backpay under 5 U.S.C. § 5596. Thomas J. Rudolph, B-219859, September 19, 1986.

10. Pay adjustments for supervisors

A General Schedule supervisor whose salary rate was less than prevailing rate employees he supervised, is not entitled to retroactive adjustment of his rate of pay for his agency's failure to set his pay at a higher rate under 5 U.S.C. § 5333(b). Entitlement to a pay adjustment under section 5333(b) is within the discretion of the agency. Since there was no mandatory agency policy requiring the pay adjustment, a General Schedule supervisor whose pay was less than the pay of the prevailing rate employees he supervised is not entitled to backpay. B-165042, December 21, 1978. Absent a mandatory policy, an agency that once adjusted a General Schedule supervisor's pay under 5 U.S.C. § 5333(b) is not required to adjust that supervisor's pay each time the Wage Board employees she supervises receive a pay increase. B-191523, September 5, 1978.

However, where Air Force regulations specifically provided that a request for pay adjustment must be initiated on behalf of a General Schedule supervisor of higher paid prevailing rate employees, the Air Force's failure to identify an employee as eligible for pay adjustment under 5 U.S.C. § 5333(b) constituted a failure to carry out a nondiscretionary regulation. The employee's pay may be adjusted retroactively and he may be awarded backpay. 55 Comp. Gen. 1443 (1976), as modified by 57 Comp. Gen. 97 (1977).

11. Retroactive increase for advanced step placement

Attorney-advisor in U.S. Air Force claims retroactive advanced step placement and accompanying backpay based on detrimental reliance on erroneous salary listed on vacancy announcement. His claim is denied. Although OPM allowed advanced step placement based on superior qualifications to relieve hardship, retroactive adjustment is not authorized under 5 U.S.C. § 5596. Failure by agency to request advanced step placement is not a violation of a nondiscretionary regulation or policy. B-203528, April 13, 1982.

Employee of EEOC was hired with the understanding she would be appointed at step 3 of grade GS-14. After actual appointment at minimum step of that grade, it was discovered that prior approval of the higher rate was not obtained from the Office of Personnel Management (OPM), due to administrative oversight. Upon subsequent, but prospective, approval of higher step placement by OPM, a claim for retroactive increase in that pay was denied. Under 5 U.S.C. § 5333, the applicable

regulations, and our decisions, appointments to grades GS-11 and above may be made at a rate above the minimum rate of the grade, but only with prior OPM approval. Since such an appointment is discretionary and not a right, the employee may not receive a retroactive increase. Susan E. Murphy, 63 Comp. Gen. 417 (1984).

12. Overtime

Where the union and agency stipulated that a violation of their collective-bargaining agreement had occurred when an employee was denied an overtime assignment, and they requested a ruling from this Office concerning whether backpay could be granted the employee, we held that the employee was entitled to backpay. We indicated that if the agency had not improperly assigned the work, the employee would have worked overtime and received overtime compensation. 54 Comp. Gen. 1071 (1975). See 55 Comp. Gen. 171 (1975) and 55 Comp. Gen. 405, for similar cases involving arbitration awards. See also B-188125, October 31, 1977, in which we awarded Sunday, night, and holiday backpay. In another case, however, we refused to allow implementation of an arbitration award that awarded backpay for overtime not worked to a group of shipyard workers whose hours of work had been rescheduled in violation of consultative provisions in the collective-bargaining agreement. The arbitration award failed to satisfy the "but for" test because there was no showing that the agency could not have rescheduled the employees' hours of work as it did, had it properly followed the consultative provisions of the agreement. Thus there was no basis for backpay. 55 Comp. Gen. 629 (1976).

Employee who was denied a promotion because of age discrimination is entitled to be credited with the amount of compensatory time earned by the incumbent of the position she was denied for all periods during which she would have been ready, willing, and able to perform the duties of the position. Since the employee now is retired, she may receive overtime pay for these compensatory hours as part of her backpay award. Lillian B. Crosier, 68 Comp. Gen. 657 (1989).

Employee claims that he is entitled to additional overtime pay as part of his backpay award based on overtime hours worked by other employees during period of his separation. Agency based overtime payment on amount of overtime worked by the employee during preceding year. Based on the facts presented, this Office cannot say that the formula used by the agency in computing his entitlement to overtime is incorrect. Employee's claim for additional overtime in this respect is denied.

Kenneth L. Clark, 62 Comp. Gen. 370 (1983). See also Mark J. Worst, B-223026, November 3, 1987.

13. Environmental and hazardous duty differentials

Where a food service employee worked in a cold storage area and was exposed to temperatures below freezing for substantial periods of time, we held that he was entitled to an environmental differential on a retroactive basis for the periods of exposure despite the fact that the agency provided him with protective clothing. 53 Comp. Gen. 789 (1974) and B-163901, May 2, 1973.

14. Awards

Where an arbitrator found that an employee had been discriminated against in violation of the agency's and union's bargaining agreement which precluded discrimination in use of the agency's awards program, the arbitrator's order that the employee be given a cash performance award is improper. The granting of awards under the Incentive Awards Act is discretionary with the agency. The language contained in the labor agreement did not establish a nondiscretionary agency policy changing the granting of awards to a nondiscretionary exercise. 56 Comp. Gen. 57 (1976).

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with backpay under 42 U.S.C. § 2000-16(b) (1976 & Supp. III 1979). Under regulations implementing section 2000e-16(b), set forth in 29 C.F.R. § 1613.271(b)(1), backpay must be computed in the same manner as if awarded pursuant to 5 U.S.C. § 5596, and its implementing regulations set forth in 5 C.F.R. § 550.805. The standards for computing backpay must be applied in light of the make-whole purposes of 42 U.S.C. § 2000e-16(b). Ladorn Creighton, 62 Comp. Gen. 343 (1983).

15. Agency failure to forward claim to GAO

Decisions where we have held that a claim for sick leave is not a monetary claim cognizable by the Comptroller General, and subject to the Barring Act, are overruled. Irene L. Marek, 67 Comp. Gen. 188 (1988).

16. Post differential and living quarters allowance

A predecessor of the Back Pay Act of 1966 was applied to retroactively compensate an employee who was removed while stationed overseas and entitled to a post differential. The employee was transported back to the United States, where he proceeded with legal action that ultimately succeeded in his reinstatement. Although the employee remained in the United States throughout the period his legal action was pending, his entitlement to a post differential was included in the award, since he would have received it but for his unjustified removal. Vitarelli v. United States, 150 Ct. Cl. 59 (1960). The Back Pay Act of 1966 has been applied to compensate an employee stationed overseas who, at the time of an unjustified removal, was receiving a living quarters allowance pursuant to 5 U.S.C. § 5923 and section 031, Department of State Standardized Regulations (Government Civilians, Foreign Areas). The living quarters allowance was included in a backpay award despite the fact that the employee had been returned to the United States at the time of removal. Urbina v. United States, 192 Ct. Cl. 875 (1970).

An Army employee who had filed a religious discrimination complaint returned from Europe to the United States and resigned. To resolve the complaint, the Army negotiated a settlement agreement providing for reinstatement to an overseas position without a break in service, and backpay retroactive from the date of resignation to the date of reinstatement. The backpay award may include an overseas living quarters allowance between the date the employee left Europe and the date of his reinstatement. Harold Darefsky, 66 Comp. Gen. 422 (1987).

17. Personnel actions not affecting pay

An employee's reassignment and reduction in rank from a GS-12 supervisory position to a GS-12 nonsupervisory position was determined to be an erroneous personnel action. However, that erroneous personnel action creates no entitlement to a retroactive temporary promotion and backpay because it did not affect his pay and allowances so as to constitute an unjustified or unwarranted personnel action remediable pursuant to 5 U.S.C. § 5596 (1976). 59 Comp. Gen. 185 (1979). See also B-205452, June 14, 1982.

18. Attorney fees

a. Generally

Regulations authorizing reasonable attorneys' fees are in 5 C.F.R. § 550.807.

A civilian employee of the United States Coast Guard filed a grievance contesting her annual performance rating. The final agency decision upgraded the employee's performance rating and granted her request for attorney fees. Before attorney fees may be paid, the agency must determine that the employee's rating was "affected by an unjustified or unwarranted personnel action" as required by 5 U.S.C. § 5596, and that the award of attorney fees would be in the interest of justice as required by the governing regulations under the act. The case is remanded to the Coast Guard to make the necessary determinations. Marilyn L. Scarbrough, B-231813, August 22, 1989.

An employee, subject to an Inspector General investigation caused by a third party, may not be reimbursed expenses he incurred for microfilming and researching his banking records after he produced the records at the Inspector General's request. There is no authority for reimbursement of the expenses that were voluntarily incurred, and for which there was no obligation to incur. Moreover, attorney's fees incurred by the employee may not be paid since the agency, having decided to investigate the employee, did not have a common interest with him. B-212487, April 17, 1984.

b. In the interests of justice

The union representing the employee failed to demonstrate that the agency knew or should have known it would not prevail on the merits of a case. Therefore, payment of attorney fees is not warranted in the interest of justice. Elias S. Frey, B-208911, June 10, 1983, sustained on reconsideration, B-208911, March 6, 1984.

c. Prevailing party

Employee who prevailed on appeal before MSPB was awarded attorney fees in connection with that appeal. His subsequent claim for attorney fees in connection with negotiating the amount of his backpay is denied since he was not a "prevailing party" on this issue. Jack M. Haning,

63 Comp. Gen. 170 (1984). See also Gregorio Natividad, B-213316, February 23, 1984.

d. Appeals before MSPB

An employee was discharged from his position on June 15, 1979. Such action was found to be unjustified by the MSPB, and the MSPB restored the employee to his position but denied his claim for attorney fees under 5 U.S.C. § 7701(q). This Office has no authority to review MSPB decisions, and therefore, the denial under section 7701(q) must stand. If an attorney fees claim is being asserted under 5 U.S.C. § 5596(b)(A)(ii), then that claim is also denied, since claimant has not prevailed on any of the backpay computation issues raised with the agency or this Office. Gregorio Natividad, B-213316, February 23, 1984.

e. Named as alleged discriminating official

There is no legal authority to reimburse an Agriculture employee for legal fees incurred in connection with a discrimination complaint in which he was named as an alleged discriminating official. John E. Schrote, B-201183, February 1, 1985.

f. Disability retirement

Employee's attorney claims attorney fees in case where GAO held Army committed an unjustified and unwarranted personnel action following the denial of an agency-filed application for disability retirement. Claim for reasonable attorney fees under 5 U.S.C. § 5596, as amended, is allowed since GAO, as an "appropriate authority" under the Back Pay Act, finds fees to be warranted in the interest of justice. See 5 C.F.R. § 550.806. David G. Reyes, B-206237, August 16, 1982. Claim for attorney fees under the Back Pay Act requested payment for 29 hours at $100 per hour. Following criteria established by Merit Systems Protection Board, the hourly rate is reduced to $75 to be consistent with rates charged by other attorneys in the locality. Shelby W. Hollin, 62 Comp. Gen. 464 (1983).

Employee, who was reemployed by Bureau of Alcohol, Tobacco and Firearms following service with Federal Energy Administration (FEA), did not receive benefit of highest previous rate rule. Following successful claim with GAO for retroactive pay adjustment, the union representing the employee claims attorney fees under 5 U.S.C. § 5596, as amended. The claim for attorney fees is denied since payment is not

deemed in the interest of justice under the circumstances. We conclude that the agency did not commit a prohibited personnel practice and that the agency neither knew nor should have known it would not prevail on the merits, two criteria for awarding attorney fees in the interest of justice. Elias S. Frey, B-208911, June 10, 1983.

g. Authority of Special Counsel

The Special Counsel of the Merit Systems Protection Board is not an "appropriate authority" with power to award attorney fees under 5 U.S.C. § 5596. However, the Special Counsel may include a recommendation to pay reasonable attorney fees in his recommendation for corrective action to be taken by an agency under 5 U.S.C. § 5596. However, the Special Counsel may not recommend the payment of attorney fees in those cases where the corrective action recommended is outside the purview of the Back Pay Act, absent some other statutory authority authorizing the complainant employee's agency to award attorney fees. 59 Comp. Gen. 107 (1980).

h. Appeal before MSPB

An employee who successfully appealed his separation from his agency before the Merit Systems Protection Board (MSPB), claims reimbursement of legal fees. Since the legal fees claimed relate to the services of an attorney in connection with the appeal to MSPB and not GAO, payment of such fees is for consideration by MSPB under 5 U.S.C. § 7701(g)(1). Any appeal from an adverse decision by the MSPB would be to a federal court. 5 U.S.C. § 7703. B-206931, August 30, 1982.

i. Photocopying costs of attorney

An employee claims reimbursement for her attorney's photocopying costs as part of an award of attorney fees under the Back Pay Act. The courts have specifically denied reimbursement for photocopying expenses under the act, since such "taxable costs" are excluded from the concept of "attorney fees." Marilyn L. Scarbrough, B-231813, August 22, 1989.

j. Interest on loan secured to pay attorney

An employee seeks payment of an interest charge she incurred on a loan secured to pay her attorney for services in connection with a grievance contesting her annual performance rating. We know of no authority

which would permit reimbursement of the interest charge. Marilyn L. Scarbrough, B-231813, August 22, 1989.

C. Remedies Not Allowed Under the Back Pay Act

1. Contributions to employee thrift savings plan

The Department of the Interior is without authority to make payments to employee Thrift Savings Plan accounts for lost earnings on insufficient agency contributions resulting from administrative error. The earnings on contributions are a form of interest not expressly provided for by Interior appropriations and such payments are not otherwise authorized under 5 U.S.C. § 5596. Employee Thrift Savings Plan Accounts, 68 Comp. Gen. 220 (1989).

Editor's note: See footnote 3 to this case to understand limited impact of the decision.

2. Health insurance

Employees who are reinstated under the Back Pay Act may enroll as new employees in a health benefit plan or have their old coverage reinstated retroactively in which case they must pay the premiums. See 5 U.S.C. § 8908 (1982). However, the government will not reimburse employees for the cost of private health insurance which may have been obtained during the period of removal. James B. Ruch, B-215626, January 7, 1985.

3. Consequential damages

An employee was erroneously separated and required to vacate government quarters. Expenses of moving household goods out of, and back into, government quarters upon reinstatement, were disallowed because these costs are considered as consequential expenses and, therefore, not covered by the Back Pay Act. B-182282, May 28, 1975. See also B-206931, August 30, 1982. See also Jack M. Haning, 63 Comp. Gen. 170 (1984).

4. Recompense for discrimination in hiring on non-EEO grounds

It is a general principle of law that the salary and other entitlements of a government job are incident to and attached to the job. Consequently, the salary and other entitlements are payable only to the person appointed to the job, and a government employee is entitled only to the

salary and other benefits of the position to which he has been appointed. See Borak v. United States, 78 F. Supp. 123 (Ct. Cl. 1948), cert. denied, 335 U.S. 821 (1948); Price v. United States, 80 F. Supp. 542 (Ct. Cl. 1948); and Ganse v. United States, 376 F.2d 900 (Ct. Cl. 1967). If an applicant for employment is not selected on the basis of discrimination because of his race, color, religion, sex, or national origin, an exception is made and the agency may be ordered to hire him under the provisions of the Equal Employment Opportunity Act of 1979, 42 U.S.C. § 2000e-16. However, if he is not selected on some equally unjustified or unwarranted non-EEO ground, and therefore never appointed, he has not suffered a diminution of pay or other entitlements so as to come within the purview of any make-whole legislation, such as the Back Pay Act. B-180021, March 20, 1975.

5. Punitive damages

An agency hired a consultant and the union grieved that the work he was performing violated the collective-bargaining agreement. The matter was submitted to binding arbitration. The arbitrator found that the agreement had been violated but that no employee had been injured as a consequence of the agency's action. Nevertheless, the arbitrator ordered the agency to pay the union a sum equal to 5 days' pay of the consultant. The matter was submitted to this Office, and we ruled that the payment was in the nature of punitive damages and not authorized by statute or regulation. 55 Comp. Gen. 564 (1975).

6. Compensatory damages

An employee is not entitled to backpay under 5 U.S.C. § 5596 for the difference between a grade GS-5 and a grade GS-6 salary where there is no evidence of an unjustified or unwarranted personnel action. The employee was downgraded from a supervisory position prior to completion of a probationary period. See 5 U.S.C. § 3321. Further, neither the Back Pay Act nor any other statutory authority provides for payment of compensatory damages. Lewis E. Robinson, B-230496, June 7, 1988.

7. Veterans' educational assistance

Employee who was employed in Navy apprenticeship program also received Veterans' Educational Assistance. The VA benefits were terminated upon his removal from Navy position, and, after successful appeal of removal, VA benefits lapsed due to 10-year time limitation. Although

erroneous removal caused termination of VA benefits, there is no entitlement to reimbursement of lost VA benefits under Back Pay Act which restores monetary benefits that are incident to federal employment. B-202849, March 9, 1982.

8. Relocation expenses

Neither 5 U.S.C. § 5596 nor implementing regulations, which prescribe allowable payments when an employee undergoes an unwarranted personnel action, authorize consequential relocation and moving expenses when an employee is erroneously separated. Although such expenses may result from an improper personnel action, they do not represent benefits an employee would have received had the personnel action not occurred. However, relocation and moving expenses in connection with a restored employee's transfer may be allowed where the employee would have received such benefits but for the personnel action. Orlan Wilson, 66 Comp. Gen. 185 (1987). See also Willie F. McCormick, B-233836, June 13, 1989 and Dwight Kimsey, B-225289, February 17, 1987.

9. Medical insurance premiums

A reinstated employee who is eligible for backpay under 5 U.S.C. § 5596 as a result of an improper personnel action may not be reimbursed for medical insurance premiums incurred in the period of the wrongful dismissal. Willie F. McCormick, B-233836, June 13, 1989.

D. Computation of Backpay Under 5 U.S.C. § 5596

1. Generally

In recomputing the pay, allowances, etc. of an employee who has undergone an unjustified or unwarranted personnel action, the agency is responsible for determining the exact amount of pay the employee would have earned had the improper personnel action not occurred. Such pay would include all premium pay the employee would have earned (B-163142, February 28, 1968), and the computations should account for changes in pay and allowances such as a periodic step increase or shift change. 55 Comp. Gen. 1311 (1976). However, in the case of an employee improperly removed or suspended, recomputations may not include periods when the employee was not ready or able to perform his job due, for example, to sickness, B-179422, September 27, 1973, or when the employee was not available due to incarceration. B-178712, July 16, 1973.

2. Effect of Barring Act

An intermittent federal employee failed to receive within-grade increases due to administrative error. Upon discovery, the employing agency took corrective action under 5 U.S.C. § 5596. The backpay period spanned 19 years. A portion of claim is barred since 31 U.S.C. § 3702(b)(1) limits recovery to 6-year period. The accrual of a claim for underpayment of compensation found due pursuant to employing agency determination for services rendered is the date of performance, and a new claim accrues on each day such services are rendered. 29 Comp. Gen. 517 (1950). Alfred L. Lillie, B-209955, May 31, 1983.

3. Alternate employment

Agency denied backpay for a portion of employee's involuntary separation since he had refused an offer of temporary employment during his appeal to the Merit Systems Protection Board, and also because he did not show he was ready, willing, and able to work during that period. Employee, however, was not obligated to accept alternate employment while administrative appeals were pending. Further, no evidence shows that employee's medical condition during that period differed from his medical condition during the period for which he was awarded backpay. Accordingly, employee's claim for additional backpay is granted, with appropriate adjustments in annual and sick leave. Kenneth J. Clark, 62 Comp. Gen. 370 (1983).

4. Gradual retirement plan

A regularly scheduled full-time employee participated on one of his agency's gradual retirement plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 (1977) and B-206655, May 25, 1982, distinguished. Richard A. Wiseman, B-210493, August 15, 1983.

5. Period of improper separation

An air traffic controller who was selected for promotion to a higher grade position at another air traffic control facility claims backpay on

the basis of the salary of the higher grade position where the agency improperly removed him prior to his promotion. The employee's backpay for the period of improper separation should be computed on the basis of the salary of the higher grade position where the record clearly establishes that the employee would have been promoted if he had not been improperly removed. George F. Ackley, B-214828, October 11, 1984.

An employee of the U.S. Navy in the Philippines held a position available only to Philippine nationals. When he acquired U.S. citizenship, he was separated from his position. The MSPB held that he should have been given 60–day notice prior to separation under RIF procedures. He is not entitled to backpay beyond the 60–day period since there were no other positions available to him and since he emigrated to the United States shortly after he was removed from his position. Joseph B. Riego, Sr., B-217044, December 11, 1985.

6. Premium pay

Premium pay is specifically included at 5 C.F.R. § 550.804(b)(1) within the elements of compensation for which backpay may be awarded. Subchapter V of Chapter 55, of Title 5, U.S. Code, includes overtime pay, Sunday and holiday pay, and night differential within the general category of premium pay. B-188125, October 31, 1977.

A restored air traffic controller claims entitlement to premium pay for on-the-job training supervision, but her claim is denied since she was not qualified as a journeyman controller and since selection for training is not a right nor is it guaranteed. Janet L. Apple, B-214659, February 12, 1985.

7. Leave

Under 5 U.S.C. § 5596(b)(2), as amended by Pub. L. No. 94-172, an employee who is restored to duty after a separation that is found to have resulted from an unjustified or unwarranted personnel action may be recredited with annual leave that he would have accrued during the period of separation without forfeiture of leave in excess of the employee's annual leave ceiling. A restored employee who had 354 hours of annual leave at the time of his erroneous separation and who would have earned an additional 304 hours should have 240 hours, the maximum leave accumulation permitted by law, credited to his leave

account and should have the balance of 418 hours credited to a separate special leave account for use within 2 years. 57 Comp. Gen. 464 (1978).

8. Overseas allowances

A civilian employee of the Air Force who was stationed in Japan returned to United States upon involuntary dismissal. She contested the dismissal and was reinstated to the position with backpay under 5 U.S.C. § 5596. The backpay award should include allowances for housing and cost of living which are paid employees working in high cost areas overseas even though the employee was not sent in that area during the period of wrongful dismissal. 59 Comp. Gen. 261 (1980).

9. Union dues

The Back Pay Act does not authorize deduction of union dues from an employee's award of backpay even though the erroneously separated employee had a voluntary allotment for union dues in effect at the time of his separation. Termination of the voluntary dues allotment that occurred at his separation remained in effect through his restoration to duty. B-180095, November 15, 1976.

10. Retirement contributions

The agency's action in offsetting refunded retirement contributions from an employee's backpay award is consistent with Federal Personnel Manual requirements which were sustained in our decision in Angel F. Rivera, 64 Comp. Gen. 86 (1984). Therefore, we will not disturb the agency's action, although the issue of whether refunded retirement contributions are deductible from a backpay award is now in litigation. Jeffrey Kassel, 65 Comp. Gen. 865 (1986).

11. Setoff of outside earnings from backpay

Earnings from employment during the period of the improper action may not be set off against federal backpay on a pay period basis. Total private sector earnings for the period must be set off against total federal backpay. 55 Comp. Gen. 48 (1975); B-178143, July 9, 1973; and 48 Comp. Gen. 572 (1969). Also, where income was generated from part-time teaching, lecturing, and writing activities prior to the unjustified separation action, only the added increment from such activities during the period need be deducted from backpay. The determination as to the amount of the added increment may be based upon a comparison of the

amount of such work prior to and after separation. Income from the publication of a book during period need not be set off against backpay if substantial work on the book was accomplished prior to separation. 53 Comp. Gen. 824 (1974).

12. Lump-sum leave payment

There is no authority to permit employee to elect option of retaining lump-sum payment and canceling annual leave. 59 Comp. Gen. 395 (1980).

Agency properly deducted from backpay an amount representing the lump-sum annual leave payment made to employee when he was removed. Lump-sum leave payments must be offset from backpay awards. 59 Comp. Gen. 395 (1980). Waiver is denied because deduction of this amount did not result in a net indebtedness. Jeffrey Kassel, 65 Comp. Gen. 865 (1986).

Former employee claims backpay equal to amount agency deducted from her lump-sum leave payment to cover overpayments of pay for periods of alleged absence without leave. It is within agency's administrative discretion to place employees who refuse to comply with order to report to work on leave without pay. In view of the administrative discretion which exists with respect to determinations concerning absence from duty, and in the absence of any finding by an appropriate authority of an unjustified or unwarranted personnel action, her claim is denied. Verda L. Campbell, B-221067, June 1, 1987.

13. Severance pay

Severance pay paid to an erroneously separated employee at the time of his removal is a proper item for deduction from backpay awarded upon restoration to duty. Severance pay is conditioned upon actual separation from the service. Since a restored employee is considered, for all purposes, to have performed duty during the period of his separation, he may not simultaneously receive severance pay and backpay. 57 Comp. Gen. 464 (1978). See also Georgia and Leonie Mallory, B-209349, April 9, 1984.

14. Unemployment compensation

Where an employee of the District of Columbia was erroneously separated and, during the period of his separation, received unemployment

compensation from the District of Columbia, that unemployment compensation is a proper item for deduction from backpay upon reinstatement. 57 Comp. Gen. 464 (1978).

The Commissioner of Customs asks whether unemployment compensation paid by a state to a federal civilian employee during a period of wrongful separation may be deducted from a subsequent backpay award under 5 U.S.C. § 5596. Under the law providing unemployment compensation for federal employees (5 U.S.C. §§ 8501 – 8525) and Department of Labor regulations (20 C.F.R. Part 609), overpayments of unemployment compensation are to be determined and recovered under the applicable state's law. Since unemployment compensation received from a state by a federal employee during a period of wrongful separation may be required to be refunded to the state, no deduction should be made from the backpay award. Glen Gurwit, 63 Comp. Gen. 99 (1983). See also Ralph V. McDermott, B-125137, December 7, 1983. See Kassel below, modifying Gurwit.

Unemployment compensation benefits must be deducted from backpay awards where state law requires employer, rather than employee, to reimburse the state for overpayments and where appropriate state agency has determined that an overpayment has occurred and has notified employing agency. Here, state agency determined that, since employee would receive backpay for period covered by unemployment compensation, he had been overpaid, and it so notified Veterans Administration (VA). The VA properly deducted the overpayment from backpay. Absent such a state determination and requirement, unemployment compensation should not be deducted from backpay. Glen Gurwit, 63 Comp. Gen. 99 (1983), modified. Jeffrey Kassel, 65 Comp. Gen. 865 (1986).

15. Disability compensation

An air traffic control specialist was disabled and granted total disability compensation by the Office of Workers' Compensation Programs. The agency later awarded him backpay because it had improperly refused to restore him to a position that did not require medical certification. He is entitled to backpay, but disability compensation received must be deducted from backpay award. However, he is not entitled to backpay for period of convalescence when he was not ready, willing, and able to perform his duties. B-195213, July 7, 1980.

16. Period of active military service

A wrongfully removed civilian employee may not receive backpay for the period during his separation that he was on active military duty. While on active duty he could not accept an obligation to render concurrent civilian service, and thus was "unavailable" for the performance of his civilian position. B-186963, March 4, 1977.

17. Outside earnings exceed backpay award

An employee, who was improperly demoted and later restored to his former position retroactively, claims backpay during the period of demotion. The agency computed backpay as if improper demotion had not occurred and determined employee's backpay would be less than his interim earnings. The employee may retain interim earnings but he is not entitled to any backpay. B-196053, February 29, 1980. See also B-194777, October 30, 1979.

18. Employee not ready, willing, and able

Civilian employee of Department of Navy claims backpay on basis of Merit Systems Protection Board decision overturning his separation. Claim was disallowed based on agency's report that during the period of improper separation employee was not ready, willing, and able to perform his duties because of an incapacitating illness. See 5 C.F.R. § 550.804(d). Claimant now requests reconsideration alleging that during period in question he was physically fit for duty. Resulting factual dispute on which appeal is based is of insufficient probative value to permit payment of the claim. B-199263, February 4, 1981.

An employee who was absent-without-leave (AWOL) for a period prior to her removal is not entitled to backpay for the period of AWOL after reinstatement by the MSPB absent evidence that she was ready, willing, and able to work during that period. Colegera L. Mariscalo, 64 Comp. Gen. 631 (1985).

E. Other Make-Whole Remedies

1. Waiver of claims against employees

Another remedy in law sometimes useful to correct errors resulting from certain erroneous overpayments to an employee is the claims waiver statute contained in 5 U.S.C. § 5584. See also CPLM Title I—Compensation, Chapter 5, Subchapter III.

2. Restoration of annual leave lost under certain circumstances

A make-whole remedy contained in 5 U.S.C. § 6304(d) permits the restoration of leave to an employee which is lost, through no fault of his, because of administrative error, exigencies of the public business, or sickness of the employee when the annual leave was scheduled in advance. It should be noted that this make-whole remedy does not cover leave lost as a result of unjustified and unwarranted personnel actions which are covered under the Back Pay Act in 5 U.S.C. § 5596(B)(2). See also CPLM Title II—Leave, Chapter 2.

3. Health insurance for restored employees

Employees improperly removed or suspended upon reinstatement may, at their option, enroll as if they were new employees or have their coverage restored, with appropriate adjustments made for contributions and claims. This make-whole remedy is governed by 5 U.S.C. § 8908. B-180021, March 20, 1975. See James B. Ruch, B-215626, January 7, 1985.

4. Government life insurance for restored employees

Employees improperly removed or suspended upon reinstatement are deemed to have been insured during the period. However, deductions otherwise required by law shall not be withheld from any backpay awarded for the period unless death or accidental dismemberment of the employee occurs during such period. This make-whole remedy is governed by 5 U.S.C. § 8706(e). B-180021, March 20, 1975.

Two Forest Service employees elected to retire when they were removed for failing to accept reassignments outside of their commuting areas. Both appealed their removals, and the MSPB ordered their reinstatements. They are entitled to reimbursement for life insurance premiums deducted from their annuities during the period of erroneous retirement. However, premiums for insurance coverage will be deducted from their backpay awards based on the coverage previously selected by the employees. Neal and Roy, 64 Comp. Gen. 435 (1985).

5. Employment discrimination

a. Generally

The Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, provides make-whole remedies for individuals where federal agencies have taken discriminatory action against them with respect to employment opportunities, compensation, terms, conditions, or privileges of employment, hiring, or discharge because of their race, color, religion, sex, or national origin. There are some significant differences between the remedies provided in the Back Pay Act and the Equal Employment Opportunity Act which have a bearing on the extent to which employees are made whole. In some respects remedies under the Equal Employment Opportunity Act are broader, in that remedies are provided for applicants for employment as well as employees, and expungement of records is also allowed. However, backpay under the Equal Employment Opportunity Act is to be computed in the same manner as prescribed for the Back Pay Act in 5 C.F.R. § 550.805. The Equal Employment Opportunity Act, in contrast to the Back Pay Act, limits the period of retroactivity for which backpay is permitted to 2 years from the date the action is brought. B-180021, March 20, 1975.

Agencies have the general authority to informally settle a discrimination complaint and to award backpay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination under EEOC regulations and case law. Title VII of the Civil Rights Act of 1964, as amended, and EEOC regulations issued thereunder provide authority for agencies to award backpay to employees in discrimination cases, independent of the Back Pay Act. Thus, backpay is authorized under Title VII without a finding of an "unjustified or unwarranted personnel action" and without a corresponding personnel action. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

Informal settlements without a specific finding of discrimination are authorized by Title VII of the Civil Rights Act of 1964, as amended. In such informal settlements, federal agencies may authorize backpay awards, attorney fees, or costs without a corresponding personnel action. However, agencies are not authorized to make awards not related to backpay or to make awards that exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination were made. An award may not provide for compensatory or punitive damages

as they are not permitted under Title VII. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

Employee filed discrimination complaint when he was not selected for a promotion. Informal settlement of complaint without any admission of discrimination contained lump-sum monetary award to employee. Since the award is related to backpay and is less than the maximum amount recoverable if discrimination had been found, the settlement may be implemented. Only taxes and other mandatory deductions are required to be withheld from this award. Daniel L. Fisher, B-212723, September 20, 1983.

An applicant was not selected for a teaching position at West Point Elementary School and filed a discrimination complaint with the Equal Employment Opportunity Commission. The Commission ordered the Army to offer her employment with backpay and if she declined that employment, only the backpay she would have received from September 1979 until the date the offer was made should be paid. The applicant is entitled to the full amount of her claim because, according to the applicable regulations, she was available for the position during the entire period even though she accompanied her husband, a military officer, on a tour of duty in Korea for part of the period. Mrs. Lujuana Butts, 63 Comp. Gen. 20 (1985).

Federal Communications Commission (FCC) employee temporarily detailed to higher grade position filed complaint alleging race, sex, and age discrimination because she was not temporarily promoted to the higher grade level. The FCC made a proposed finding of no discrimination and reached settlement agreement with employee. Because proposed settlement award exceeds amount the employee would be entitled to receive under Title VII of the Civil Rights Act of 1964, as amended, if discrimination had been found, it must be reduced. Backpay for the period employee was ineligible for promotion to higher grade because of insufficient time in grade may not be included in settlement. Additionally, backpay for period employee was performing duties of position to which she was officially appointed, during which period no discrimination is alleged, may not be included in settlement. Mary Anna Cole, B-215311, December 4, 1984.

An agency may informally settle an age discrimination complaint with a lump-sum compromise settlement to the extent that the settlement does not exceed the amount of backpay which could be recovered under a finding of discrimination. Albert D. Parker, 64 Comp. Gen. 349 (1985).

b. GAO jurisdiction

No action will be taken by GAO on an Army employee's claim that he was denied a promotion as the result of illegal discriminatory employment practices, since it is not within GAO's jurisdiction to conduct investigations into or render decisions on claims of discrimination in employment by other agencies of the government under 42 U.S.C. § 2000e-16. B-193834, June 13, 1979.

The scope of remedial actions under Title VII is generally for determination by EEOC. However, EEOC's present regulations on informal settlements do not provide sufficient guidance for federal agencies to carry out their responsibilities under Title VII of the Civil Rights Act of 1964, as amended. We recommend that EEOC review and revise its present regulations to provide such guidance. Until that time agencies may administratively settle Title VII cases in a manner consistent with the guidelines in this decision. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

In view of authority granted to EEOC under Title VII of the Civil Rights Act of 1964, as amended, GAO does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the government. However, in view of GAO's authority to determine the legality of expenditures of appropriated funds, GAO may determine the legality of awards agreed to by agencies in informal settlements of discrimination cases arising under Title VII. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

c. Interest on backpay awards for discrimination

Pursuant to 5 C.F.R. § 713.217, SEC adjusted an employee's complaint of discrimination by an agreement to authorize retroactive promotion and backpay plus interest. The SEC has no authority to allow payment of interest. It is well settled that interest may be assessed against the government only under express statutory authority and neither the Equal Opportunity Act nor the incorporated provisions of Title VII provide express authorization of interest against the government. 58 Comp. Gen. 5 (1978).

There is no authority to allow interest on backpay provided for in a conciliation agreement entered in the settlement of a law suit which alleged discriminatory conduct by government officials. It is a well-settled rule of law that interest may be assessed against the government only under

express statutory authority; and neither the Equal Employment Opportunity Act, the incorporated provisions of Title VII of the Civil Rights Act, nor any other act provide express authorization of interest against the government in this situation. Juan S. Griego, B-207176, January 6, 1983.

d. Attorney fees

(1) Discrimination complaints—See Equal Employment Opportunity Commission regulations, 29 C.F.R. §§ 1613.801 - 1613.806.

The Equal Employment Opportunity Commission may provide in its regulations for administrative payment of attorneys fees to a prevailing party in federal employee complaints filed under the Rehabilitation Act of 1973, and under the Age Discrimination in Employment Act of 1967, since the scope of regulatory and judicial authority is the same as granted under Title VII of the Civil Rights Act of 1964. 59 Comp. Gen. 728 (1980).

An employee claims attorney fees in connection with administrative settlement of his age discrimination complaint. Although we previously stated in 59 Comp. Gen. 728 (1980) that we would not object to regulations authorizing agencies to pay fees, we now hold that such fees may not be paid at the administrative level in view of the lack of specific statutory authority and subsequent court decisions. Albert D. Parker, 64 Comp. Gen. 349 (1985), overruling in part 59 Comp. Gen. 728 (1980).

(2) Administrative grievance—whistleblowing—An employee, who filed an agency grievance alleging that his reassignment was in retaliation for his whistleblowing, received a favorable settlement but no backpay or other monetary award. Since the grievance did not involve a reduction or denial of pay or allowances, it was not subject to 5 U.S.C. § 5596 (1982). He may not be reimbursed his attorney fees since there is no statutory or other authority for the payment of attorney fees in connection with an administrative grievance proceeding where there is no backpay or other monetary award. Stanley D. Welli, 68 Comp. Gen. 366 (1989).

An employee who settled an agency grievance may not be reimbursed his attorney fees under the Equal Access to Justice Act. The act only applies to "adversary adjudications" and the agency grievance is not within the statutory definition of an adversary adjudication. Stanley D. Welli, 68 Comp. Gen. 366 (1989).

Other Provisions Pertaining to Employees

A. Government Employees Training Act

1. Generally

The payment by an agency of all or part of the necessary expenses incurred in the training of employees by, in, and through government and nongovernment facilities is authorized by the Government Employees Training Act, 5 U.S.C. §§ 4101 – 4119. The head of each agency is authorized and directed to establish needed training programs in accordance with regulations issued by OPM, found at 5 C.F.R. Part 410.

2. Definition of training

The definition of training for which the head of an agency is permitted to pay is defined by 5 U.S.C. § 4101(4).

3. Personal versus government benefit

Examinations leading to certification of a federal employee as an accredited rural appraiser are not an integral part of the course of instruction and, therefore, are not within the definition of "training" in 5 U.S.C. § 4101(4). Professional accreditation as a rural appraiser is personal to its holder and remains with him whether or not he remains in the employ of the government. Thus, the costs of such examinations were not reimbursable. 55 Comp. Gen. 759 (1976).

4. Employees eligible for training

a. Employee defined

Title 5 of the U.S. Code, § 4101(2) defines employee for the purposes of the Government Employees Training Act.

b. Specific exceptions

Title 5 of the U.S. Code, § 4102 lists organizations and employees to which the Government Employees Training Act does not apply.

c. Presidential appointees

A Presidential appointee is not eligible for training under the Government Employees Training Act, unless he is specifically designated by the President for training under the Act. B-166117, March 17, 1969.

5. Requirement of 1 year of civilian service

An employee sought to qualify for reimbursement of tuition expense at the American University for a course under 5 U.S.C. § 4106, which provides for the training of employees with 1 year or more of continuous civilian service as a federal government employee, could not count the time spent working for Gallaudet College towards the 1 year requirement since, though the Department of Health, Education, and Welfare is charged with supervision of public business relating to it, under District of Columbia Code, Gallaudet is a private corporation and, except for certain insurance, health and retirement benefits, its employees are not federal employees. B-155751, September 17, 1971.

6. Military members

The specific exclusion of members of the uniformed services from the Government Employees Training Act precludes use of appropriated funds for expenses of attendance at meetings of any member of the uniformed services during periods he is receiving active duty military pay and allowances under Title II of the Career Compensation Act of 1949, even though during such period the member is assigned to active duty with a civilian government agency which reimburses the military service for the member's pay and allowances. 38 Comp. Gen. 312 (1958).

7. Authorization requirement

a. Must be in advance and in writing

The requirement in 5 U.S.C. § 4108 that employees selected for training in nongovernment facilities shall, prior to such assignment for training, enter into written agreements implies an advance authorization for such training by an appropriate administrative official prior to the training. In the absence of authority for retroactive approval of such training, payment for training expenses of an employee who was undergoing training prior to both the request for and the administrative approval of the request for training must be denied. 40 Comp. Gen. 12 (1960).

b. Delegation of authority

The authority to approve for payment on an individual basis expenditures that were incurred in the administration of a training program established by the Selective Service System pursuant to 5 U.S.C. §§ 4101 – 4119, and to establish criteria for payment, was delegated by the

Director of the Selective Service, and a directive to this effect was issued. This was permissible notwithstanding that neither the language of the Government Employees Training Act nor the implementing regulations did not expressly provide for such delegation. Sections 4103, 4109(a), and 4105(c) of 5 U.S. Code, in assigning to agency heads the responsibility for the establishment of training programs and for oversight of such programs, sanction the delegation of authority by agency heads in connection with the development and conduct of agency training programs. 51 Comp. Gen. 777 (1972).

8. Agreements to continue in government service

a. Generally

Title 5 of the U.S. Code, § 4108 requires that an employee selected for training by, in, or through a nongovernment facility enter into a written agreement before assignment to training to continue in the service of his agency for a minimum specified period, and to repay the government for the additional expenses incurred by the government if he is voluntarily separated from the service prior to the end of the required period of service.

b. Failure to fulfill obligated service

A former employee was indebted to the government on account of his resignation in violation of a training agreement which required 18 months of service with the Department of the Navy after completion of training. He contended that he should not have been returned to a GS-7 position when he qualified for a higher grade. However, since the debt resulted from his failure to serve the obligated period, and since he remained at work an insufficient period of time to be assigned duties warranting a higher classification, and since prior to earning a Ph.D. he did not possess the required 1 year engineering experience at the GS-7 level or education which would have qualified him for a higher grade, there is no basis for canceling the indebtedness. B-160977, June 2, 1967.

c. Waiver of repayment of training costs

Under FPM Chapter 410, Subchapter 5-7.b, the head of an agency, or a representative, may waive in writing, in whole or part, training costs extended under 5 U.S.C. § 4108, whenever he finds that payment would be against equity or good conscience or against the public interest. The

FPM sets forth circumstances in which the head of the agency may use this authority. Also see 5 C.F.R. § 410.509(b).

d. Transfer to another government agency

A determination made before transfer of an employee not to require payment of training costs at the time of transfer to another government agency does not stop the obligation to serve under the continued service agreement at the new agency. FPM Chapter 410, Subchapter 5-7.b(2). See also 5 C.F.R. § 410.509(a).

e. Assumption of training costs by losing agency

There is no authority for the assessment of training costs against an agency to which the employee transferred after receiving training, notwithstanding that the benefit of the employee's training paid for by the losing agency inured to the gaining agency. 51 Comp. Gen. 419 (1972).

f. Effect of reemployment

The amount collected and deposited into the U.S. Treasury upon the failure of an employee to remain in government service for the time required after training under an agreement pursuant to 5 U.S.C. § 4109 was not refundable to the employee upon his reemployment. Recovery of the indebtedness was proper since the amount was collected prior to the determination to waive the indebtedness, and was not erroneously received and covered into the Treasury so as to be available for refund. B-146111, July 6, 1961. See also 40 Comp. Gen. 162 (1960).

9. Prohibition against payment of overtime, holiday pay, and night differential

a. Statutory authority

The prohibition in 5 U.S.C. § 4109 against the payment of overtime, holiday pay, and night differential during training courses precludes the payment of such premium compensation to employees during periods of training, even though the employees would otherwise be entitled to such pay, unless an exception is established by OPM. 48 Comp. Gen. 620 (1969); 38 Comp. Gen. 262 (1958); 38 Comp. Gen. 363; 38 Comp. Gen. 404; and 39 Comp. Gen. 453 (1959). See also B-168528, January 2, 1970.

b. Overtime

(1) Holidays—Although employees who are in training on holidays are precluded under 5 U.S.C. § 4109 from receiving overtime or holiday pay, they are entitled to receive regular pay during periods of training. 38 Comp. Gen. 262 (1958).

(2) Compensatory time—In view of the restriction in 5 U.S.C. § 4109 against payment of overtime, unless OPM establishes an exception, employees who are assigned to training courses for more than 40 hours in any week may not be granted compensatory time for the hours in excess of 40. The condition precedent to the granting of compensatory time in lieu of overtime under 5 U.S.C. § 5543, is qualification for overtime under 5 U.S.C. § 5542(a). Furthermore, an employee may not be granted compensation at straight time rates for overtime training. 39 Comp. Gen. 453 (1959).

(3) Administratively uncontrollable overtime—Additional annual compensation in lieu of premium pay which is authorized under 5 U.S.C. § 5545(c) and received by employees who are to participate in training programs under the Government Employees Training Act is considered a type of pay in lieu of overtime, holiday, and night differential within the prohibition in 5 U.S.C. § 4109, such additional compensation may not be paid during training programs. 38 Comp. Gen. 404 (1958).

(4) Exceptions to prohibition—The restriction in 5 U.S.C. § 4109 against payment of overtime for training does not preclude payment of overtime compensation for work in addition to the 40 hours of training performed in any workweek. 41 Comp. Gen. 477 (1962).

The authority vested in the President to exempt agencies or employees from the restrictive provisions of the Government Employees Training Act may be viewed as authority for the exemption of certain employees from the premium pay prohibition in 5 U.S.C. § 4109(a)(1), in those cases where denial of premium pay would defeat the broad purposes of the act. 38 Comp. Gen. 363 (1958). See also 5 C.F.R. § 410.602.

(5) Overtime compensation for traveling to and from training—With respect to the payment of overtime compensation to employees when they are traveling to and from training courses, 5 U.S.C. § 4109(a)(1), which prohibits the payment of premium compensation to employees during periods of training (except when specifically authorized by OPM)

does not prevent payment of overtime compensation to employees traveling to and from places of training, provided that the conditions of 5 U.S.C. § 5542(b)(2) are met. B-165311, November 12, 1968.

c. Special training courses at night

Customs patrol officers attended special training courses after 6 p.m. to train for situations that only occur at night. Although overtime or premium pay, holiday pay and night differential may not generally be paid to employees for time spent in training, 5 C.F.R. § 410.601(b)(2) establishes an exception for training at night for situations that occur only at night. In such circumstances, the agency does not have discretion to deny the premium pay under either the Fair Labor Standards Act or Title 5 of the United States Code. 58 Comp. Gen. 547 (1979).

10. Foreign area allowance

Although the allowances payable to employees in foreign areas may not in the strict sense be considered "salary" or "pay" as those words are used in 5 U.S.C. § 4109, which authorizes the head of each department to pay "all or any part of the salary, pay, or compensation" to employees in training programs, they may be considered to be within the broader term "compensation." Therefore, when employees are receiving training at a foreign post, the head of the department may authorize payment of all or any part of the allowances applicable to employees permanently stationed overseas, or he may authorize a per diem as for temporary duty, but not both such benefits. However, foreign area allowances may be paid in addition to transportation of dependents and effects. 39 Comp. Gen. 140 (1959).

11. Post differential

Under 5 U.S.C. § 4109, an employee who is authorized to receive training at an overseas location where a post differential is payable may, in the discretion of the head of the department, be paid all or part of the post differential which is additional compensation payable under 5 U.S.C. § 5941, and also receive a per diem allowance during the period of detail, provided that such employee would be eligible for the post differential if the detail or assignment were in connection with the official duties of his position, as distinguished from training. 39 Comp. Gen. 140 (1959).

12. Subversive activities prohibition

a. Statutory authority

The prohibition in 5 U.S.C. § 4107(a)(1) against the payment of funds whenever the nongovernment training facility teaches or advocates overthrow of the government of the United States by force or violence applies to individuals contracting with the government to provide training as well as to institutions. It, however, does not apply to individual teachers or instructors employed by institutions or to employees of government contractors where there is no contractual relationship between the government or the employee receiving the training and the teacher or employee of the contractor. 38 Comp. Gen. 857 (1959).

b. Enforcement

A loyalty affidavit, certificate, or an express contractual warranty that the institution or individual furnishing training under the Government Employees Training Act does not teach or advocate the overthrow of the government of the United States by force or violence would be a proper means of enforcement of the subversive activities prohibition in 5 U.S.C. § 4107(a). 38 Comp. Gen. 857 (1959).

c. Foreign organizations and individuals

In making a determination whether the prohibition in 5 U.S.C. § 4107(a) against the training of employees by, in, or through a nongovernment facility which teaches or advocates the overthrow of the government of the United States by force or violence, or by or through an individual whose loyalty is in doubt applies to foreign organizations and individuals in foreign areas, the Department of Defense may delegate the authority granted agency heads by Executive Order No. 11,348, dated April 20, 1967, to determine the eligibility of a foreign government or an international organization to provide training to a major theater or local commander, subject to consultation with the Department of State and other appropriate federal agencies in the area, and may also provide that the eligibility of noncitizens may be determined from security files in the local or theater level since applying the procedures in 5 C.F.R. § 410.504 to determine security eligibility in the United States would be ineffective. 51 Comp. Gen. 199 (1971).

13. Related expenses

a. Rental fee charged for use of equipment owned by employee

A claim for $30 representing 2 months rental of a typewriter purchased and used by an employee of Internal Revenue Service in a training program sponsored by CSC was denied, notwithstanding the fact that the costs for typing during the course were specifically authorized by written agency guidelines under 5 U.S.C. § 4118(a)(8), since there are no regulations authorizing a trainee to purchase a typewriter for this private use and charge the government a rental fee for its use during a 2–month training program. It is doubtful whether the purchase could be considered a necessary expense of training within the meaning of 5 U.S.C. § 4109. B-176928, November 17, 1972.

B. Details of Government Employees

1. Statutory authority

The head of an executive department or military department may detail employees among the bureaus and offices of his department, except employees who are required by law to be exclusively engaged on some specific work. Such details may be made only by written order of the head of the department and may be for not more than 120 days. These details may be renewed by written order of the head of the department, in each particular case, for periods not exceeding 120 days. 5 U.S.C. § 3341.

2. Details to higher graded position for more than 120 days

a. Temporary promotions after 120 days

The Court of Claims in A. Leon Wilson v. United States, Ct. Cl. No. 324-81C, October 23, 1982, held that employees who were detailed to a higher graded position for over 120 days did not have a remedy of a retroactive temporary promotion under the Back Pay Act, 5 U.S.C. § 5596, the detail statute, 5 U.S.C. § 3341, or the Federal Personnel Manual.

A grade GS-3 employee, who claims that she was detailed to perform the duties of a grade GS-4 position for nearly 1 year, is not entitled to a retroactive temporary promotion and backpay. The Court of Claims ruled in Wilson v. United States, 229 Ct. Cl. 510 (1981), that employees have no entitlement under the applicable statute or regulations to temporary

promotions for overlong details. Winifred McCulley, B-229086, May 25, 1988.

As a result of the Wilson decision we reconsidered our earlier Turner-Caldwell decisions and held that we would follow the Wilson decision and deny all pending and future claims under our Turner-Caldwell line of decisions. Prior decisions or claims settlement issued before date of decision, May 25, 1982, pursuant to Turner-Caldwell line of decisions will not be disturbed. 61 Comp. Gen. 408 (1982).

An employee's claim for a retroactive promotion and backpay for a detail in 1976 and 1977 to a higher grade position is denied on the basis of Turner-Caldwell III, 61 Comp. Gen. 408 (1982). The fact that the employee's agency lost or misplaced his claim for a considerable time does not constitute a basis for consideration of the claim after the holding in Turner-Caldwell III that no further payments would be made to individuals detailed to higher grade positions for more than 120 days. Herbert M. DeLano, B-216752, November 14, 1984. See also Evelyn O. Cheeseboro, B-217830, August 29, 1985, and Edward R. Smith, B-219470, November 8, 1985.

b. Agency regulation and provisions of negotiated agreement

Even though our Office follows the Wilson decision, an agency, by regulation or collective-bargaining agreement, may establish a policy under which it becomes mandatory to promote employees detailed to higher grade positions. The violation of such a mandatory provision in a regulation or agreement may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596. 61 Comp. Gen. 492 (1982).

3. Details between executive agencies

a. Performance of the same duties

The detail of a civilian employee to the Public Health Service for a brief period, either on a reimbursable or nonreimbursable basis, for such duties as the Public Health Service might specify, was not legally objectionable so long as the employee performed the duties on the same basis that duties would ordinarily have been performed by any civilian employee detailed from one department or agency to another under 31 U.S.C. § 686. However, if the employee were to be "detailed" to the Public Health Service, to perform he would be regarded as a reserve

officer in an active duty status and could not have been considered to be on detail from his civilian position. 41 Comp. Gen. 478 (1962).

b. Requirement of written agreement

In the absence of a written agreement in advance between two federal agencies operating under separate appropriations, the loan of employees between such agencies is regarded as an accommodation only for which no reimbursement or transfer of appropriations will be made for salaries. Such nonreimbursable details of personnel do not fall under the constraints of 31 U.S.C. § 628, now 31 U.S.C. § 1301, (which requires that funds appropriated to the various governmental agencies and instrumentalities be applied solely to the objects for which they are made and for no others), provided the employees so detailed are not required by law to be engaged exclusively upon the work for which their salaries are appropriated and provided the employees' services can be spared for the purpose of the details. 15 Comp. Gen. 32 (1935); 13 Comp. Gen. 234 (1934); and B-182398(1), March 29, 1976.

c. Nonreimbursable details barred

Except under limited circumstances, nonreimbursable details of employees from one agency to another violate the law that appropriations must be spent only for the purposes for which appropriated (31 U.S.C. § 1301(a)), and such details unlawfully augment the appropriations of the agencies using the detailed employees. To the extent that they are inconsistent with this decision, prior decisions such as 13 Comp. Gen. 234 (1934) and 59 Comp. Gen. 366 (1980) will no longer be followed. Since this decision represents a change in our views on nonreimbursable details, it will apply prospectively. 64 Comp. Gen. 370 (1985).

Nonreimbursable details of employees from one agency to another or between separately funded components of the same agency will continue to be permissible where the details pertain to a matter similar or related to those ordinarily handled by the loaning agency and will aid the loaning agency in accomplishing a purpose for which its appropriations are provided or when the fiscal impact on the appropriation supporting the detail is negligible. 64 Comp. Gen. 370 (1985).

d. Detail of military personnel to civilian agency

(1) Prohibition against double compensation—Officers and enlisted personnel serving on extended active duty in the armed forces may not be employed during their off-hours in civilian positions which are paid for by appropriated funds. The enactment of the Dual Compensation Act did not change the longstanding rule that active military service is incompatible with concurrent federal civilian service. 46 Comp. Gen. 400 (1966). See also 38 Comp. Gen. 222 (1958).

Fee-basis medical services rendered to an eligible veteran for disabilities identified on an Outpatient Medical Treatment Identification Card by a military physician on active duty with the armed forces, who is engaged in a limited medical practice after hours with the permission of his commanding officer, could not be paid by the Veterans Administration in the absence of statutory authority under the rule that concurrent federal civilian employment and active duty military service are incompatible. 47 Comp. Gen. 505 (1968).

4. Details under foreign assistance programs

Members of the armed forces assigned to perform functions outside the United States under the Foreign Assistance Act of 1961, 22 U.S.C. § 2385(d), which authorized compensation, allowances, and benefits to assigned personnel at the rates provided for the Foreign Service Reserve and staff by the Foreign Service Act of 1980, 22 U.S.C. §§ 3901, 3662, and 3963, may only be paid in accordance with section 625(d)(1) of the 1961 Act in the absence of statutory exemption to the extra allowance restrictions of 5 U.S.C. § 5536. Therefore, the right of commissioned personnel of the United States Coast Guard assigned to programs under the Foreign Assistance Act to their pay and allowances is suspended during the period of the assignment and they may only receive the compensation, allowances, and benefits prescribed for the Foreign Service Reserve and staff. 42 Comp. Gen. 296 (1962).

5. Details of Public Health Service employees

a. Employee benefits

Although Public Health Service employees detailed to state, municipal, and other nonprofit institutions under 42 U.S.C. § 215 may continue to be paid from federal appropriated funds and to retain all federal employee benefits, when detailed and placed in leave-without-pay status,

employees are entitled only to federal employee benefits prescribed in 42 U.S.C. § 215(d)—basic pay, promotion, retirement, injury or death compensation, and benefits provided in 42 U.S.C. § 213—but they are not entitled to annual and sick leave (5 U.S.C. §§ 6301 – 6312), a 40–hour workweek (5 U.S.C. § 6101), and overtime and holiday pay (5 U.S.C. §§ 5542 and 5546). The entitlement to return to the federal service without loss of or detriment to the detailed employees' status as federal employees did not create entitlement to retain all rights and benefits of federal employees during leave-without-pay period. 43 Comp. Gen. 511 (1964).

b. Payment of state license fees

State license fees imposed on medical doctors employed by the Public Health Service who were detailed to states or local health agencies may not be reimbursed to employees detailed to carry out state functions, absent statutory authority for use of federal funds to defray the cost of license fees. Title 42 of the U.S Code § 215, although authorizing the detail of personnel and providing for the use of appropriated funds and credit for state service as though performed for the Public Health Service, does not include authority for payment of license fees. 46 Comp. Gen. 695 (1967).

c. Local holidays

Employees of the Public Health Service detailed to state, municipal, and other nonprofit institutions, pursuant to 42 U.S.C. § 215, who are paid by the federal government may be excused from duty on state or local holidays on which normal duties may not properly be performed. However, if they are required to work on such holidays, even though other federal employees similarly situated may have been excused, there is no authority for the payment of extra compensation to them, and, although employees excused from work on a state or local holiday need not be charged leave, if the employees are not excused they are only entitled to their regular compensation. 43 Comp. Gen. 511 (1964). See also 17 Comp. Gen. 298 (1937).

6. Intergovernmental Personnel Act

a. Assignment of federal employees

An employee of an executive agency assigned to a state or local government is deemed, during the assignment to be either (1) on detail to a

regular work assignment in his agency or (2) on leave without pay from his position in the agency. In either case he remains an employee of his agency. The assignment may be made with or without reimbursement by the state or local government for the travel and transportation expense to or from the place of assignment and for the pay of the employee during assignment. Any reimbursements are credited to the appropriation of the agency used for paying the travel and transportation expenses or pay.

In the event the rate of pay of an employee so assigned and on leave without pay is less than what he would have received on his regular assignment with the agency, he is entitled to receive supplemental pay from the agency for the difference between the state and local government rate and the agency rate. He is also entitled to annual and sick leave, continuation of his insurance, crediting of the period of his assignment toward periodic step increases, retention, and leave accrual purposes, and, upon payment into the civil service retirement and disability fund or other applicable retirement system of the appropriate percentage of his pay, to treat his service during that period as service of the type performed in the agency immediately before his assignment. Further, he is entitled to credit such outside service as federal service and to consider his state and local government pay as federal wages. However, the employee may not receive continuation of his insurance, credit of the period of assignment toward periodic step increases, retention, and leave accrual, and treatment of his service during his assignment as service of the type performed in the agency immediately before his assignment, on the basis of service during the assignment for which he elects to receive benefits under any state or local government retirement or insurance law or program which OPM determines to be similar. An employee who elects to receive benefits from a state or local government may not receive a retirement annuity from the federal government and benefits from the state or local government for an injury or disability to himself covering the same period of time. 5 U.S.C. § 3373.

b. Assignment of state employees

(1) Generally—An employee of a state or local government who is assigned to a federal agency may either (1) be appointed without regard to the statutory provisions governing appointment of the competitive service for the agreed period of the assignment or (2) may be deemed to be on detail to the federal agency. An employee given an appointment is entitled to the pay accorded a federal employee and is deemed to be an employee of the agency for all purposes except retirement annuity, life

insurance, and health insurance. A state or local government employee on detail to a federal agency is not entitled to pay from the agency, except to the extent that the pay received from the state or local government is less than the appropriate rate of pay which the duties would warrant under applicable pay provisions. The employee on detail is deemed to be an employee of the agency for certain specified purposes, and is subject to regulations as prescribed by the President. Such detail may be made with or without reimbursement by the agency for the pay, or part thereof, of the employee during the period of assignment. 5 U.S.C. § 3374.

In the event a state or local government fails to continue the employee's contribution to state or local government retirement, life insurance, and health benefits plans for a state or local government employee who is given an appointment in a federal agency, the employer's contribution may be made from the appropriations of the federal agency concerned. 5 U.S.C. § 3374(e).

(2) Payment of per diem to achieve pay comparability—A state employee who was detailed under 5 U.S.C. §§ 3374 - 3376 to a federal agency was paid per diem authorized by assignment agreement while not traveling, purportedly to bring his salary to a level comparable with federal employees. Title 5 of the U.S. Code, § 3374(c)(1) states that a state or local government employee who is detailed to an executive agency "is not entitled to pay from the agency." Thus, that portion of assignment agreement purporting to grant per diem for the purpose of supplemental salary was without legal effect. B-185496, August 26, 1976.

(3) "Pay" reimbursement to state and local governments—When a state or local government employee is detailed to a federal agency, 5 U.S.C. § 3374(c) authorizes the federal agency to reimburse the state or local government for all or part of the "pay" of the employee. Such reimbursement may include fringe benefits, such as retirement and life and health insurance, but may not include the cost of negotiating an assignment agreement required under 5 C.F.R. § 334.105, nor the cost of preparing payroll records or assignment reports prescribed under 5 C.F.R. § 334.106. 54 Comp. Gen. 210 (1974).

The federal employee pay limitation imposed by 5 U.S.C. § 5308 is not applicable to reimbursements to state and local governments for "pay" of employees detailed to federal executive agencies under 5 U.S.C. § 3374. Reimbursement for such details is made under 5 U.S.C. § 3374(c) and not

under the statutory pay system to which the limitation applies. Such reimbursement is not pay to a federal employee, but is repayment to a state or local agency for the cost of participation in the program. B-157936, March 18, 1976.

A university paid $12,000 to a faculty member for consulting fees that he lost when he was detailed to the Department of Energy under 5 U.S.C. § 3374. Before his detail, the employee was regularly paid consulting fees by a private corporation on 1 business day off per week granted by the university for that purpose. The fee is regarded as part of that faculty member's academic pay and the university's payment of such fee may be reimbursed by the Department of Energy under 5 U.S.C. § 3374(c). B-192438, June 13, 1979. Compare B-195393, August 10, 1979, holding that under the Intergovernmental Personnel Act (IPA), the Department of Commerce may not reimburse the American Graduate School of International Marketing $5,000 representing a "cost-of-living difference" for an assignee. Cost-of-living differential is not considered an item of pay which may be reimbursed by an executive agency to an institution of higher education under 5 U.S.C. § 3374(c).

(4) Retirement fund contributions—Under 5 U.S.C. § 3374(c) a federal agency which appoints a state or local government employee may pay the employer's contribution to his state or local retirement plan if the state or local government fails to make such payments for the period of his federal assignment. In the absence of any agreement by the agency to pay interest on the employee's state retirement contribution, the agency is not obligated to pay such interest charge. B-192415, March 1, 1979.

C. Rights Reserved Upon Transfer to International Organizations

1. Statutory authority

The head of any federal agency is authorized to detail, for a period not exceeding 5 years, an employee of his agency to an international organization which requests services, except that under special circumstances, where the President determines it to be in the national interest, he may extend the 5-year period for up to an additional 3 years. A detail is defined to mean the assignment or loan of an employee to an international organization without change of position from the agency by which he is employed to an international organization. 5 U.S.C. § 3343.

2. Entitlement to pay and other allowances

Under 5 U.S.C. § 3582 an employee who is detailed for service with an international organization continues to receive compensation, allowances, and benefits from funds available to that agency and retains coverage by the retirement, life insurance, health benefits (if proper payments are made), employees' compensation, leave acts and definitive reemployment rights with his agency. B-135075, May 10, 1968.

3. Travel and transportation expenses specifically excluded

The travel and subsistence expenses, transportation of household effects and leave are not considered to be monetary benefits; therefore, reimbursement is not authorized to an employee who transfers to an international organization. 5 C.F.R. § 352.310(a)(3) (1973) and B-181853, August 23, 1976.

4. Entitlement to relocation allowances upon return to regular agency

The Agriculture Research Service, which planned to reemploy a former employee in Georgia, who was separated in Texas to accept a position with an international agency overseas, when his contract expired, was allowed to issue an order transferring the employee from Texas to Georgia. Payment of travel expenses was allowable, temporary quarters and subsistence expenses were allowable, and transportation expenses for household effects were reimbursable, as these determinations accorded with the provisions of then-applicable Bureau of Budget Circular No. A-56 and with 5 U.S.C. §§ 3581 – 3584, for reemployment rights in such cases. However, expenses involved in the sale of a former Texas residence were not allowable since the employee's actual family residence had been established in Austria. B-166678, May 23, 1969.

5. Detail versus transfer of employee

A distinction is made between those employees detailed to international organizations and those who are transferred. Detailed employees remain on the government rolls and receive pay as being in the service of the United States. Those transferred are guaranteed that their pay will not be less than if they had remained on the government rolls, but such guarantee is effective only upon condition of reemployment. Should an employee while serving with an international organization earn as much or more than he would have earned as a federal employee, no payment under the guarantee would be required. If he earns less without being

reemployed, no payment would be authorized. 50 Comp. Gen. 173 (1970).

6. Reemployment rights

A federal employee who transfers to an international organization under 5 U.S.C. § 3582, is an employee of the international organization, not of the federal government, but has reemployment rights with the federal government if application is made within 5 years, or any authorized extension, after entering employment with the international organization. If an individual should fail to exercise his reemployment right within the stated time period, then all entitlements between him and the United States government are severed. B-181853, August 23, 1976.

Under 5 U.S.C. § 3581(3) an international organization is defined as a "public international organization or international organization preparatory commission in which the Government of the United States participates." Thus, a former AID employee who transferred to the International Labor Organization (ILO) and whose period of employment expires on December 15, 1977, may not retain reemployment rights and other entitlements if his employment with the ILO is extended since the United States terminated its participation in November 1977. B-135075, December 12, 1977.

7. Grade promotions

An employee on detail to an international organization is considered to be an employee of the agency for general administrative purposes, thus an agency may grant promotion to an employee while he is on such detail. B-135075, May 10, 1968.

D. Restoration After Military Service

1. Statutory authority

Title 5 of the U.S. Code, § 3551 provides that an employee as defined by 5 U.S.C. § 2105, who is ordered to active duty or to duty as a reserve of the armed forces or member of the National Guard is entitled, on release from duty within the time limits specified in 38 U.S.C. §§ 2021 – 2026, to be restored to the position that he held at the time he was ordered to duty. The right to restoration given by 5 U.S.C. § 3551 is a right separate from and in addition to the restoration rights given former employees by 38 U.S.C. §§ 2021 – 2026 and the right given by 5 U.S.C. § 3551 is not defeated by the length of time the former employee has been in military

service. Further, the responsibility of reinstating eligible individuals is that of the head of the department or agency involved. 43 Comp. Gen. 439 (1963).

2. No vacancy at place from which furloughed

a. Payment of travel and transportation expenses

Upon the return of a civilian employee from military duty, where no appropriate vacancy exists in the particular agency at the place from which he was furloughed to enter the armed forces, the employee may be regarded as restored at that place for the purpose of paying travel and transportation expenses in connection with his transfer from the place of restoration to the place where a suitable vacancy was available in the same agency. 25 Comp. Gen. 786 (1946); 25 Comp. Gen. 293 (1945); B-176982, December 14, 1972; and B-170987, December 14, 1970.

b. Appointment to a different position

A postal employee was given a temporary indefinite appointment pending establishment of a substitute clerk-carrier register. He resigned upon his induction into the Army. Upon his retirement from the Air Force he received a probationary appointment and reinstatement in a different position in the Postal Service. His claim for a higher salary rate was properly disallowed. The question of whether a veteran has been restored to a position within the meaning of 38 U.S.C. §§ 2021 – 2026 is for determination by the administrative agency, jointly with OPM. As the Postal Service determined that the veteran was not entitled to reemployment rights upon reemployment to a different position, that determination was binding upon this Office. B-159926, September 27, 1966.

c. Effect of relinquishment of reserve status

An employee who, while on active duty as a reserve officer in the naval service, voluntarily accepted a commission in the regular Navy was held to have relinquished his reserve status and was, therefore, no longer entitled to benefits under 5 U.S.C. § 3551 which provides for reemployment of government employee members of the Reserves or National Guard upon release from active duty. 41 Comp. Gen. 680 (1962).

3. Restoration under 38 U.S.C. §§ 2021 - 2026

a. Erroneous refusal by agency to restore

After completing military service, an employee was denied restoration to the position he had formerly held in violation of his statutory right. Upon restoration, he may avail himself of the remedy provided by the Back Pay Act of 1966, 5 U.S.C. § 5596, for the period that restoration was withheld upon determination that the agency's failure to restore him was erroneous. B-158925, July 16, 1968.

b. Failure to apply for restoration within statutory period

An employee of the General Services Administration who had been serving under a temporary appointment, was ordered to active duty on June 24, 1951, and was separated retroactive to June 23, 1951, on June 9, 1961, was not entitled to reemployment rights and benefits under 38 U.S.C. §§ 2021 – 2026, since he was retired from active duty on June 4, 1960, by reason of physical disability and the record did not indicate that an attempt was made to obtain a release within the statutory time limitation. Therefore, the employee was paid in a lump sum for annual leave previously earned at the rate at which it was earned, sick leave was noncreditable since there was no reemployment within 3 years after release from active duty, and the employee's military service was not creditable as civilian service since he was not regarded as having been in a furlough status during that period. B-162148, October 5, 1967.

4. Salary entitlement upon restoration

a. Promotion rights while in military service

An Internal Revenue Service examiner on military leave who, through administrative error, was not considered for waiver of the time-in-grade restriction under the Whitten Amendment, 5 U.S.C. § 3101 note, incident to offered conversion from examiner to attorney position, was entitled to have his promotion date changed to September 22, 1968, with adjustments in step increase dates, despite the general prohibition against retroactive adjustment of a personnel action which would result in additional compensation. Under 38 U.S.C. §§ 2021 – 2026, 5 U.S.C. § 5335(b), and OPM regulations, it is mandatory for an employee who is absent in military service to be considered for promotion, and if eligible,

to be promoted on the same date as he would have been had he remained in his civilian position. B-172077, April 7, 1971.

E. Settlement of Accounts of Deceased Officers and Employees

1. Statutory authority

Payments of unpaid compensation due deceased civilian employees of the federal government to beneficiaries or to proper claimants in accordance with the order of precedence contained in 5 U.S.C. § 5582, may be made by the employing agency without reference to GAO. However, a claim for any such payment must be submitted to the Claims Group, GAO, for adjudication when doubt exists as to (1) the amount of validity of the claim, or (2) the person or persons properly entitled to payment. B-143966, June 29, 1961. 4 GAO Manual for the Guidance of Federal Agencies, §§ 20.1 – 20.2.

The disposition of the unpaid compensation of a federal employee is governed exclusively by federal statute and regulation. Under federal law, entitlement to such unpaid compensation vests in the beneficiary designated by the employee, notwithstanding any competing claims that may be presented by others not so designated who claim entitlement on the basis of local laws or court orders. Hence, in the case of a Department of Energy employee who named his father as his beneficiary, the father became entitled to the unpaid compensation due the employee at the time of his death, rather than the employee's widow who claimed entitlement to the unpaid federal compensation on the basis of a state court order issued in divorce proceedings. Chester F. Dean, B-227728, March 23, 1988.

2. Beneficiary designation

a. Designation of other than statutory beneficiary

The executor of the will of a deceased federal employee who did not file a designation of beneficiary to receive his unpaid compensation upon death was not entitled to payment in preference to the decedent's adopted son notwithstanding the executor's status as principal beneficiary under the will. Section 5582 of Title 5, U.S. Code, which governs the distribution of unpaid compensation due government employees, requires that designations of beneficiaries be filed with the employing agency. B-150308, December 12, 1962. See also B-172540, May 28, 1971.

b. Unnecessary for relationship to employee to exist

Under 5 U.S.C. § 5582, an employee may designate any person or persons as beneficiary. The term "person or persons" includes a legal entity or the estate of the deceased employee. 4 GAO Manual for the Guidance of Federal Agencies § 19.2.

c. Error in names

The claimant, the cousin of a deceased Army employee, who contended that the beneficiary "Mary E. Sanchez, cousin," designated by the employee to receive the unpaid compensation due at the time of his death was actually the claimant, Mary E. Santos, who resided at the address shown for the beneficiary on the designation form. Her claim may not be paid in the absence of a determination by a court of competent jurisdiction that the name of the beneficiary shown was in error and that the intent was to designate the claimant, in view of the fact that the employee's former wife at one time was known as Mary Sanchez and was referred to as a cousin by the employee after their divorce. B-147549, November 22, 1961.

A deceased government employee incorrectly listed the name of the person that he desired to receive part of any compensation due him at death. However, other evidence clarified the employee's intent as to the intended beneficiary and the intended beneficiary is entitled to payment. B-182519, July 2, 1975.

d. Necessity for designation to comply with statute

Even if a court should declare the written statement left on the evening of death to be the last will and testament of a deceased federal employee, such decision would not satisfy the statutory requirements of designation of beneficiary under 5 U.S.C. § 5582, since the statute requires the designation by an employee to be in writing and filed with the agency prior to the employee's death. B-154278, June 11, 1964.

e. Distinction from designation of beneficiary under FEGLI

A deceased federal employee did not designate a beneficiary to receive her unpaid compensation due at death, in accordance with 5 U.S.C. § 5582(b). The employee's aunt may not be paid this compensation, even though she is designated beneficiary under the Federal Employees'

Group Life Insurance program (FEGLI), since the latter designation is distinct from the designation of a beneficiary to receive unpaid compensation. Under the terms of 5 U.S.C. § 5582(b), the employee's widower, from whom she was separated, was entitled to this compensation. B-178403, June 5, 1973.

f. Surviving spouse as designated beneficiary

(1) Rights of common-law widow—Claim of the sister of a deceased civilian employee for unpaid compensation due the decedent who had not designated a beneficiary but who was survived by a common-law widow, may not be allowed. Under 5 U.S.C. § 5582, when no beneficiary has been designated, payment is to be made to the widow. Furthermore, unpaid compensation of a deceased federal employee does not become part of the estate of the decedent unless there is no designated beneficiary, spouse, children or their issue, or parents. B-130743, November 30, 1962. See also B-175195, April 26, 1972.

The disposition of the unpaid compensation of a deceased federal civilian employee is governed by the order of precedence in 5 U.S.C. § 5582(b) (1982). Where a claimant has sufficiently established that she had a common-law marriage with the employee and thus was his widow, this determination places her in a higher order of precedence than the employee's children for claiming unpaid compensation. Leroy Chase, Jr., B-226914, September 9, 1988.

A claimant who asserts that she is the common-law wife of a deceased employee may not collect his unpaid compensation since no common-law marriage has been established and it is unclear whether the deceased employee believed himself to be or held himself out as married. Bernice Webb Becks, B-227483, October 23, 1987.

(2) Claim of widow or widower—Under California law, the legal relationship between husband and wife is not terminated by the interlocutory divorce decree. It is terminated only by the expiration of the statutory waiting period and entry of final judgment. Therefore, as the ceremonial marriage of the claimant and the decedent occurred prior to entry of final judgment (no later evidence of validation of the marriage having been presented), the claimant was not the decedent's lawful widow and there was no basis for allowance of the claim for unpaid compensation due the deceased employee, settlement having been made in favor of his children under the order of precedence contained in 5 U.S.C. § 5582. B-173414, July 30, 1971.

Deceased employee, James A. Smalls, entered into ceremonial marriage with Juanita Stephens on March 1, 1955, in South Carolina, and there is no record of divorce between James and Juanita in that jurisdiction. James Smalls entered into ceremonial marriage with Susie (now Susan) Wright on March 12, 1959. Although second marriage is presumed to be valid, such presumption is rebutted by showing that there is no record of divorce between James and Juanita. Under South Carolina law, all marriages contracted while either of the parties has a former wife or husband living are void. Hence, James's marriage to Susan is void, and she is not the legal widow of the deceased employee, and is not entitled to payment of his unpaid compensation. James A. Smalls, B-212148, July 23, 1984.

(3) Effect of separation agreement—A separation agreement does not divest a wife of her right to unpaid compensation in the absence of the designation of another beneficiary. B-169560, June 3, 1970.

(4) Beneficiary charged with decedent's death—A husband who entered a plea of guilty to first degree manslaughter in connection with the death of his wife—a former federal employee in the state of Ohio—was not entitled to the unpaid compensation due the decedent. The policy governing payment pursuant to 5 U.S.C. § 5582, prescribing the order of precedence for the payment of money due a deceased employee, is that payment will not be made to a person otherwise entitled if such a person participated in the death of the employee, in the absence of evidence establishing that there was not felonious intent on his part. 51 Comp. Gen. 483 (1972); B-193743, September 28, 1979.

(5) Change of beneficiary received by agency after death of employee—Where the designation of the widow as sole beneficiary was not received by the employing agency until after the employee's death, the widow was not entitled to unpaid compensation due the employee at time of death, notwithstanding allegations that previously designated persons were not legal heirs and the employee's will named her as beneficiary. Title 5, U.S. Code, § 5582 provides that the employing agency must receive the designation prior to the employee's death and that payment to the designated persons bars recovery by any other person. B-157353, August 12, 1965.

(6) Death of beneficiary before the death of employee—Where the wife, who was the designated beneficiary, died before the employee, the designation was ineffective by operation of law upon her death. No rights to compensation which would later become due upon death of the

employee vested in the wife or her heirs or estate. Therefore, even though the employee did not cancel or change the beneficiary designation after his subsequent marriage, his surviving wife, rather than the children of his deceased wife, became entitled to the unpaid compensation upon his death. 41 Comp. Gen. 431 (1962).

(7) Death of beneficiary after the death of employee—A claim by the administratrices of the deceased beneficiary of a deceased employee for money due the employee at his death was allowed as the beneficiary died after her husband. Under 5 U.S.C. § 5582(b), if the person entitled to payment of money due the deceased employee survives the deceased employee, the right to payment vests in that person. If she should thereafter die before payment is accomplished, that right passes to her estate or to her heirs-at-law as the case may be. B-162287, August 25, 1967.

(8) Prohibition against beneficiary to waive statutory right—A claimant who stated that the deceased employee was his legal wife and who relinquished his claim in favor of his step-daughter was allowed compensation due the decedent as widower. Section 5582, Title 5 of the U.S. Code, which established the order of precedence to unpaid compensation, does not permit a survivor of higher order of preference, such as the widower, to waive his statutory right in favor of a child of the decedent. B-156732, May 24, 1965.

g. Other legal beneficiaries

(1) Sufficiency of evidence—A claim for the unpaid compensation of a deceased employee filed by his daughter on behalf of herself and her brother and sister of the whole blood was previously denied because of insufficient evidence that they were the legal beneficiaries of the claimed pay and that they constituted the entire class of individuals entitled to the payments. Joe Marvin (Deceased), B-207143, December 30, 1982. Although the issues then in doubt are unresolved, the other potential beneficiaries have failed to file claims for the unpaid compensation within 3 years of the former employee's death. Under the rule stated at 4 C.F.R. § 33.6(d) payment of the claim may be issued to the deceased employee's children on whose behalf the claim has been filed. Joe Marvin (Deceased), Reconsidered, B-207143, December 26, 1984.

(2) Failure of beneficiary-husband to claim unpaid compensation—The mother of the deceased employee was advised that under 5 U.S.C. § 5582, GAO was prohibited from authorizing payment to her unless it could be established by competent evidence that her daughter's husband was

either divorced from or had predeceased her daughter. Where reasonable and diligent efforts had been made without success to establish the existence or death of the husband, settlement for the amount of unpaid compensation due upon the death of the decedent was issued in favor of the mother. The mere possibility of the husband's existence should not foreclose entirely the entitlement of those whom Congress has designated as next in the order of precedence. B-173574, November 2, 1971. See also B-168930, June 16, 1970.

(3) Illegitimate children—In light of decisions of the United States Supreme Court and lower federal court decisions, any distinction between "legitimate and illegitimate" children for purposes of receipt of federal benefits, including unpaid compensation, has been abrogated. All prior Comptroller General decisions which held contra will no longer be followed. 54 Comp. Gen. 858 (1975).

(4) Dual claims—lack of sufficient evidence of entitlement—The claims of his mother and alleged son for unpaid compensation due a deceased civilian employee are too doubtful to be allowed without resolution by a court of competent jurisdiction. The alleged son's claim is higher on the statutory list of distribution; however, his status as son is based on a document executed by the deceased in El Salvador recognizing him as the deceased's son, and other information of record makes his status as biological son questionable. Estate of John A. Thomas, 68 Comp. Gen. 284 (1989).

(5) Effect of bankruptcy judge's order—At the time of his death an employee was subject to a wage earner's plan under Chapter XIII of the Bankruptcy Act. The bankruptcy judge issued an order requiring unpaid compensation due the employee at the time of his death to be paid to the trustee of the plan. The agency had also received a claim for unpaid compensation under 5 U.S.C. § 5582 from surviving children. The order of the bankruptcy judge may not be followed since there is no waiver of sovereign immunity sufficient to permit enforcement of the order against the United States in the face of the competing claim based upon a specific statutorily granted right. 58 Comp. Gen. 644 (1979).

h. Compensation payable

(1) Day of death—Compensation is payable for the day of death where the employee was in a pay status immediately prior to his death. 25 Comp. Gen. 366 (1945). In the case of a substitute postal employee who worked only when called and who was on sick leave on May 31,

1962, the day preceding his date of death, his salary was allowed for a full day for June 1, 1962, in view of the administrative report that the employee would have been carried in a sick leave status, on that day had not death intervened. It is reasonable to assume that an employee in a pay status immediately before his death would have continued in such a status had not death intervened; therefore, his beneficiary is entitled to compensation for the day on which the employee's death occurred. B-149836, September 20, 1962.

(2) Unused compensatory time—Where, for reasons beyond his control, an employee's compensatory time in lieu of overtime remains unused at the time of his death, payment at the overtime rates may be made therefor to his beneficiary pursuant to 5 U.S.C. § 5582. 31 Comp. Gen. 245 (1952).

(3) Donated annual leave—death of employee—Under the Temporary Leave Transfer Program for fiscal year 1988, the retroactive substitution of donated annual leave for leave without pay after the death of a leave recipient was improper. Any unused donated leave remaining to the credit of a leave recipient after his death should have been restored to the leave donors. Harold A. Gibson, 68 Comp. Gen. 694 (1989).

(4) Setoff of indebtedness—Where a deceased employee was found to have obtained over $64,000 from the government through falsified purchase orders and invoices, the indebtedness may be collected from unpaid salary and accrued annual leave. The government's right of setoff is founded upon the common-law right of a creditor to apply amounts due a debtor to liquidate the indebtedness. B-190291, January 3, 1978.

F. Payments to Missing Employees

1. Statutory authority

Under 5 U.S.C. §§ 5561 – 5570, the Missing Persons Act, an employee in a missing status is entitled to receive or have credited to his account, during the period he is in a missing status, the same pay and allowances to which he was entitled at the beginning of such period or may become entitled thereafter. An employee in a missing status on or after January 1, 1965, may elect either to receive payment for annual leave which accrued to his account on or after January 1, 1965, but which was forfeited because he was unable to use such leave by virtue of his missing status, or to have such annual leave restored to him and credited to a separate leave account. 5 U.S.C. § 5562(a).

2. Termination of entitlement

Entitlement to pay and allowances ends on the date of (1) receipt by the head of the agency concerned of evidence that the employee is dead or (2) a determination of death made after review by the agency and the lapse of 12 months in a missing status. 5 U.S.C. § 5562(b) and B-163944, May 23, 1968.

3. Finality of administrative determination

A determination of an employee's entitlement under the Missing Persons Act by the head of an agency is conclusive in accordance with 5 U.S.C. § 5566. Where an agency head determined that an employee was intermittent or native labor casually hired and, therefore, ineligible for benefits under the act, GAO had no authority to reconsider the matter. B-157343, August 17, 1965. However, the conclusiveness of such a determination does not extend to decisions as to whether a particular type of pay or allowance is properly includable under the act. 27 Comp. Gen. 205 (1947).

4. Court concurrence with agency death determination

A claim made under the Missing Persons Act, 5 U.S.C. §§ 5561 – 5570, may be paid since the employing agency made a determination of death, which is supported by the findings of a court of competent jurisdiction, and such finding is conclusive on all other agencies. Estate of Ms. Sharon Z. McCully, 67 Comp. Gen. 576 (1988).

5. Overtime compensation

A civilian employee is entitled to overtime compensation based on the amount of overtime compensation received prior to entering a missing status, if such compensation was part of his regularly scheduled pay and allowances and such overtime compensation would have continued throughout his missing status period. This is so even though the office to which the employee was assigned had been disestablished. However, where overtime was not a part of the employee's regularly scheduled workweek, the employee is not entitled to overtime compensation unless he became entitled to it thereafter. Such entitlement would be based on the overtime performed by his replacement or the average overtime performed by employees in his unit. 55 Comp. Gen. 147 (1975). See also Chapter 4 of this title.

6. Post allowance

Foreign Service Officer, who was held captive for 7 years in Vietnam, seeks payment for station per diem and travel per diem under Missing Persons Act, 5 U.S.C. §§ 5561 - 5570. The military term "station per diem" under the Missing Persons Act may be equated with a civilian post allowance. Therefore, if he was receiving a post allowance at the time of capture, that allowance may be continued for 90 days. However, travel per diem may not be allowed under Missing Persons Act. B-159399, October 14, 1981.

7. Living quarters allowance

Foreign Service Officer seeks a living quarters allowance under the Missing Persons Act, 5 U.S.C. §§ 5561 - 5570, for 7-year period he was held captive in Vietnam. Since civilian employees in Vietnam were provided either government quarters or a living quarters allowance, we conclude that a living quarters allowance may be paid for 7-year period he was held in captivity. B-159399, October 14, 1981.

8. Inflation adjustments

Foreign Service Officer who is entitled to the continuance of certain pay and allowances under the Missing Persons Act, 5 U.S.C. §§ 5561 - 5570, may not receive currency and inflation adjustments or interest on amounts due him in the absence of specific statutory authority. B-159399, October 14, 1981.

G. Conflict of Interest Statutes

1. Statutory authority

Title 18, U.S. Code, §§ 201 - 224, in general,

- prohibits federal employees from receiving compensation for any services rendered or to be rendered by the employee or another in relation to any proceeding, application, request for a ruling or other determination, charge, accusation, arrest, or other matter in which the United States is a party;
- prohibits such employees from appearing as agent or attorney on behalf of anyone in a proceeding in which the United States is a party;
- disqualifies former officers and employees from participating in matters connected with their former duties or official responsibilities;

- prohibits a government employee from having any present or prospective financial interest in government decisions in which he participates; and
- prohibits federal employees from receiving compensation for their work from any private source.

2. GAO jurisdiction

A retired Public Health Service dentist provided dental services under contract to the Coast Guard. Our Office has no authority to issue formal opinions concerning the application of conflict of interest statutes to the arrangement, but we are aware of no basis to generally exclude federal retirees from obtaining government contracts. Dr. Edward Kuzma, B-215651, March 15, 1985.

3. Aiding or assisting in claims

Although an agency is not required to notify employees of underpayments, separated Veterans Administration employees—who were not compensated for holidays occurring within periods of lump-sum leave payments or not granted statutory increases under schedule II, Pub. L. No. 87-793 and who were not aware of their entitlement and who apparently would not claim the amounts due—could be informed of underpayments of pay when current addresses became available without awaiting the filing of claims since GAO did not object to the additional payments, legally due. The criminal provisions of former 18 U.S.C. § 283, prescribing penalties for employees who aided or assisted in prosecution of claims against the United States, have been repealed and replaced by 18 U.S.C. § 205. Whether that provision is applicable is a matter for determination by the Department of Justice or the courts. B-115800, December 8, 1964.

4. Criminal penalties—jurisdiction

The principal statutory provisions relating to conflicts of interest are contained in 18 U.S.C. §§ 201 - 224. The basic regulatory provisions setting forth standards of conduct for government employees are found in Executive Order No. 11,222, May 8, 1965, as amended, and OPM and agency regulations promulgated thereunder.

Under the executive order and OPM regulations, the determination of whether a conflict of interest or the appearance of a conflict of interest exists is left to the head of the agency concerned or OPM. In the event it

is determined that there is conflict of interest and that a violation of the criminal code may have occurred, the matter would be referred to the Department of Justice. GAO does not have authority, either by statute or regulations, to determine whether conduct on the part of an employee of another federal agency had violated any statutes or regulations pertaining to conflicts of interest. See 48 Comp. Gen. 24 (1968).

H. Labor Relations Matters

1. GAO jurisdiction pursuant to 4 C.F.R. Part 22

A claim submitted pursuant to GAO's Procedures for Decisions on Appropriated Fund Expenditures which are of Mutual Concern to Agencies and Labor Organizations, 4 C.F.R. Part 22 (1981), will generally be considered by the GAO even if the claim could have been submitted under the collective-bargaining agreement's grievance and arbitration procedures as long as neither party objects.

Although the agency requests a decision concerning computation of overtime backpay awarded by an arbitrator pursuant to a collective-bargaining agreement, we decline jurisdiction in the absence of a request from an arbitrator or other neutral party or a joint request from the parties. If the parties cannot reach an agreement, the matter is more appropriately resolved under the procedures set forth in 5 U.S.C. Chapter 71. Robert D. Healy, B-217172, June 12, 1985.

However, if a final and binding arbitration award has been issued pursuant to 5 U.S.C. § 7122(a) or (b), the GAO will not review or comment on the merits of such decisions.

2. Arbitration award

Employee, whose claim for higher exposure environmental pay was denied by our Claims Group, requests reconsideration on basis of arbitrator's award under labor-management agreement. In accordance with 4 C.F.R. § 22.7(a) payments made pursuant to an arbitration award which is final and binding under 5 U.S.C. § 7122(a) or (b), are conclusive on GAO, and this Office will not review or comment on the merits of the award. To the extent that the employee's request places in issue the finality or propriety of implementation of arbitrator's decision, GAO, under 4 C.F.R. § 21.8, will not issue a decision. Those issues are more properly within the jurisdiction of the Federal Labor Relations Authority, pursuant to Chapter 71 of Title 5, U.S. Code. 60 Comp. Gen. 578 (1981).

3. Arbitrator requests GAO opinion

Where an arbitrator has requested that the parties in dispute seek the Comptroller General's opinion as to the legality of a labor-management agreement provision, the Comptroller General will issue a decision to the parties on their request. 4 C.F.R. § 22.7(b). 60 Comp. Gen. 668 (1981).

4. Agency objects to GAO jurisdiction

Employees of Library of Congress asserting claims for retroactive temporary promotion and backpay in connection with overlong details filed grievances under collective-bargaining agreement. After receipt of agency decision at step two of grievance procedure, union filed claims with GAO pursuant to 4 C.F.R. Part 31, seeking to extend the remedy granted by the agency. The agency objects to submission of the matter to GAO. In instances where a claimant has filed a grievance with the employing agency, GAO will not assert jurisdiction if a party to the agreement objects since to do so would be disruptive to the grievance procedures authorized by 5 U.S.C. §§ 7101 – 7135. Moreover, the issue of the timeliness of the grievances is primarily a question of contract interpretation which is best resolved pursuant to grievance arbitration procedures. 61 Comp. Gen. 15 (1981). See also American Federation of Government Employees, Local 2459, 62 Comp. Gen. 274 (1983).

Civilian employee of Department of Army was detailed to higher grade position for period of 42 days. Collective-bargaining agreement provided for temporary promotion with backpay for details beyond 30 days. Agency objects to submission of the matter to GAO since same collective-bargaining agreement provides that employees must use negotiated grievance procedures to resolve grievable issues. GAO will not assume jurisdiction over claims filed under 4 C.F.R. Part 31, where the right relied upon arises solely under the collective-bargaining agreement and one of the parties to the agreement objects to submission of the matter to GAO. However, if otherwise appropriate, GAO will consider, under 4 C.F.R. Part 31, matters subject to a negotiated grievance procedure, despite the objection of a party, where the right relied upon is based on a law or regulation or other authority which exists independently from the collective-bargaining agreement and no grievance has been filed. 61 Comp. Gen. 20 (1981).

The jurisdictional policies established in this case for claims filed with GAO under 4 C.F.R. Part 31, involving matters of mutual concern to agencies and labor organizations differ from those established in 4 C.F.R. Part

22. The differences are based upon differences in the respective procedures and are designed to achieve a balance between GAO's statutory obligations under Title 31 of the United States Code and the smooth functioning of the procedures authorized by the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101 – 7135. 61 Comp. Gen. 20 (1981).

5. GAO interprets collective-bargaining agreement

Negotiated labor-management agreement provision, which is protected by savings provision of section 9(b) of Pub. L. No. 92-392, August 19, 1972, provides for payment of construction rates of pay to specified temporary employees of Grand Coulee project office. The arbitrator found that as of September 1979, the payment of construction rates of pay to temporary employees was not a prevailing practice in the area. Since section 704 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, October 13, 1978, requires that agreement provisions protected by section 9(b) shall be negotiated in accordance with prevailing rates and practices, we conclude that these temporary employees may not continue to be paid at construction rates of pay. 60 Comp. Gen. 668 (1981).

Although claim concerning overlong detail pertains to the interpretation of a collective-bargaining agreement, it is appropriate for GAO to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover, the parties are in agreement as to the intent of the negotiated provisions, there is no arbitration award involved, no one has objected to submission of the matter to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this Office. 61 Comp. Gen. 492 (1982).

6. Union dues allotments

For cases involving allotments for union dues, see Chapter 5, Subchapter I, Part H of this title.

I. Emergency Evacuations

Under the broad authority in 5 U.S.C. § 5523(b), the special allowances, prescribed by the Standardized Regulations, incident to the evacuation of the dependents at an overseas post of duty may be paid to an employee on behalf of his dependents at an overseas post of duty who are not at his post at the time of an evacuation but who are directly

affected by the evacuation orders. However, as payments of the additional allowances for unusual expenses must be attributable to a post evacuation order, when dependents are absent for personal reasons at the time an evacuation order issues, with no intention of returning to the post for the duration of the evacuation, the employee is not entitled to the special allowance, having incurred no unusual expenses. But if an absent dependent is prevented from returning by reason of the evacuation order issued during his absence, the unusual expenses incurred are payable from the time the intended return is blocked. 50 Comp. Gen. 89 (1970).

J. Services to Employees

Under 5 U.S.C. § 7901 and implementing regulations, the EPA may expend appropriated funds for procurement of diagnostic and preventive psychological counseling services for employees. However, it may not provide employee treatment and rehabilitation at government expense. 57 Comp. Gen. 62 (1977). Compare 53 Comp. Gen. 230 (1973).

Service as Juror or Witness

A. Statutory Authorities

1. No fees in United States courts

An employee of the United States or the District of Columbia may not receive fees for service as a juror in courts of the United States or the District of Columbia or for service as a witness on behalf of the United States or the District of Columbia. 5 U.S.C. § 5537.

2. Setoff of fees for jury or witness service in state courts

Jury or witness fees received by an employee of the United States or the District of Columbia for service as a juror or witness during a period for which the employee is entitled to court leave under 5 U.S.C. § 6322 shall be credited against pay payable to the employee by the United States or the District of Columbia for that period. 5 U.S.C. § 5515.

3. Court leave

An employee of the United States or of the government of the District of Columbia is entitled to leave, without loss of or reduction in pay or leave to which the employee is otherwise entitled, for a period of absence during which the employee is summoned in connection with a judicial proceeding to serve as a juror or as a witness on behalf of a state or local government. Judicial proceeding means any action, suit, or other judicial proceeding, including any condemnation, preliminary, information, or other proceeding of a judicial nature, but does not include an administrative proceeding. 5 U.S.C. § 6322(a).

4. Testimony for U.S. or D.C. or in official capacity

An employee who is summoned or assigned by his agency to (1) testify or produce records on behalf of the United States or the District of Columbia, or (2) testify in his official capacity or produce official records on behalf of a party other than the United States or the District of Columbia, is performing official duty for the period of such service. 5 U.S.C. § 6322(b).

Subchapter I—Service as Juror

A. Effect on Non-Basic Compensation

1. Night differential

An employee otherwise entitled to night pay differential may continue to receive such pay for periods excused from duty while serving as a juror in the United States District Court for the District of Columbia. 29 Comp. Gen. 427 (1950).

2. Premium pay

Because it would be a hardship on employees called for weekday jury service to also work on weekends, the Federal Aviation Administration could establish a policy to permit employees whose normal tours of duty included work on Saturday or Sunday, or both days, to be absent on weekends without charge to annual leave and with payment of the premium pay normally received by them for work on Saturdays and Sundays. 54 Comp. Gen. 147 (1974).

3. Overtime

Per diem and per hour employees who are regularly required to work 6 8–hour days per week, for which overtime rates of compensation are paid in accordance with 5 U.S.C. § 5544 for the sixth day of work, may be paid overtime compensation when required to serve on a jury for such day of the week. 23 Comp. Gen. 904 (1944).

B. Payment for Jury Service

1. Per diem allowance

Prohibition of 5 U.S.C. § 5537 against receiving compensation for jury service, does not preclude allowing employees serving as jurors mileage payments, meals, and lodging in kind authorized by law for jurors, in addition to their regular compensation as employees of the United States, but does preclude payment of the per diem allowance for each day's attendance in courts and for traveltime prescribed by 28 U.S.C. § 1871. 20 Comp. Gen. 145 (1940).

By a 1979 amendment to the Texas statute which authorizes pay of jurors, the term "per diem" was substituted for the term "compensation," which was used in the derivative statute. In spite of this change in the statutory terminology, federal employees who are entitled to leave for jury duty while serving as jurors in Texas state courts may not retain any amount received for such jury service under the relevant Texas statute, because there is no indication in that statute that the fees, or any portion thereof, are intended to be an expense allowance or reimbursement for travel. Texas State Court Juror Fees, B-214863, July 23, 1984.

A statute of the state of Texas in effect between August 1979 and April 1985 authorized a "per diem" for the "pay of jurors." As the original construction of that statute, the Comptroller General's holding in July 1984 that jury fees payable under the statute constituted compensation for services rather than reimbursement of expenses is applicable retroactively to the date the statute first went into effect. Texas State Court Juror Fees, B-219496, January 22, 1986.

In April 1985 the laws of the state of Texas were amended to provide for a daily allowance ranging from $6 to $30 "as reimbursement for travel and other expenses" of jurors. Since the express intent of this statute is merely to reimburse jurors for their out-of-pocket expenses, and the amounts authorized do not appear unreasonable or excessive for that purpose, amounts paid under this amended statute need not be regarded as compensation for jury service and federal employees have no duty to account for them. Texas State Court Juror Fees, B-219496, January 22, 1986.

2. Part-time employees

A part-time permanent federal employee who is called for jury service in a United States court may receive the compensation of his position, and for any hours of jury service which do not conflict with his regular tour of duty and for which he is not entitled to court leave, the employee may receive the jury fee. 36 Comp. Gen. 378 (1956).

3. Jury service on nonworkdays

Full-time and part-time employees who perform jury service on nonworkdays are entitled to retain the fees received for such service. 37 Comp. Gen. 695 (1958).

4. Jury service outside of normal work hours

An employee who is authorized by a state court to be paid jury fees for 2 days during which the trial was recessed and who returned to and performed the duties of her regular position during the period of the recess may retain the jury fees received for those days without setoff against her regular compensation. B-170497, September 9, 1970.

An employee who performs duty for a full workday and then sits on grand jury duty in the evening may be granted court leave for the following day to the extent necessary to alleviate hardship. Employee is entitled to retention of pro rata portion of grand jury fee to the extent that hours of actual service exceed hours of court leave granted. B-70371, August 5, 1975.

An employee who performs jury duty in a court of the United States or the District of Columbia after his hours of duty so that no court leave is involved is entitled to payment of jury fees. 36 Comp. Gen. 378 (1956).

5. Jury service overlapping normal work hours

For each hour of jury service performed in a court of the United States or the District of Columbia, outside of the hours of duty an employee otherwise worked or, but for jury service, would have been required to work on a given day, the employee is entitled to a proportionate part of the jury fee for that day. Prior decisions to the contrary are overruled. 53 Comp. Gen. 407 (1973).

Principle of 53 Comp. Gen. 407 (1973) permitting pro rata payment of jury fees to employees for jury service in federal courts extending beyond scheduled workday is equally applicable to jury duty performed in state courts. Employees may be permitted to retain a pro rata portion of fee for jury service in state or municipal courts extending beyond their scheduled workday. Prior decisions overruled. 55 Comp. Gen. 1266 (1976).

When an employee, while serving on jury duty 8 hours a day, also performs 4 hours of his regular duties, he is not entitled to premium pay for overtime for performing his regular duties. Jury service may not be regarded as work actually performed in excess of 8 hours for which overtime compensation is payable. Internal Revenue Service Employee, B-210181, March 8, 1983.

6. Computation of jury fee entitlement

a. Federal courts

Jury service fee payable to federal employees whose period of jury service in federal court overlaps in part their normal workday shall be based on the statutory jury service fee of $20, prorated over standard 8-hour workday; that is, $2.50 for each hour of jury service outside hours employee worked or would have worked but for jury service. 55 Comp. Gen. 1264 (1976).

b. Retroactive increases—federal courts

The presiding judge may at his own discretion authorize a retroactive increase in jury fees for jurors in cases extending beyond 30 days' duration under the provisions of 28 U.S.C. § 1871 which, at that time, authorized a jury fee of $25 per day for each day of service on one case beyond 30 days. 54 Comp. Gen. 472 (1974).

c. State courts—fees

Amount of jury service fee retainable by employee whose period of jury service extends beyond end of normal workday should be computed by dividing the total jury service fee by eight to arrive at an hourly rate. This rate times the number of hours of jury service beyond the end of the employee's workday equals the amount retainable. 55 Comp. Gen. 1266 (1976).

d. State courts—travel expenses in lieu of fees

A federal employee who has performed jury service in a state court is not required under 5 U.S.C. § 5515 to remit to the federal government that part of the compensation he receives from the state to cover traveling expenses where it is clear that a specific amount is received for travel expenses rather than for juror fees. 52 Comp. Gen. 325 (1972).

Absent evidence that a specific amount is intended as reimbursement for transportation expenses, an amount received as a jury fee must be credited against compensation. Although a Tennessee statute allowed local jurisdictions to increase the jury fee of $10 per day to cover travel expenses, where the employee received only the $10 fee, he is not entitled to travel expenses as an offset to the jury fees required to be remitted to his agency. The travel expenses were incident to his duty as

a citizen of a state and not as an employee of the United States. B-192043, August 11, 1978.

Where a Kentucky statute provides for a jury fee of $5 per day as well as an expense allowance of $7.50 per day, an Army employee may retain amounts received as an expense allowance incident to his jury service. GAO will not look beyond the prima facie intent of the statute in determining whether the payment is for expenses as opposed to jury fees. Only the latter is within the purview of 5 U.S.C. § 5515 and amounts paid as expenses may be retained by the employee. B-183711, August 23, 1977.

e. Hours of jury service

In computing excess hours of jury service over number of employee's working hours in day, fractional hours shall be rounded off, one-half hour or more being considered 1 hour. 55 Comp. Gen. 1264 (1976) and 55 Comp. Gen. 1266 (1976).

When the end of an employee's working day coincides with beginning of jury service, there is no necessity to prorate fee. Any traveltime between duty station and court is to be considered court leave. 55 Comp. Gen. 1264 (1976).

f. Jury fees that exceed compensation payable

Title 5 of the U.S. Code, § 5515 does not require that collection of deduction on account of jury fees received by an employee exceed the compensation otherwise payable to the employee for the period of absence on jury service. 20 Comp. Gen. 209 (1940).

g. Rate of payment of jury fees

The rate of pay for members of juries in federal courts is set forth in 28 U.S.C. § 1871.

h. Variable "expense rate"—state courts

Where Georgia statute provides for reimbursement of expenses at a rate from $5 to $25 per day as determined by county grand juries for next year's jurors, GAO will not look beyond prima facie intent of statute since varying amount seems reasonable in statute that covers entire state.

Employees may therefore retain moneys paid to them as an expense allowance. B-183711, October 21, 1975.

i. Refund of fees

Since section 59-120 of Georgia Code Annotated, as amended effective July 1, 1974, provides that jurors in state courts are to receive expenses instead of compensation in connection with their service, employees who performed jury service in Georgia state courts on or after July 1, 1974, and who have turned in the moneys received to their agencies, are entitled to refunds from the appropriations into which such moneys were deposited. B-183711, October 6, 1976.

j. Employees of the government of Guam

Employees of the government of Guam who receive salaries from the territory in accordance with sections 26(a) and (b) of the Organic Act of August 1, 1950, do not receive compensation as employees of the United States within the purview of 5 U.S.C. §§ 5537 and 6322 which authorize court leave for federal employees. Such employees therefore are entitled to retain the jury fee without diminution of salary for performance of jury duty in the District Court of Guam. 35 Comp. Gen. 369 (1955).

Subchapter II—Court Leave

A. Entitlement

1. Employee on other types of leave

When an employee is on annual leave status when summoned for jury service in a state or United States court, court leave should be substituted for annual leave for the period of such duty, but if the employee is in a leave without pay status, court leave is not available to him—such leave being available only to employees who otherwise would be in a duty status or on authorized leave with pay status. 27 Comp. Gen. 84 (1947).

2. Reporting to work before or after jury duty

When it appears that an employee will be expected to perform jury duty for a substantial part of the day on the date stated in the summons commencing jury service, the employee is not required to report to work that same day. Once summoned by a court for jury duty an employee's primary responsibility is to the court. When it is apparent that an employee will be required to perform jury duty for less than a substantial part of the day, and when it is reasonable to do so, the employee's agency may require the employee to report for work prior to reporting for or after being excused from jury duty. 60 Comp. Gen. 412 (1981).

3. Jury duty outside normal workday

An employee who performs duty for a full workday and then sits on grand jury duty in the evening may be granted court leave on the following day to the extent necessary to alleviate hardship. Employee may retain pro rata portion of grand jury fee to the extent that hours of actual service exceed hours of court leave granted. B-70371, August 5, 1975.

4. Overtime compensation

Labor organization asks whether firefighters are entitled to additional pay under Title 5, United States Code, when their overtime entitlement is reduced as a result of court leave for jury duty. The firefighters are entitled to receive the same amount of compensation as they normally receive for their regularly scheduled tour of duty in a biweekly work period. The court leave provision, 5 U.S.C. § 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay. Overtime Compensation for Firefighters, 62 Comp. Gen. 216 (1983).

B. Temporary Employees

An employee who had served on jury duty under both his current 4-year term appointment and under a prior 1-year temporary limited appointment may be granted court leave for the jury duty performed under both appointments. Temporary employees may be granted leave of absence with pay for the purpose of serving on jury duty. 48 Comp. Gen. 630 (1969).

C. Part-Time Employees—"When-Actually-Employed"

Substitute employees of the Postal Service, whether career or temporary, who are compensated at an hourly rate and have no established work schedules, hold appointments that are similar to appointments on an intermittent "when-actually-employed" basis, even though substitutes may work an average of 40 hours per week and, therefore, they may not be granted court leave under 5 U.S.C. § 6322. 49 Comp. Gen. 287 (1969).

Employee serving under a career-conditional (intermittent) appointment, whose work technically is on a "when-actually-employed" basis, but whose employment actually covered a protracted period under a continuing established work schedule, may be viewed for purposes of court leave to occupy a position similar to that of a temporary employee and court leave may be granted for jury duty performed on prescheduled workdays. B-166056, August 12, 1970.

Subchapter III—Service as a Witness

A. Court Martial Proceedings

1. Expert versus ordinary witness

Claim of psychiatrist for payment of expert witness fees incident to the taking of a deposition in connection with court martial proceedings may not be paid where the record fails to disclose that employment of claimant as an expert witness was authorized in advance of the deposition as required by paragraph 116 of the Manual for Court Martials (1969). However, a claim may be submitted for ordinary witness fees and mileage incident to the taking of the deposition. B-168623, February 17, 1970.

2. Travel expenses

A change to the Joint Travel Regulations to permit the issuance of invitational travel orders and the payment of travel allowance to civilian persons other than federal employees who are requested to testify at pretrial investigations made pursuant to Article 32 of the Uniform Code of Military Justice may not be authorized in view of paragraph 34d of the Manual for Court Martials (1969), which, in its present form, provides no authority for any payment to Article 32 witnesses. Article 34d

must be changed prior to the contemplated revision of the Joint Travel Regulations. 50 Comp. Gen. 810 (1971) and B-171739, April 21, 1972.

B. Administrative Hearings

1. Invited witness

Payment of travel expenses, including lodging and subsistence, to nongovernment employee witnesses who are invited rather than subpoenaed to appear at an administrative hearing may be made on a computed basis as well as on an actual expense basis. The term "persons serving without compensation" is broad enough to include such persons, and constitutes authority for reimbursement of travel expenses on a computed basis. 48 Comp. Gen. 110 (1968).

2. Corporation, etc. summoned

The word "person" in 26 U.S.C. § 7602 which authorizes issuance of summonses incident to tax inquiries, includes corporations, trusts, etc. Therefore, when a summons is issued to a corporation to compel attendance as a witness before an Internal Revenue Officer, the witness fees and allowances authorized to compensate persons appearing as witnesses are payable directly to the business organization and not to the individual appearing on its behalf. 49 Comp. Gen. 666 (1970).

3. Mileage fees—persons summoned

Persons summoned for testimony to enable the Internal Revenue Service to establish tax liability, whether the witness is the taxpayer or is a person whose testimony is relevant and material to the inquiry involving the taxpayer, may be paid the fees and mileage provided for attendance at administrative hearings. 48 Comp. Gen. 97 (1968).

Individuals not members of the uniformed services or federal employees may be called as witnesses in adverse administrative proceedings, whether on behalf of the government or on behalf of a member or employee, and paid transportation and per diem allowances as "individuals serving without pay" if the presiding hearing officer determines that it has been reasonably shown that testimony of the witness is substantial, material, and necessary, and that an affidavit would be inadequate. 48 Comp. Gen. 644 (1968).

C. Judicial Hearings

1. Testimony in official capacity

Where value of employee's testimony in private litigation arises from his official capacity and he is subpoenaed solely because of and to testify in that capacity, or to produce official records, he may be regarded as having been in official duty and pay status during the period of necessary absence. 15 Comp. Gen. 196 (1935).

The attendance of an employee as a witness in a criminal hearing concerning an automobile accident which occurred while the employee-witness and another employee were on official business, for the purpose of strengthening the other employee's case in order to obtain a favorable verdict which would limit the possibility of a tort claim against the government, must be regarded as an appearance in the best interest of the government. Travel of the employee-witness may, therefore, be considered official business for the reimbursement of travel expense. 44 Comp. Gen. 188 (1964).

2. Private litigation

Title 5 of the U.S. Code, § 6322 permits the use of court leave when appearing in court as a witness on behalf of any party in connection with any judicial proceeding to which the United States, the District of Columbia, or a state or local government is a party.

Veterans Administration employees, who testify or produce records on behalf of victimized private parties (VA claimants) to aid in criminal prosecution of individuals under Philippine statute limiting fees which may be charged for assisting VA claimants, may be reimbursed for travel expenses since employees are in an official duty status. See 44 Comp. Gen. 188 (1964) and B-166938, July 17, 1969.

3. Suspended employees as witnesses

Suspended employees who were requested by U.S. Attorney to give testimony before federal grand jury and in trial of criminal cases were not reinstated to duty status for periods they spent testifying, even though their testimony was in regard to their official duties. They were, however, entitled to be paid and to retain any witness fees that would be payable to nongovernment employees appearing as witnesses in such proceedings. 53 Comp. Gen. 515 (1974).

Services Obtained Through Other Than Regular Employment

Subchapter I—Experts and Consultants

A. Authority to Employ Experts and Consultants

1. Statutory authority

The general statutory authority to hire experts and consultants as federal employees is contained at section 3109 of Title 5, United States Code, which provides in part as follows:

"(b) When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts and consultants or an organization thereof, including stenographic reporting services. Services procured under this section are without regard to—

"(1) the provisions of this title governing appointment in the competitive service;

"(2) chapter 51 and subchapter III of chapter 53 of this title; and

"(3) section 5 of title 41, except in the case of stenographic reporting services by an organization.

"However, an agency subject to chapter 51 and subchapter III of chapter 53 of this title may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section 5332 of this title only when specifically authorized by the appropriation or other statute authorizing the procurement of the services."

2. Generally

When an agency is authorized by an appropriation or other statute to use section 3109, it may obtain experts and consultants to perform temporary (not in excess of 1 year) or intermittent services. Because the services contemplated under such an arrangement are typically specialized and unusual, and because the time required for performance is often short, sporadic, and uncertain, these experts are not subject to the same employment procedures as permanent employees. Section 3109 excepts appointments made under its authority from those civil service personnel laws which require competitive examinations, classification of positions, and compensation under General Schedule plan. However,

final authority for determining whether a particular position or class of positions falls within the exception rests with the U.S. Office of Personnel Management (OPM) (formerly the Civil Service Commission). 16 Comp. Gen. 703 (1937); 17 Comp. Gen. 537 (1938).

3. OPM guidance

In the exercise of its authority OPM has issued instructions to departments and agencies in Chapter 304 of the Federal Personnel Manual. To help agencies do a more effective job managing experts and consultants who serve as federal employees, Chapter 304

- clarifies distinctions between employment and contracting;
- includes references to oversight activities such as OMB policies, GAO decisions, and Inspector General evaluations;
- includes statutory restrictions on conflict of interest, reemployed annuitants, and use of the 5 U.S.C. § 3109 appointing authority for SES jobs; and
- includes instructions from other OPM issuances on pay, leave, and benefits for agency convenience.

Thus, Chapter 304 of the FPM contains definitions of the terms "expert," "consultant," "intermittent employee," and "temporary employment" and provides guidance as to the proper use of expert and consultant services. Procedural instructions regarding employment of experts and consultants are contained at FPM, Chapter 304, Appendix A. The instructions apply to appointments under 5 U.S.C. § 3109 or similar authorities for agencies to make excepted appointments of experts and consultants, whether the services are paid or unpaid. The instructions also apply to individual expert or consultant services procured by contract if an employer-employee rather than an independent contractor relationship is created. See also Subchapter II of this chapter of the CPLM.

B. Compensation Limitations

1. General limitation on compensation

Under 5 U.S.C. § 3109, the amount an agency may compensate an expert or consultant is limited to the daily equivalent of the highest rate payable under 5 U.S.C. § 5332, unless a higher rate is specifically authorized by the appropriation or other statute authorizing procurement of the services.

2. Pay limitation imposed by 5 U.S.C. § 5308

The FEA appointed a consultant and set his pay at $161 per day, $21.72 below the maximum daily rate for GS-18. The consultant may be compensated for work in excess of 10 days per pay period only insofar as his total compensation does not exceed the biweekly rate for level V of the Executive Schedule. Thus, a consultant paid at the daily rate for GS-18 would not be entitled to any compensation for work in excess of 10 days per pay period. Since the compensation of experts and consultants under 5 U.S.C. § 3109 is set by administrative action, it is subject to the limitation on compensation imposed by 5 U.S.C. § 5308 which, by virtue of 5 U.S.C. § 5304, is applicable on a pay period basis. 58 Comp. Gen. 90 (1978).

3. Limitation applies to "employees"

The compensation payable to an expert or consultant whose services are secured on an employer-employee basis is the maximum rate of compensation payable under the General Schedule. A discussion of when services are obtained on an employer-employee basis rather than on an independent contract basis is included in Subchapter II of this chapter. See also FPM Chapter 304, Subchapter 1-4.

4. Scientific and engineering positions

The rate of compensation payable to experts or consultants appointed to research and development, scientific, and engineering positions is grade GS-18, inasmuch as such positions may be filled without numerical limitation and approval by OPM. 43 Comp. Gen. 509 (1964).

5. Exceptions

a. Higher rate authorized

By virtue of specific statutory authority granted it, an agency may be authorized to pay experts or consultants a different or higher rate of compensation than prescribed in 5 U.S.C. § 3109. Also, appropriation acts authorize a GS-18 rate. 51 Comp. Gen. 225 (1971).

b. Lower rate authorized

The Agency for International Development, by virtue of a specific limitation contained in the Foreign Assistance Act of 1961, was held to be

limited in the amount it could compensate experts or consultants to $100 per day, notwithstanding the higher limitation otherwise prescribed in 5 U.S.C. § 3109. 55 Comp. Gen. 567 (1975).

c. Pay set at an hourly rate

Land commissioners appointed by federal district courts in condemnation cases are compensated under 5 U.S.C. § 3109 and the Judicial Appropriations Act not to exceed $182.72, the highest daily rate payable under the General Schedule. Where it has been administratively determined to pay land commissioners on an hourly rate basis rather than on a daily rate basis, the hourly rate may be set at a rate in excess of one-eighth of the daily rate, provided that the total amount of compensation for services within any 1 day does not exceed $182.72. The computational principle set forth at 5 U.S.C. § 5504(b) for establishing an hourly rate need not be applied since the decision to compensate the commissioners on an hourly rate basis is discretionary. B-193584, January 23, 1979.

6. Independent contracts

The limitation on compensation contained at 5 U.S.C. § 3109 is not applicable, however, to a contract for expert or consultant services entered into under that authority on a truly independent contract basis. 26 Comp. Gen. 188 (1946). The fact that services are secured by contract is not conclusive of the question of the applicability of the fee limitation. If the relationship created under the contract as between the purported contractor and the government is in fact tantamount to that of employer and employee, the expert or consultant will be regarded as an employee and the amount of compensation which he may be paid will be regarded as subject to the maximum limitation set forth at 5 U.S.C. § 3109. 26 Comp. Gen. 188 (1946); 26 Comp. Gen. 442 (1946); and 42 Comp. Gen. 395 (1963).

7. Employment versus independent contract

The criteria to be used to determine whether the relationship created between an expert or consultant and the government is in fact an employment relationship rather than an independent contractual relationship are set forth at FPM Chapter 304, Subchapter 1-4 and are more fully discussed at Subchapter II of this chapter. And, where a contract for conducting management workshops is truly an independent contract which does not create an employer-employee relationship, payment need

not be limited to the highest rate of the General Schedule which is payable by an agency as prescribed by 5 U.S.C. § 3109. B-191865, November 13, 1978.

C. Intermittent Versus Temporary

1. Statutory authority

Under 5 U.S.C. § 3109, experts and consultants may be employed only on an intermittent or temporary basis.

2. Temporary employment

Temporary employment is defined as employment for 1 year or less and covers continuous employment. It includes periods of temporary employment less than 130 days. 35 Comp. Gen. 90 (1955); B-180698, August 19, 1974; and FPM Chapter 304, Subchapter 1-2.

3. Intermittent employment

Intermittent employment is occasional or irregular employment on programs, projects, and problems requiring intermittent services as distinguished from continuous employment. 35 Comp. Gen. 90 (1955) and FPM Chapter 304, Subchapter 1-2.

4. Conversions from intermittent to temporary

When an intermittently employed expert or consultant has worked more than one half of full-time employment, or in excess of 130 days in a service year, his employment automatically ceases to be intermittent and becomes temporary. 36 Comp. Gen. 351 (1956) and B-179640, August 16, 1971.

5. Renewal of appointment

a. Generally

Intermittent appointments or contracts may be renewed from year to year, whereas temporary appointments can not. FPM Chapter 304, Subchapter 1-3.

The services of experts or consultants may not be secured under a succession of short-term contracts for full- or part-time services where the resulting continuous employment would be in excess of 1 year. When the

need for temporary services extends beyond 1 year, there is no authority to enter into an employment agreement under 5 U.S.C. § 3109 for periods extending beyond 1 year, regardless of any period extending between the employment agreements. 28 Comp. Gen. 670 (1949).

b. Exceptions

(1) Intermittent appointment following temporary—An expert or consultant who served under a temporary appointment in 1 service year may be reappointed the next year to the same position on a purely intermittent basis. FPM Chapter 304, Subchapter 1-3.

(2) Successive but distinct temporary appointments—An expert or consultant who served under a temporary appointment in 1 service year may be appointed on a temporary basis in the subsequent year to an entirely different position. FPM Chapter 304, Subchapter 1-3.

6. Travel expenses

a. Intermittent appointment

The travel expense entitlement of persons employed intermittently as experts or consultants is governed by 5 U.S.C. § 5703 which authorizes payment of travel expenses, including a per diem allowance, to such individuals while away from their homes or regular places of business. Under that authority, intermittently employed experts or consultants may be paid a per diem allowance while at the place of their employment as an expert or consultant. 35 Comp. Gen. 90 (1955). Thus, where a consultant was given an intermittent appointment and it was the agency's intent that he work intermittently, the consultant may be paid travel expenses between his residence and official station and per diem while on duty there under 5 U.S.C. § 5703 even though, for part of the period involved, an unexpected heavy workload required him to work 40 hours a week. B-193170, May 16, 1979.

b. Temporary

A temporarily employed expert or consultant, like a regular federal employee, is entitled to the ordinary travel allowances payable in connection with the performance of official duty away from the individual's permanent duty station. 35 Comp. Gen. 90 (1955) and B-180698, August 19, 1975. However, a consultant is not entitled to travel expenses from his residence after 130 days of service since his

appointment then ceased to be intermittent and became temporary. He may be paid such expenses under an intermittent appointment the following year. B-187389, July 19, 1978.

See also Chapter 2, "Experts and Consultants," Title III—Travel, of the CPLM.

D. Procedural Aspects

1. Contracts and appointments

a. Employer-employee relationship versus independent contract

Where the relationship between the expert or consultant and the government is to be essentially that of employer and employee, the services should be obtained in accordance with the procedural requirements set forth at FPM Chapter 304, Appendix A. These procedures are not applicable to the procurement of expert or consultant services on an independent contract basis. Such services should be obtained under a proper contract executed in accordance with appropriate procurement procedures. 51 Comp. Gen. 561 (1972) and B-174226, January 12, 1972.
A discussion of when services are obtained on an independent contract basis rather than on the basis of an employer-employee relationship is contained at Subchapter II of this chapter. See also FPM, Chapter 304, Subchapter 1-4.

b. Contract or appointment

Under FPM requirements, services of experts or consultants obtained on an employer-employee basis may be obtained either by contract or appointment. B-174226, January 12, 1972. Although the form and content of the contract of employment is primarily for administrative consideration, the use of a purchase order in lieu of the procedures prescribed in FPM Chapter 304, Appendix A, is not sufficient to constitute the appointment required to be made in order to secure the services of an expert or consultant. 27 Comp. Gen. 695 (1948) and B-174226, January 12, 1972.

2. Pay administration

a. Payroll forms

The performance of expert or consultant services on an employer-employee basis by contract or appointment, as distinguished from independent contract services, results in an employer-employee relationship between the United States and the person performing the services and, consequently, payment therefor should be made on the regular payroll forms with income tax deductions made in the usual manner. 26 Comp. Gen. 695 (1948).

b. Setoff of annuity

Under 5 U.S.C. § 8344(a) an individual who receives an annuity from the civil service retirement fund and becomes employed in an appointive or elective position is required to have the amount of his compensation in such position reduced by the amount of his retirement annuity. This setoff provision applies to experts or consultants who are civil service annuitants and whose services are obtained on an employer-employee basis. 39 Comp. Gen. 681 (1960). Regardless of the manner in which the services are secured, the nature of the expert or consultant services will be scrutinized under the criteria set forth at FPM Chapter 304, Subchapter 1-4, and the standards discussed at Subchapter II of this chapter to determine whether the expert or consultant is required to function in a manner tantamount to that of a government employee. If so, his compensation as an expert or consultant is to be reduced by the amount of his civil service retirement annuity. 53 Comp. Gen. 542 (1974) and B-165378, October 25, 1968.

c. Setoff of military retired pay

A retired military officer or member whose services as an expert or consultant are obtained on an employer-employee basis is subject to the annuity setoff provisions of 5 U.S.C. § 5332. 42 Comp. Gen. 297 (1962) and 51 Comp. Gen. 189 (1971).

d. Specifically exempted positions

Although the setoff provisions of 5 U.S.C. § 8344(a) are applicable to reemployed annuitants whose services are secured in an employer-employee relationship, experts or consultants appointed under section 213 of the Economic Stabilization Act, set forth as a note to 12 U.S.C.

§ 1904, are specifically exempted by statute from the setoff provisions. B-175501, April 12, 1972.

e. Independent contracts

If the expert or consultant services are obtained in a truly independent contract, the fee payable under the contract is not required to be reduced by the amount of the retirement annuity being received by the independent contractor inasmuch as the setoff provisions of 5 U.S.C. § 8344(a) are applicable only to annuitants who become "employed" by the government. 53 Comp. Gen. 702 (1974) and B-154204, September 4, 1964.

f. Amount to be set off

In the case of an individual who is a civil service annuitant and whose temporary or intermittent services as an expert or consultant are obtained on an employer-employee basis subject to the setoff provisions of 5 U.S.C. § 8344(a), his daily rate of compensation is required to be reduced by 1/260th of his annuity. 36 Comp. Gen. 186 (1956); B-159780, October 6, 1966; and B-167670, September 24, 1969.

E. Right to Compensation

1. Salary increases

The pay of an expert or consultant hired pursuant to 5 U.S.C. § 3109 is fixed by administrative action. Each agency decides what it will pay subject to the maximum rate payable under section 3109 or other statutory authority. Without a provision in the documents effecting the expert's or consultant's appointment making increases in the General Schedule rate of pay under 5 U.S.C. § 5305 automatically applicable to those individuals, and in the absence of administrative action authorizing a consequent increase under 5 U.S.C. § 5703, an expert or consultant is not entitled to a pay increase on the basis of an increase in the General Schedule rate of pay. B-131259, July 6, 1976.

2. Overtime

Although, under 5 U.S.C. § 5542, intermittent employees who work in excess of 8 hours per day are entitled to payment of overtime compensation, that entitlement does not extend to experts or consultants employed on an intermittent basis under 5 U.S.C. § 3109. 28 Comp. Gen. 328 (1948) and 46 Comp. Gen. 667 (1967). Thus, a consultant may

not be paid overtime, but is entitled to his daily rate of compensation regardless of the number of hours worked in any day. B-187389, July 19, 1978. However, an expert or consultant who is employed on a per diem basis may be paid his rate of basic compensation for work in excess of 10 days per pay period, subject to the biweekly pay limitation of 5 U.S.C. § 5308. 58 Comp. Gen. 90 (1978).

3. Severance pay

Claim of Bolivian national for additional severance pay under personal services contract with Agency for International Development mission to Bolivia may be settled by the contracting officer under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 - 613. Enrique Garcia, B-206352, October 1, 1982.

4. Leave

An expert appointed on an intermittent basis is not entitled to leave even though he worked on substantially a full-time basis for the term of his employment. His work was assigned on a project basis and the hours at which he worked were largely within his discretion. Since he was not required in advance to report at a definite and certain time within each workweek, he is not entitled to leave as a part-time employee with an established regular tour of duty. Nor is he entitled to leave as a de facto full-time employee since he was not required to work a standard workweek. 58 Comp. Gen. 167 (1978).

5. Holiday pay

Unless the appointment papers expressly provide to the contrary, an expert or consultant employed on a per diem basis is not entitled to compensation for holidays on which no work was performed. 36 Comp. Gen. 723 (1956); B-131457, September 19, 1962; and B-131259, January 23, 1976.

6. Traveltime

Generally the question of whether compensation may be paid during travel from and to home of the expert or consultant depends upon the terms of the contract. Where no particular place for the services is named in the contract, it has been held that compensation attaches the moment the consultant departs from his home or regular place of business. 28 Comp. Gen. 502 (1949); B-106176, January 8, 1952; and

B-113778, March 19, 1953. Where the contract provides for payment of compensation "for each day worked" such contract may not be construed so as to permit compensation for elapsed traveltime between the employee's home or regular place of business and his official headquarters. B-106176, January 8, 1952. See also 24 Comp. Gen. 498 (1945); 25 Comp. Gen. 704 (1946); 27 Comp. Gen. 659 (1948); 30 Comp. Gen. 283 (1950); and 30 Comp. Gen. 495 (1951).

7. Pay setting upon regular appointment

To permit employment as an expert or consultant on an intermittent basis under 5 U.S.C. § 3109 to be considered a "first employment" when the consultant is subsequently appointed to a regular full-time position for the purpose of fixing his compensation above the minimum rate for the grade of that position would not only be an evasion of the within-grade waiting requirements for advancement to higher steps in grades, but also would be contrary to the spirit and intent of the Classification Act of 1949. Therefore, the fixing of the salary of a consultant employed under 5 U.S.C. § 3109 when he is appointed to a regular position at a rate of compensation based on his per diem rate which is above the minimum rate of pay for the grade of the regular position is not proper. 42 Comp. Gen. 114 (1962) and B-154195, June 11, 1964.

8. Retirement allowance

Retirement allowance received by Agency for International Development personal services contractor is considered part of the contractor's salary although it is designated in the contract as an "allowance" and the contractor has requested that it be paid into an individual retirement account in a financial institution. The tax (FICA and income) consequences of such payment is a matter for the Internal Revenue Service. B-198040, June 19, 1981.

F. Services Not Contemplated Under 5 U.S.C. § 3109

1. Full-time operating positions

Since 5 U.S.C. § 3109 relates to the procurement of expert or consultant services on a temporary or intermittent basis, it does not contemplate full-time employment in positions properly for allocation to a Classification Act grade. The civil service laws and regulations require that regular full-time positions be set up under the Classification Act and allocated to the appropriate salary grade prescribed therein. It was not intended that 5 U.S.C. § 3109 be used as a subterfuge to pay such

employees compensation and other benefits, such as per diem and travel expenses, in excess of those legally payable to regular employees of the government. 30 Comp. Gen. 495 (1951).

2. Policy or decision-making

Explicit guidance as to the nature of services that may be obtained by contract is now provided by OMB Circular No. A-76. See the discussion under Subchapter II of this chapter of the CPLM.

3. Legal services in connection with litigation

Normally, in view of the existence of the Justice Department and the agency's own staff attorneys, the need for a federal agency to retain private counsel should rarely occur. In limited situations, the Comptroller General has held that the retention of private attorneys as experts or consultants under 5 U.S.C. § 3109 was authorized. For example, in B-192406, October 12, 1978, GAO concluded that the (then) Civil Service Commission could hire a private law firm under 5 U.S.C. § 3109 to serve as "special counsel" to the chairman to investigate alleged merit system abuses, since the matter was not covered by 5 U.S.C. § 3106 nor otherwise under the jurisdiction of the Justice Department. Similarly, the Navajo and Hopi Indian Relocation Commission could retain a private attorney under 5 U.S.C. § 3109 as an independent contractor to handle matters beyond the Justice Department's jurisdiction, where the workload was insufficient to justify hiring a full-time attorney. B-114868.18, February 10, 1978. See also 61 Comp. Gen. 69 (1981); B-133381, July 22, 1977; and B-141529, July 15, 1963. Agencies may have specific authority to retain special counsel in addition to the lawyers on the regular payroll. For example, appropriations for the Federal Communications Commission have traditionally included "special counsel fees." The Comptroller General has construed this authority as permitting contractual arrangements with former employees as retired annuitants to perform functions for which they were uniquely qualified. Since the appropriation provision constitutes independent authority, the contracts are not subject to the salary limitations of 5 U.S.C. § 3109. 53 Comp. Gen. 702 (1974); B-180708, January 30, 1976.

Subchapter II—Contract Support and Technical Services

A. Determination to Contract Out

Pursuant to their general authority to contract, departments and agencies may contract for support and technical services. The determination of whether such services should be performed by the agency with its own employees or under an independent contract for services is to be made on the basis of the policy guidance set forth by the Office of Management and Budget (OMB). OMB Circular No. A-76, Performance of Commercial Activities, as revised August 4, 1983, states the government's basic policy of relying on the private sector for goods and services and provides the means to determine whether commercial or industrial work shall be done by contract with private sources or in-house using government facilities and personnel—including a consideration of the comparative costs of either method of securing the needed services and the requirement that Circular A-76 not be used to justify a departure from any law or regulation, including OPM regulations. B-183487, July 3, 1975. See also the detailed supplement to A-76.

The general rule is that purely personal services for the government are required to be performed by federal personnel under government supervision. See for example, 6 Comp. Gen. 140 (1926) and 32 Comp. Gen. 427 (1953). However, this rule is one of policy rather than positive law and when it is administratively determined that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances to have the services performed by nongovernment parties, and that is clearly demonstrable, such services may be procured through proper contract arrangement. 43 Comp. Gen. 390 (1963); 44 Comp. Gen. 761 (1965); and B-160555, February 3, 1967. Thus for example, in the absence of a contrary showing, a proposal to contract with the D.C. Urban Corps for the purpose of recruiting students and dealing with institutions on the behalf of an agency would appear improper since the services to be rendered are the type of services for which personnel units of federal agencies are ordinarily maintained and could presumably be performed on a substantially more economical and feasible basis by such personnel units. 50 Comp. Gen. 553 (1971).

B. Proper Contracting

1. Generally

A proper contract for services is one in which the relationship established between the government and the contract personnel is not that of employer-employee. 51 Comp. Gen. 561 (1972) and B-183487, April 25, 1977. In addition, a government contract for the furnishing of a product or the performance of a service is to be accomplished without detailed government control or supervision over the method by which the required result is achieved. 45 Comp. Gen. 649 (1966). In other words, the individual supplying the service must be a bona fide independent contractor or a bona fide employee of an independent contractor. In addition, the contract must comply with policies prescribed by Office of Management and Budget Circular No. A-76, and the services must be of a type which can properly be delegated to nongovernment personnel and which can be accomplished without detailed government control or supervision over the method by which the required result is achieved. 44 Comp. Gen. 761 (1965) and 50 Comp. Gen. 553 (1971).

2. Independent contract versus employer-employee relationship

In determining whether the relationship created by a contract is prescribed, OPM has taken the position that the contract is to be questioned if it permits or requires detailed government supervision over the contractor's employees. Decisions of this Office have referred to the criteria set forth in Chapter 304, Subchapter 1-4 of the Federal Personnel Manual for ascertaining whether a contract permits or requires supervision. 51 Comp. Gen. 561 (1972). Additional guidance has been provided in the Federal Personnel Manual Letters No. 300-B, dated December 12, 1967, and No. 300-12 dated August 20, 1968, by the then Civil Service Commission (now OPM) for review by the agencies of service contracts to determine if they are in accordance with personnel laws. According to that decision, the basic criteria by which the employer-employee relationship is judged are those set forth in 5 U.S.C. § 2105(a), namely whether a person is:

- appointed in the civil service by a federal officer or employee;
- engaged in the performance of a federal function under authority of law or an executive act; and
- subject to the supervision of a federal officer or employee while engaged in the performance of the duties of his position.

In addition, six elements were identified as indicia of the existence of supervision by a federal officer. These elements are:

1. performance on-site

2. principal tools and equipment furnished by the government

3. services applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission

4. comparable services, meeting comparable needs, performed in the same or similar agencies using civil service personnel

5. need for the type of service provided reasonably expected to last beyond 1 year

6. inherent nature of the service, or the manner in which it is provided reasonably requires—directly or indirectly—government direction or supervision of contractor employees in order:

- to adequately protect the government's interest, or
- to retain control of the function involved, or
- to retain full personal responsibility for the function supported in a duly authorized federal officer or employee.

The six elements, as indicated above, relate principally to the third statutory criterion concerning supervision of a contractor employee by a federal office or employee. The absence of any one or a number of these elements would not mean that supervision does not exist but that there is less likelihood of its existence. See generally B-193035, April 12, 1979, wherein we concluded that the function of negotiating final prices prior to an agency's award of a contract is integrally related to the contracting officer's authority and is a function which management must perform to retain essential control over the conduct of agency programs. The above elements also may be found in Part 37, Federal Acquisition Regulation.

3. Other examples

A contract for the services of clerks, typists, and telephone and teletype operators was held to be improper where the contract specifically provided for government supervision and there was no evidence that the work could be properly performed without detailed and close supervision of contractor employees by government personnel. 44 Comp. Gen. 761 (1965).

Notwithstanding the FEA's urgent need to obtain office coverage to avoid closing its Alaska field office while its staff was on leave, and notwithstanding its efforts to obtain secretarial services through the employment registers, it was not proper to issue a purchase order to Kelly Services, Inc. for the services of a temporary secretary. B-186700, January 19, 1977. Also, Indian Health Services' use of a purchase order to secure services of a medical laboratory technologist was, likewise, an improper procurement of services under the OMB and OPM guidelines. B-190118.1 and B-190118.2, January 24, 1978.

A court order appointing an interpreter to render and prepare simultaneous translation service 7 days a week for the duration of a trial constitutes a valid contract and does not establish an employer-employee relationship. B-186919, April 27, 1977.

A contract to perform a warehouse receiving function does not create an illegal employer-employee relationship where the services rendered do not require government direction or supervision of contractor employees and where no supervision is found to exist. B-183487, April 25, 1977.

Under proposed contract for study of the special use Commercial Public Service Fee Structure, the study was to be performed for a lump-sum price regardless of the time involved in its performance and was to be performed without government supervision. Under these circumstances and where the study was only periodically required and comprised a definite limited service, the proposed contract was found to contemplate proper independent contractor performance even though the government was to furnish office space, equipment, supplies, and stenographic and typing services required by the contractor while working in the government office. B-155365, October 28, 1964.

Air Force contract for services for assistance in the conduct and analysis of experiments with the University of New Mexico was held not to be a proper independent contract but to involve an employer-employee relationship where the contractor was to be paid on the basis of the number of hours worked by its personnel, where the Air Force had control over the selection of contractor employees, where the type of work was such that it could not be performed without the direct supervision of government personnel, and where such government supervision was provided for by the contract terms. Under such circumstances the relationship created between the government and the contractor's employees is tantamount to that of employer and employee, and personnel performing such work should be employed in accordance with

the civil service laws and classification principles. B-157192, July 30, 1965.

However, see B-193858, October 25, 1979, where due to an extreme shortage of medical personnel, the Rosebud Public Health Service Indian Hospital entered into an agreement with and issued a purchase order to Indian Health Management, Inc. for services needed. Although the physician assistant services secured under the agreement were improperly provided under circumstances that created an employer-employee relationship, payment for services received may be made in view of the extenuating circumstances involved. B-193858, October 25, 1979.

4. Oral agreement

Coast Guard medical staff members who entered into an oral agreement with a retired Public Health Service officer for dental services lacked authority to enter into or administer government contracts. However, payment may be allowed for the reasonable value of the services since the arrangement would have been a permissible procurement action if the formal procedures had been followed. Payment is appropriate where (1) the government received a benefit, (2) the contractor acted in good faith, and (3) the amount claimed represents the reasonable value of the benefit received. Dr. Edward Kuzma, B-215651, March 15, 1985.

Prevailing Rate Employees

Subchapter I—Background Information

A. Generally

The term "prevailing rate" or "Wage Board" employee is generally used to designate a civilian employee of the government who occupies a position in a recognized trade or craft or any other position having trade, craft, or laboring experience and knowledge as the paramount requirement, and whose position is exempted by 5 U.S.C. § 5102(c)(7) from the position classification standards applicable to General Schedule employees. The term "prevailing rate employee" is more fully defined at 5 U.S.C. § 5342. See also similar coverage of certain agencies outside of executive branch in 5 U.S.C. § 5349.

B. Historical Development of Prevailing Rate Systems

1. Old wage system

Initially there was no uniform requirement that the rates of pay for Wage Board positions be set upon a prevailing rate basis. Certain agencies, including the Government Printing Office and Department of the Navy, were subject by statute to procedures requiring that the pay rates of their Wage Board employees be so established and, as to those agencies, the procedures were mandatory. With respect to other agencies with positions exempted by 5 U.S.C. § 5102(c)(7), the authority to utilize Wage Board procedures stemmed from the inherent authority vested in the heads of the departments or agencies to fix the compensation of employees not otherwise controlled by statute. 13 Comp. Gen. 367 (1934) and 15 Comp. Gen. 308 (1935).

2. Coordinated Federal Wage System (CFWS)

By Presidential directive of November 16, 1965, to the Chairman of CSC (now Director of OPM), the President recognized that uncoordinated treatment of the pay-setting procedures for Wage Board employees had resulted in diverse and often inequitable treatment of employees. In response to his direction to take action to develop common job standards and wage policies and practices, CSC issued procedures and instructions implementing the CFWS in furtherance of the statutory requirement that the pay of Wage Board employees be "fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance

with prevailing rates." Under the CFWS, CSC sought to regulate the conduct of wage surveys, the determination of occupational groups, and to establish rules governing administration of pay for individual employees upon appointment and transfer.

C. Present Status of Prevailing Rate System

1. Federal Wage System

Pub. L. No. 92-392, August 19, 1972, 86 Stat. 564, provided statutory authority for a pay system under which the rates of pay of Wage Board employees were to be adjusted. The pertinent provisions of Pub. L. No. 92-392 are codified at 5 U.S.C. §§ 5341 – 5349. OPM's instructions implementing the Federal Wage System are contained at FPM Supplement 532-1.

2. Employees governed by certain collective-bargaining agreements

By virtue of section 704(b)(B) of the Civil Service Reform Act of 1978, prevailing rate employees whose labor-management contract provisions are covered by section 9(b) of Pub. L. No. 92-392, may negotiate the contract provisions without regard to Subchapter V of Chapter 5, Title 5, United States Code. 58 Comp. Gen. 198 (1979).

Subchapter II—Basic Compensation

A. Basic Determinations

1. Prevailing rate determinations and wage schedules

Statutory requirements for making prevailing rate determinations and establishing regular (5-step) and special wage schedules, including provisions for hazard and night differential and for the use of rates from other areas (Monroney Amendment), are prescribed by 5 U.S.C. § 5343 and implemented by Subpart E, Part 532, Title 5, C.F.R., and Subchapters S4, S5, S8, S11, FPM Supplement 532-1.

2. Job grading

Prevailing rate positions under the Federal Wage System must be classified in grades in conformance with or consistent with standards published by OPM. Agencies are authorized to make grade determinations subject to review by OPM. 5 U.S.C. § 5346; Subchapter S6, FPM Supplement 532-1.

3. Application of pay cap to wages adjusted under the Monroney Amendment

Prevailing rate employees at Barksdale AFB, Louisiana, were entitled to wage adjustments from another area based on the Monroney Amendment. These wage increases may not exceed the statutory pay increase caps for fiscal years 1982, 1983, and 1984 since there is no indication that the pay caps are not applicable to wages initially established under the Monroney Amendment. Barksdale AFB, 64 Comp. Gen. 227 (1985).

4. Application of pay cap to pay changes due to reassignment between wage areas

Prevailing rate employees were "transferred in place" due to a realignment of district boundaries, and this resulted in a pay increase in excess of the pay cap. These adjustments did not result from a wage survey, and thus they are outside of the scope of the pay cap legislation. Corps of Engineers, 64 Comp. Gen. 912 (1985).

B. Effective Date of Increases in Pay Rates

1. Generally

Subject to the exceptions stated below, an increase in compensation authorized by a Wage Board or other wage-fixing authority for employees under the prevailing rate system may not be made effective prior to the date of final action by that wage-fixing authority. B-174278, December 23, 1971.

A Wage Board employee claimed a wage rate increase retroactive to the date of a wage adjustment given for other positions in the employing agency. Notwithstanding his claim that the agency erred in failing to implement the intended personnel action, he is not entitled to retroactive increase when the record fails to establish administrative intent to adjust his wage at the earlier date. B-187597, January 24, 1977.

2. Forty-five days after wage survey ordered

By virtue of 5 U.S.C. § 5344, increases in rates of basic pay granted pursuant to wage surveys are effective not later than the first day of the first pay period which begins on or after the 45th day (including Saturdays and Sundays) following the date the wage survey is ordered to be made. However, retroactive pay pursuant to section 5344 is payable only when the individual is employed on the approval date of the order granting the increase, or when the individual returned or died during the period between the effective date of the increase and the approval date of the order granting the increase, and only for services performed during that period. Accordingly, Wage Board employees who are separated prior to the approval date may receive a retroactive adjustment only if they meet the statutory conditions. 54 Comp. Gen. 655 (1975). Section 5344 does not apply to special wage schedule employees. B-173783.169, August 5, 1976.

3. Monroney Amendment

a. Separated employees

The Monroney Amendment, Pub. L. No. 90-560, October 12, 1968, 82 Stat. 997, requires reconstruction of pay schedules based on "out-of-area" data where comparable positions do not exist in the survey area. The schedule adjustments required by the Monroney Amendment are to be regarded as corrective action and not as an order granting an increase in pay within the meaning of 5 U.S.C. § 5344. Hence, each separated employee who was on the rolls on the date of the original wage schedule order is entitled to a retroactive pay adjustment. 50 Comp. Gen. 266 (1970).

b. Corrective increases

In retroactive application of the corrected Monroney Amendment wage schedule, when a comparison of individual wage payments shows that previous wage schedule payments are less than the employee is entitled to under the Monroney Amendment wage schedule, the employee is to be paid the difference. If the previous payments are greater than the amount due under the Monroney Amendment wage schedule, the employee may retain the difference. Overpayments are to be set off against underpayments and if they are equal, no payment is due the employee. 50 Comp. Gen. 495 (1971).

C. Under Pre-Existing Collective-Bargaining Agreements

1. Generally

Collective-bargaining agreements between an agency and a labor union which were in effect on the date of enactment of Pub. L. No. 92-392, August 19, 1972, and which provided for negotiated wage fixing, are exempted from the wage survey provisions of 5 U.S.C. § 5343 by section 9(b) of Pub. L. No. 92-392. See 5 U.S.C. § 5343 note. 55 Comp. Gen. 162 (1975).

Section 9(b) of Pub. L. No. 92-392, governing prevailing rate employees, exempts bargaining agreements in effect on August 19, 1972, containing wage-setting provisions. Certain United States Information Agency radio broadcast technicians are covered by such an agreement and, therefore, may continue to negotiate wage-setting procedures until the parties agree to delete wage-setting provisions from their agreement. Then such employees would be governed by the Prevailing Rate Statute, 5 U.S.C. Chapter 53, Subchapter IV. 56 Comp. Gen. 360 (1977).

2. Retroactivity of wage adjustments

Retroactive wage adjustments for federal prevailing rate employees which are not based upon a government "wage survey," but rather on negotiations and arbitration under a 1959 basic bargaining agreement, are not governed by 5 U.S.C. § 5344 as added by section 1(a) of Pub. L. No. 92-392. Section 9(b) of that law preserves to such employees their bargained for and agreed rights under that basic bargaining agreement. Thus, employees who separated from the service after the date to which a pay increase was made retroactive may have their lump-sum leave payments computed on the basis of the increased pay rates. 57 Comp. Gen. 589 (1978).

Wage adjustments for prevailing rate employees determined through collective bargaining under labor-management agreements, as differentiated from those determined by wage surveys, are not subject to 5 U.S.C. § 5344(a) and are, therefore, subject to the general rule that increases may not be made effective prior to the date of final approval. See 38 Comp. Gen. 538 (1959). However, a preliminary agreement between a competent wage-fixing authority and a union, which prospectively sets the effective date for wage increases yet to be negotiated, properly authorizes increases from that date even though the amount of the increase is not agreed upon or otherwise determined until a later date. 55 Comp. Gen. 162 (1975); B-170170, October 9, 1970; and B-185506, September 2, 1976. In the absence of a preliminary agreement fixing the

date, the negotiated wage increase may not be made retroactive. 55 Comp. Gen. 162 (1975).

The effective date of such a pay increase may not be established retroactive to a date earlier than the date of the preliminary agreement itself. B-183083, November 28, 1975.

3. Supervisors' pay cap

Supervisors of prevailing rate employees seek reconsideration of our prior decision, 64 Comp. Gen. 100 (1984), holding that the supervisors are subject to the statutorily imposed pay limitation which does not apply to their subordinates, who negotiate their pay increases. We affirm our prior decision since the supervisors are clearly covered by the pay increase limitation and are not specifically excluded from the limitation. Prior decisions involving pay linkage between groups of prevailing rate employees are distinguished since they do not deal with specific statutory pay limitations. Prior court decisions involving prevailing rate employees who are not covered by the statutory pay limitation are also distinguished on the same basis. Reconsideration of Voice of America, 65 Comp. Gen. 434 (1986).

4. Consequential pay adjustments of Wage Board supervisors

Wage Board foremen who supervise craftsmen whose pay is established by collective bargaining, but who are precluded from union membership, are entitled to a retroactive pay increase, based on an arbitrator's award of a pay increase to craftsmen pursuant to the collective-bargaining agreement. The foremen's rate of pay is established pursuant to a special wage schedule prescribing the rate at a certain percentage above the rate for nonsupervisory employees. B-180010.07, June 15, 1977.

5. Arbitrator's decision

Inasmuch as the effective date of a wage increase to be effected by collective bargaining can be set by preliminary agreement, the arbitrator may set a retroactive effective date for a wage increase in accordance with the collective-bargaining agreement. 55 Comp. Gen. 1006 (1976).

D. Within-Grade Increases

1. Generally

Prevailing rate employees are entitled to within-grade step increases after established waiting periods under the provisions of 5 U.S.C. § 5343(e)(2). In general, the waiting period for prevailing rate (as well as General Schedule) employees begins at the beginning of a new appointment after a break in service or a nonpay status in excess of 52 weeks or begins upon receiving an "equivalent increase." Section 5335(d) of Title 5, U.S. Code, which is applicable to General Schedule employees, provides that an increase in pay granted by statute is not an equivalent increase in the case of an employee converted from a Wage Board to a General Schedule position. A pay increase received by such an employee while in a General Schedule position as the result of a wage adjustment under the Federal Wage System is considered an increase in pay granted by statute and, as such, is not regarded as an "equivalent increase" for the purpose of 5 U.S.C. § 5335. 54 Comp. Gen. 304 (1974).

2. Administrative error

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

3. Effect on promotion to General Schedule

An employee promoted to a prevailing rate position, with a scheduled rate of $14,373, and receiving night differential bringing his basic rate of pay to $15,084.24, was subsequently promoted to a General Schedule position in which his pay was set at $15,409. He did not receive an equivalent increase on the latter promotion because night differential is considered part of his "rate of basic pay" under 5 U.S.C. § 5343(f). He is, therefore, entitled to a step increase in the General Schedule position after the appropriate waiting period computed from the time of his promotion to the prevailing rate position. B-189852, February 14, 1979.

4. Effect on promotion to special pay schedule

A prevailing rate employee, on promotion and transfer to a new duty station with a special pay schedule, was granted the equivalent of the required one-step increase. When the special pay schedule was later terminated due to the qualification of the duty station for a remote worksite commuting allowance, the employee's claim for the equivalent of the one-step increase was denied since at the time of his promotion he received the equivalent of the one-step increase. B-194442, June 8, 1979.

E. Pay Incident to Promotions

Employee of Defense Mapping Agency is entitled to increased compensation in the form of an additional step rate of her applicable wage schedule because the agency's policy of rounding down fractions of less than one-half of one cent produced a raise in pay incident to her promotion of less than 4 percent, which was not in accordance with regulatory pay-setting requirements. The pay raise at time of promotion for prevailing rate employee is required to be at least 4 percent. B-205372, July 23, 1982.

F. Conversion and Transfer Between Pay Systems and Grade and Pay Retention

1. Generally

"Passage of the Civil Service Reform Act of 1978 rendered regulations relating to salary retention for federal employees and conversions between pay systems obsolete, thereby requiring their revocation." 46 Fed. Reg. 22745 (1971). Accordingly, decisions interpreting those revoked regulations will not be published here. To determine benefits under the new law concerning grade and pay retention, see 5 U.S.C. §§ 5361 – 5366 and 5 C.F.R. Part 536.

A printing and lithographic employee, whose position was converted in December 1980 from an agency-established special printing wage schedule to the Federal Wage System, received grade retention for 2 years and indefinite pay retention. In 1982, his former position was abolished before the 1982 comparability adjustment became due. He is entitled to the full comparability adjustment payable in 1982 based on the rate of basic pay for his new Federal Wage System position. M. H. Todd, B-217104, September 30, 1985.

2. Cost-of-living allowance

Department of Transportation questions payment of full cost-of-living allowance (COLA) to Coast Guard employee in Alaska whose position was converted from the prevailing rate system to the General Schedule. Employee retained his WS-6 grade for 2 years and is now on retained pay in excess of GS-11, step 10, under 5 U.S.C. §§ 5362 and 5363. Employee is entitled to full 25 percent COLA for the area under 5 U.S.C. § 5941, based on the rate of basic pay for GS-11, step 10, not on his retained rate of pay. U.S. Coast Guard, B-206028, December 14, 1982.

G. Classification

Wage Grade employees reclassified to higher positions as the result of classification appeals are not entitled to backpay for the period of wrongful classification. Regulations promulgated pursuant to 5 U.S.C. § 5346, which authorizes a job-grading system for prevailing rate employees, preclude the payment of backpay in such cases in the same manner as in erroneous classification cases under similar provisions, 5 U.S.C. §§ 5101 – 5115, involving General Schedule employees. B-192514, October 16, 1978; B-190157, February 10, 1978; and B-180144, October 20, 1976. An employee included in the General Schedule and subsequently classified in the Federal Wage System, is not entitled to pay for the period of erroneous classification since regulations issued pursuant to 5 U.S.C. §§ 5101 – 5115 and 5346 provide that a position classification action may be made retroactively effective only when there is a timely appeal which results in the reversal, in whole or in part, of a downgrading or other classification action which had occasioned the reduction of pay. 5 C.F.R. §§ 511.703 and 532.701(b)(9). 57 Comp. Gen. 404 (1978). See also B-189492, February 14, 1978.

H. Details to Higher Grade Positions

The subject of backpay for overlong details to higher grade positions is discussed at length in Chapter 8, Part B of this title. Statutory authority applies to details between Wage Board positions, as well as to details from Wage Board positions to higher grade General Schedule positions. See 56 Comp. Gen. 732 (1977) and 56 Comp. Gen. 786 (1977), respectively.

In this regard, General Schedule and wage system employees are treated alike. B-193959, September 21, 1979. Also see B-194146, March 30, 1979.

Subchapter III—Additional Compensation

A. Overtime Pay

1. Generally

Title 5 of the U.S. Code, § 5544(a) provides that prevailing rate employees not in standby status are entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. The rate is one and one-half times the employee's basic rate of compensation. Prevailing rate employees may also be entitled to overtime compensation under the Fair Labor Standards Act (FLSA). For a discussion of entitlement under the FLSA, see CPLM Title I—Compensation, Chapter 4.

2. Labor-management wage agreements negotiated under section 9(b) of Pub. L. No. 92-392

Section 704(b)(B) of Pub. L. No. 95-454, the Civil Service Reform Act of 1978, allows prevailing rate employees whose labor-management contract provisions are covered by section 9(b) of Pub. L. No. 92-392, to negotiate these contract provisions without regard to the restrictions in 5 U.S.C. § 5544. Accordingly, decisions 57 Comp. Gen. 259 (1978); B-191520, June 6, 1978; and 56 Comp. Gen. 360 (1977); which held that certain provisions of these contracts concerning overtime were invalid and that any overtime worked was subject to 5 U.S.C. § 5544, are overruled. 58 Comp. Gen. 198 (1979) and B-189782, March 1, 1979. See also B-194401, July 3, 1980.

Fair Labor Standards Act (FLSA) does not modify any existing pay laws, rather it establishes a minimum standard to which "nonexempt" employees are entitled. Fact that employee may have overtime compensation entitlement under provision of negotiated labor-management agreement protected by the savings provision of section 9(b) of Pub. L. No. 92-392, August 19, 1972, does not preclude entitlement of a nonexempt employee to overtime compensation under the terms and conditions of FLSA, which would only be used if it provided a greater benefit. However, where that same employee has been determined to be "exempt" from provisions of FLSA, his entitlement to overtime compensation arises—if at all—under the labor-management agreement. B-204984, May 10, 1982.

3. Limitation on overtime compensation

Overtime pay for Wage Board employees is not subject to the aggregate limitation of 5 U.S.C. § 5547 applicable to General Schedule employees. 34 Comp. Gen. 512 (1955).

4. Method of computation

a. Work in excess of daily and weekly limitation

Section 5544 of Title 5, U.S. Code, must be construed as providing alternative methods of computation for determining overtime work in excess of 8 hours a day or in excess of 40 hours a week. The method allowing the greater number of overtime hours shall be used. Therefore, an employee whose workweek consists of 3 12–hour days and 1 10–hour day, or 46 hours per week, is entitled to overtime pay for the 14 hours per week in excess of 8 hours per day, but not for the 6 hours in excess of 40 hours per week. 42 Comp. Gen. 195 (1962), as modified by 42 Comp. Gen. 329.

b. Day and week definitions

A calendar day should, whenever administratively feasible, be defined as from midnight to midnight and a calendar week as Sunday through Saturday. However, to avoid problems involving employees with uncommon tours of duty, a 24–hour period may be treated as a day and any consecutive 7–day period may be treated as a week. 42 Comp. Gen. 195 (1962).

c. Administrative determination

Whether to adopt the consecutive 24–hour day concept is an administrative matter for determination by the agency. B-165765, March 17, 1969.

d. Back-to-back workweeks

Prevailing rate employees are included in 5 U.S.C. § 6101, which permits an agency head to establish a workweek of other than the normal workweek of 5 days followed by 2 consecutive nonworkdays, provided that "his organization would be seriously handicapped in carrying out its functions or costs would be substantially increased . . ." by a normal workweek. Since the measure for determining overtime compensation is the administratively determined workday and workweek, the number of

8–hour days worked consecutively is immaterial unless more than 40 hours are worked within a single workweek. B-173779, November 22, 1971. Therefore, where an employee worked 10 days straight, but only 5 days in each of 2 administrative workweeks and never more than 8 hours a day or 40 hours a week, he was not entitled to overtime compensation. B-134864, July 27, 1976.

e. Intermittent and part-time employees

Under the provisions of 5 U.S.C. § 5544(a), part-time and intermittent employees are entitled to overtime compensation for time worked in excess of 8 hours a day or 40 hours a week, regardless of whether a 40–hour workweek or an 8–hour day has been administratively established. 48 Comp. Gen. 439 (1968).

5. Training courses

Prevailing rate employees are subject to the same statutory restrictions on overtime during training periods as are General Schedule employees. See Chapter 4, above.

Provision of 5 U.S.C. § 4109 prohibiting payment of premium compensation to employees during period of training does not in itself preclude payment of overtime compensation to employees traveling to and from places of training. Here, controlling labor-management agreement provision, which is protected by the savings provision of section 9(b) of Pub. L. No. 92-392, August 19, 1972, provides for payment of overtime among other things for time worked in excess of 8 hours in a workday and time worked outside of regular hours on a workday, but is silent on issues of travel as hours of work or travel to or from training performed outside normal work hours. We conclude that there is no law or other authority which establishes an overtime entitlement for travel from training assignment outside normal work hours. B-204984, May 10, 1982.

6. Actual work requirement

a. Leave effect

Since employees must actually work overtime hours in order to receive the overtime rate of pay, employees who are on leave during their regularly scheduled overtime hours are not entitled to time and one-half the basic rate of pay, 42 Comp. Gen. 195 (1962) and 46 Comp. Gen. 217

(1966). However, the 40–hour workweek may consist of hours in a leave-with-pay status so that an employee with a 10–hour workday on leave during any part of the first 8 hours of the workday but working the last 2 hours thereof is entitled to overtime pay for the last 2 hours. He fulfills the actual work requirement. 42 Comp. Gen. 195 (1962).

b. Delay at worksite due to bad weather

Prevailing rate employees, who, due to adverse weather conditions, were denied permission to leave remote worksites at the end of the workday, are not entitled to overtime compensation for the period they remained at the worksite, since they did not satisfy the requirement of 5 U.S.C. § 5544 that work be performed or that they be in a standby or on-call status. Additionally, since the employees were completely relieved from duty, their waiting time was their own and is not compensable as overtime hours worked under the Fair Labor Standards Act, 29 U.S.C. §§ 201 – 219. B-187181, October 17, 1977.

c. Preshift and post shift duties

Security police employees of the Government Printing Office who, as a result of their work schedule, must purchase their uniforms during their off-duty hours are not entitled to overtime compensation under 5 U.S.C. § 5544 (1976) for the time spent purchasing their uniforms. 60 Comp. Gen. 431 (1981).

d. Holidays

A prevailing rate employee assigned to a workweek of 1 8–hour day, 2 10–hour days, and 1 12–hour day, who was prevented from working on a regularly scheduled 12–hour day because a holiday occurred, is only entitled to the basic rate of compensation for the holiday. 42 Comp. Gen. 195 (1962). See also 47 Comp. Gen. 358 (1968).

(1) Exceptions

(a) Callback—When a prevailing rate employee is requested to perform irregular or occasional work on a day when work is not scheduled for him or for which he was required to return to his place of employment, he is considered to have worked a minimum of 2 hours of overtime whether or not the work is actually performed. FPM Supplement 532-1, Subchapter S8(b)(8) and B-177313, November 8, 1972.

(b) Military and court leave—Overtime compensation is payable to employees on military or court leave if the overtime duty was regularly scheduled and the employees would have been required to work overtime had they not been on military or court leave. 31 Comp. Gen. 173 (1951); 49 Comp. Gen. 233 (1969); and B-159835, March 11, 1976.

(c) Back Pay Act, 5 U.S.C. § 5596—See CPLM Chapter 7 of this title.

e. Meals and rest periods

(1) Meals—Time set aside for eating is noncompensable unless the employee is required to perform substantial official duties during that period. B-166304, April 7, 1969. See also Standby duty below.

(2) Rest periods—When it is determined by proper administrative authority that brief rest periods during overtime hours of work are essential or beneficial to the service, such rest periods may be regarded as duty time for which overtime compensation is payable. B-166304, April 7, 1969.

(3) Standby duty—Time during which an employee is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status, exclusive of eating and sleeping time, is compensable as overtime work only when it is in excess of 40 hours per week. 5 U.S.C. § 5544(a).

(4) Definition of standby status—The phrases "on call" and "standby" used in the context of 5 U.S.C. § 5544(a), when used in conjunction with the phrase "required to remain at or within the confines of their post of duty," have generally the same meaning as the phrase "standby status" used in 5 U.S.C. § 5545 applicable to General Schedule employees. 42 Comp. Gen. 195 (1962). See also CPLM Title I—Compensation, Chapter 4.

(5) Sleeping and eating time—In the absence of any standard criteria for determining sleeping and eating time under 5 U.S.C. § 5544(a), attention is directed to Armstrong, et al. v. United States, 144 Ct. Cl. 659 (1959) and to Ahearn, et al. v. United States, 142 Ct. Cl. 309 (1958). In designating time for normally uninterrupted sleeping and eating, attention is called to Farley v. United States, 131 Ct. Cl. 776 (1955) and England v. United States, 133 Ct. Cl. 768 (1956); where compensation was allowed because it was determined substantial labor was performed during the time set apart for sleeping and eating. 42 Comp. Gen. 195 (1962).

(6) Standby duty at home—Time spent in a standby status at other than the employee's duty station where his use of the time in question is severely limited and is in fact spent predominantly for the benefit of the government may be compensable as overtime. Rapp v. United States, 167 Ct. Cl. 852 (1964); Moss v. United States, 173 Ct. Cl. 1169 (1965). Where an employee's performance of duty as a security officer required him to remain at his residence located within the limits of his duty station and where the employee responded to emergencies 40 to 50 times per year, his whereabouts were narrowly limited and his activities substantially restricted so as to entitle him to overtime compensation. 55 Comp. Gen. 1314 (1976) and B-176924, September 20, 1976.

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

Employee at dam reservation claims overtime compensation for standby duty. Although he was required to live in government-owned housing on the dam reservation the agency determined that effective January 10, 1971, he would not be required to remain at the dam reservation after the end of his regular duty hours. Under the circumstances, he is not entitled to overtime compensation under 5 U.S.C. § 5544(a) since his off-duty movements and activities were not severely restricted. In addition, such off-duty time is not compensable as hours of work under the Fair Labor Standards Act, 29 U.S.C. §§ 201 – 219. 61 Comp. Gen. 301 (1982).

Employee is not entitled to overtime compensation under 5 U.S.C. § 5544(a) during period he was restricted to dam site since he has not shown that he was in effect required to be on "ready alert" as in Hyde v. United States, 209 Ct. Cl. 746 (1976). There is nothing in the record to indicate that claimant's activities were often interrupted by an emergency or other work situation requiring prompt attention. 61 Comp. Gen. 301 (1982).

f. Traveltime

(1) Travel inherent in work—Travel which is an inherent part of and inseparable from work itself constitutes work, and if such travel extends the employee's time in a work status beyond 8 hours a day or 40

hours a week, it is compensable as overtime work. Travel which represents an additional incidental duty directly connected with the performance of a given job and which is considered as assigned duty is regarded as travel inherent in work. B-173103, November 16, 1971. Where an employee reports to a shore pickup point to board a government vessel in order to be transported to his duty station aboard a derrick boat, his early reporting and travel was for the purpose only of facilitating his own transportation and, hence, is separable from work. B-173103, November 16, 1971. Travel which has no purpose other than to transport an employee to and from the place where he is to perform actual work is not regarded as an incidental duty which is inseparable from work and is not regarded as work. B-178241, May 25, 1973.

(2) Travel under 5 U.S.C. § 5544(a)—The traveltime of a Wage Board employee, which is other than an inherent part of his work, is compensable under 5 U.S.C. § 5544(a) as overtime, if the time spent traveling involves travel away from the official duty station and meets one of the following conditions: (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively. The language of 5 U.S.C. § 5544(a) has, in general, been interpreted consistently with the latter provision. B-173103, November 16, 1971 and B-178241, May 25, 1973. For a more thorough analysis, see CPLM Title I—Compensation, Chapter 4.

(3) Officially ordered or approved—Where employees were given the option of reporting to a common pickup point before regular duty hours for the purpose of availing themselves of government transportation to the worksite, such early reporting and travel was not officially ordered or approved and, hence, is not compensable as overtime work. B-177438, March 28, 1973.

(4) Performance of work while traveling—An employee who performed actual work reviewing documents during air travel is entitled to overtime compensation for such time. B-164353, October 21, 1969. A truck driver who reported before regular duty hours to drive himself and other employees from a central pickup point to a duty site may be regarded as having performed work while traveling. B-177438, March 28, 1973.

(5) Administratively uncontrollable event

(a) Event controllable—When the necessity for Wage Board employee's travel resulted from the gradual deterioration of gun mounts, the event necessitating the travel may not reasonably be considered to have resulted from a sudden emergency or catastrophe or an event which could not be scheduled or controlled administratively within the meaning of 5 U.S.C. § 5544(a)(iv). 49 Comp. Gen. 209 (1969).

(b) Immediate official necessity—Travel of employee to inspect press sheets was subject to administrative scheduling and control and was not compensable under 5 U.S.C. § 5544(a), even though the event necessitating the travel was uncontrolled, since there was no immediate official necessity for the travel. B-170683, November 16, 1970.

(c) Transportation delays—Employees who were delayed 2 hours beyond regular duty hours in returning to their duty station due to traffic congestion at the Baltimore Harbor Tunnel were not entitled to overtime compensation for such delayed traveltime since the traffic congestion was not the event necessitating the travel under 5 U.S.C. § 5542(a)(iv). 54 Comp. Gen. 515 (1974).

(d) Travel under the Fair Labor Standards Act—Employees who are covered by the FLSA are entitled to overtime compensation for traveltime in accordance with OPM regulations in 5 C.F.R. § 551.422. A nonexempt employee who either drives himself to his destination or travels as a passenger during hours which correspond to his regular work hours would be entitled to overtime compensation under FLSA for those hours of travel which are in excess of 40 hours in a week. B-183493, July 27, 1976. Time spent by employees in boats traveling to and from the employees' principal worksite is within the purview of the Portal-to-Portal Pay Act of 1947 and not compensable as overtime work. B-178272, July 27, 1976. See also Chapter 4 of CPLM Title I—Compensation.

B. Holiday Pay

1. Regular pay

Title 5, U.S. Code, § 6104 provides that prevailing rate employees who are relieved or prevented from working on a holiday are entitled to the same pay for that day as for a day on which an ordinary day's work is performed.

2. Premium pay

Prevailing rate employees, pursuant to the provisions of FPM Supplement 532-1, are entitled to double time pay for work performed on a holiday. B-177313, November 8, 1972.

3. Temporary employees

In the absence of a regulation or agreement providing for holiday pay for temporary employees, only "regular employee(s)" are entitled to regular pay for holidays under 5 U.S.C. § 6104. Temporary summer aids who served under appointments limited to 90 days or less were entitled only to an ordinary day's pay for work performed on holidays, and not to premium pay, since applicable OPM regulations defined the term "regular employee" as an employee having appointments not limited to 90 days or less. B-153107, November 25, 1969. See also 34 Comp. Gen. 235 (1954) and 25 Comp. Gen. 584 (1946).

C. Night Differential

1. Statutory authority

Section 5343(f) in Title 5 of the U.S. Code provides as follows:

"(f) A prevailing rate employee is entitled to pay at his scheduled rate plus a night differential—

"(1) amounting to 7-1/2 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 3 p.m. and midnight; and

"(2) amounting to 10 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 11 p.m. and 8 a.m.

"A night differential under this subsection is a part of basic pay."

See also OPM regulations 5 C.F.R. Part 532.

Prevailing rate employees who negotiate their wages and working conditions are exempt from the effects of 5 U.S.C. § 5343(f) so that they are not automatically entitled to the statutory night differential. 5 U.S.C. § 5343 note. B-184858, August 19, 1976.

2. Computation

a. Applicable differential rate payable for entire shift

Where an employee works 4 hours between 3 p.m. and midnight and 4 hours between 11 p.m. and 8 a.m., he is not entitled to 7-1/2 percent for the first 4 hours and 10 percent for the last 4 hours, but is entitled to 7-1/2 percent for the entire shift. 53 Comp. Gen. 814 (1974).

b. Meal breaks included

An employee whose shift includes at least 5 hours between 3 p.m. and midnight, e.g., 3 p.m. to 8 p.m., would be entitled to the 7-1/2 percent night differential regardless of scheduled breaks of 1 hour or less. 53 Comp. Gen. 814 (1974).

c. Majority of hours requirement

The term "majority of hours" used in 5 U.S.C. § 5343(f) means that the number of whole hours worked in either of the night differential periods must be greater than one-half the total number of hours worked. Thus, an employee who works from 11 a.m. to 7:30 p.m. is not entitled to the night differential since the majority of the hours scheduled do not occur between 3 p.m. and 11 p.m. 53 Comp. Gen. 814 (1974).

d. Basic compensation determination

Night differential should be included in basic pay for annual and sick leave purposes and for the purpose of computing the amount of overtime pay. 26 Comp. Gen. 212 (1946) and 52 Comp. Gen. 716 (1973). But a day shift employee who occasionally works during the hours for which night differential is payable may not include the night differential in his basic compensation for purposes of computing his overtime compensation. 31 Comp. Gen. 48 (1951), amplified by 31 Comp. Gen. 391 (1952).

e. Temporary day shift assignment

An employee regularly assigned to a night shift who is temporarily assigned to a day shift is entitled to the night differential while on the temporary day shift. 53 Comp. Gen. 814 (1974). The question of what constitutes a temporary assignment is a determination primarily for the administrative agency involved and we will not question the agency's

determination as long as it is reasonable. B-175957, July 27, 1972. Where a night shift employee was temporarily assigned to a day shift pending selection of a permanent day shift employee, and due to administrative delays did not return to the night shift for approximately 64 weeks, GAO did not object to the administrative determination that the assignment was temporary. B-185793, September 8, 1976.

A former Air Force Wage Grade employee requests reconsideration of the Comptroller General's decision of March 15, 1982, which denied his claim for night differential on the grounds that he had not presented evidence that his assignment from the swing shift to the day shift was temporary for purposes of continuing entitlement to night differential. Claimant's submission of injury report which contains supervisor's notations that he was on loan is not of sufficient probative value to permit payment of claim. B-205452, June 14, 1982.

D. Sunday Premium Pay

1. Statutory authority

An employee whose regular work schedule includes work on Sunday is entitled to 25-percent premium pay in accordance with the following provision of 5 U.S.C. § 5544(a):

"... An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each period of work performed during that 8-hour period of service."

The above-quoted language is substantially similar to 5 U.S.C. § 5546(a) applicable to General Schedule employees.

2. Maximum rate payable

Section 5544(a) of Title 5, U.S. Code, is the only authority for payment of Sunday premium pay to prevailing rate employees, and that provision limits the amount of premium pay to 25 percent. Employees of the Saint Lawrence Seaway Development Corporation who had previously been paid 50-percent premium compensation for Sunday work based on prevailing rates and practices in the industry may not be paid that higher rate of premium pay. 46 Comp. Gen. 176 (1966).

3. No minimum period of work time required on Sunday

Employee whose regularly scheduled tour of duty includes an 8-hour period beginning at 11 or 11:30 p.m. Sunday and terminating on Monday is entitled to Sunday premium pay for the entire 8-hour period. There is no requirement for a minimum period of work on Sunday as a condition of entitlement to Sunday premium pay benefits under 5 U.S.C. § 5544(a). 46 Comp. Gen. 158 (1966).

4. Two Sundays in a workweek

Where an employee's regularly scheduled workweek includes two Sundays, an 8-hour tour of nonovertime duty beginning at 11 or 11:30 p.m. on the first Sunday, and the last 8-hour tour of nonovertime duty commencing at the same hours on the next Saturday, 5 U.S.C. § 5544(a) applies to both regularly scheduled 8-hour periods of work and the employee is entitled to Sunday premium compensation limited to 8 hours work actually performed during each regularly scheduled 8-hour period of service, any part of which falls within the period of Saturday midnight to Sunday midnight. 46 Comp. Gen. 158 (1966).

5. Leaves of absence

Prevailing rate employees who work a regularly scheduled 40-hour week that includes Sunday are entitled to Sunday premium pay under 5 U.S.C. § 5544(a), but may not be paid premium compensation for periods of leaves of absence during the regularly scheduled 8-hour Sunday work period. 46 Comp. Gen. 158 (1966).

E. Environmental Differential

1. Statutory authority

Entitlement to environmental differentials is provided for at 5 U.S.C. § 5343(c)(4). Also see 5 C.F.R. § 532.511. The OPM instructions pertaining to the payment of environmental differentials to Wage Board employees are set forth at FPM Supplement 532-1, Subchapter S8-7 and Appendix J. See B-176051, July 14, 1972.

2. Environmental differential as basic pay

A separately stated environmental differential may be regarded as basic pay for purposes of computing overtime and Sunday rates, for purposes of civil service retirement deductions, and for purposes of determining

the annual rate of pay for group life insurance. The differential may be paid to prevailing rate employees while in a leave status. 50 Comp. Gen. 66 (1970) and B-170182(2), July 24, 1970.

3. Duplication of payments

Employees in Vietnam who receive a 25–percent post differential under 5 U.S.C. § 5925 for "conditions of environment," including consideration of service in a combat area, may not in addition be paid an environmental differential for exposure to war risks since payment of such environmental differential would be duplicative of the post differential already authorized under the Department of State's Standardized Regulations (Government Civilians/Foreign Areas). B-174341, February 28, 1972. See also 5 C.F.R. § 532.511(b)(4).

4. Supervisors

Wage Grade supervisors who are not members of an exclusive bargaining unit claimed additional environmental differential awarded to nonsupervisory personnel by an arbitrator. Since the supervisors are not covered under the negotiated agreement and since action reducing the differential rate did not constitute an unjustified or unwarranted personnel action under 5 U.S.C. § 5596 (1976), they are not entitled to additional differential awarded to nonsupervisory personnel. B-193176, May 4, 1979.

5. Authority to determine hazard, hardship, or condition

Employees in the plating and anodizing shop at an Army aeronautical depot maintenance center claim entitlement to environmental differential pay due to exposure to hazardous and harmful chemicals. The agency maintains that protective measures have practically eliminated any hazard, physical hardship, or severe working conditions. The authority to determine whether the employees meet the qualifications for payment of environmental differential pay set by OPM is primarily vested in the agency concerned. GAO will not substitute its judgment for that of the agency's in the absence of clear and convincing evidence that the agency's determination was arbitrary and capricious. B-197142, February 12, 1980. See also B-202540, May 11, 1981 and B-181498, January 30, 1975.

6. Hazard defined by arbitration

Appendix J to FPM Supplement 532-1 allows the parties to a collective-bargaining agreement to agree to the coverage of local situations under appropriate categories listed in Appendix J.

Under a collective-bargaining agreement providing for payment of environmental differential for hazardous working conditions, the Navy may implement an arbitrator's determination that local working conditions at the Naval Air Rework Facility came under the Appendix J category for "explosives and incendiary material—low degree hazard." 56 Comp. Gen. 8 (1976).

7. Hazard determined by grievance

Under its collective-bargaining agreement, a union filed a grievance alleging the existence of hazardous working conditions and the GSA initially determined that payment of a 25–percent differential for high work was warranted. Upon providing protective measures, GSA terminated payment of the differential and the union filed an unfair labor practice which was decided in favor of the union by the Assistant Secretary of Labor and sustained by the Federal Labor Relations Council. Since FPM Supp. 532-1 allows for negotiations through the collective-bargaining process for determining local situations under categories listed in Appendix J, this Office will not substitute its judgment for that of the Assistant Secretary and the Council. The categories listed in Appendix J are illustrative only and are not intended to be exclusive of other exposures under other circumstances. 58 Comp. Gen. 331 (1979).

Subchapter IV—Similar Systems

A. Vessel Crews

1. Statutory authority

Under 5 U.S.C. § 5348 the pay of officers and members of crews of vessels is fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry. Included in this practice are the vessel employees of the Panama Canal Company. (But see footnote under section 5348 in

the U.S. Code Annotated, as to effect of Panama Canal Treaty.) However, vessel employees of the Corps of Engineers and vessel employees where an inadequate maritime industry practice exists will have their pay set under other prevailing rate systems. 5 U.S.C. § 5348.

2. Basic pay

a. Effective date of pay increase

Seamen employed by the National Oceanic and Atmospheric Administration are entitled to retroactive pay for services rendered after the effective date of a pay increase even though they had been separated before the date of the order approving the increase since it is the maritime industry practice to make such payments and the contrary provisions of 5 U.S.C. § 5344 do not apply to officers and crews of vessels. B-187972, March 25, 1977.

b. Limitation on compensation

Since the pay of crews of vessels is set by administrative action under 5 U.S.C. § 5348, it is subject to the ceiling of grade GS-18 as provided under 5 U.S.C. § 5363. 56 Comp. Gen. 870 (1977).

3. Additional compensation

a. Overtime for travel

An employee of the Military Sealift Command who traveled each day by private automobile from his residence to his temporary duty post aboard a ship located outside of the local commuting area, and returned, is not entitled under regulations issued by the Navy pursuant to 5 U.S.C. § 5348 to overtime compensation for traveltime where traveltime is 1 hour or less, since these regulations are in accordance with prevailing practices in the maritime industry. The employee traveled 61 minutes each way to and from the ship, resulting in an extra 2 minutes per day which is de minimis and not compensable as overtime. B-186369, April 22, 1977, and September 22, 1977.

b. Call-back overtime

The arbitrator's award to vessel employees of 2 hours minimum call-back overtime for reporting to duty 45 minutes early may not be implemented, since the negotiated agreement incorporated the call-back overtime provision of a departmental regulation which was applicable to Wage Grade employees, under 5 U.S.C. § 5544. Overtime performed prior to and continuing into a regularly scheduled tour of duty merges with the regular tour. The 2-hour minimum does not apply in that situation for either General Schedule or Wage Grade employees. B-189163, October 11, 1977.

4. Pay cap on premium pay

Civilian Marine employees whose pay is set administratively under 5 U.S.C. § 5348(a) are not subject to pay caps on their premium pay increases. The pay cap language for fiscal years 1981 through 1983 do not apply to premium pay. In addition, the Court of Claims in National Maritime Union v. United States, 682 F.2d 944 (Ct. Cl. 1982), overturned one agency's attempt to limit such increases in prior fiscal years, and there is no evidence of subsequent legislative intent to overrule that decision. Crews of Vessels, 64 Comp. Gen. 419 (1985).

The National Federation of Federal Employees (NFFE) requests our decision as to whether certain U.S. Army Corps of Engineers prevailing rate employees who work aboard a floating plant and are paid under a special schedule with rates set according to the New Orleans, Louisiana, wage area may be placed under the Lake Charles-Alexandria wage area schedule or, in the alternative, under a special schedule with rates comparable to that wage schedule. The NFFE's request may not be granted since it appears that the employees are being paid in accord with long-standing Corps practices. Any change in those practices must be authorized by the Office of Personnel Management after consideration and recommendation by the Prevailing Rate Committee. Prevailing Rate Employees, B-224662, August 21, 1987.

B. Employees of the Government Printing Office

1. Statutory authority

Generally the wages of employees of the Government Printing Office are set by the Public Printer under the Kiess Act, 44 U.S.C. § 305, and in certain instances to be determined by a conference with a committee of the trades involved and subject to approval of the Joint Committee on

Printing. The Kiess Act does not require the Public Printer to confer with employee representatives concerning employment standards for GPO printing procurement contracts. B-191619, May 9, 1978.

2. Pay increase

a. Effective date

The Joint Committee on Printing set the effective date for wage rate increases on June 18, 1977. Under 44 U.S.C. § 305 such wages may not be changed more often than once a year. Although Joint Committee action occurred on August 4, 1977, since wages paid actually changed on June 18, 1977, the earliest date on which the next pay adjustment may occur is June 18, 1978. B-190097, November 11, 1977.

b. Craft employees

The Public Printer and employee representatives were unable to agree on the amount of a wage increase. Appeal was taken to the Joint Committee on Printing pursuant to 44 U.S.C. § 305. The Joint Committee approved an increase on August 4, 1977, effective June 18, 1977. The Public Printer may adjust craftsmen salaries between June 18, 1977, and August 4, 1977, since impasse was reached between the parties on June 10, 1977, and at the time of submission to the Joint Committee it was clear there would be an increase. B-190097, November 11, 1977.

c. Noncraft employees

Although all employees of GPO are governed by 44 U.S.C. § 305(a), only craft employees are covered by formal wage conference and appeal provisions. Thus, the informal consultations procedure established by the Public Printer for noncraft employees does not restrict the Public Printer's authority to set wages nor does it authorize retroactive increases. B-190097, June 12, 1978.

3. Additional compensation

a. Overtime

The authority of the Public Printer under the Kiess Act, 44 U.S.C. § 305 (1970), to set wages of certain GPO employees is limited by 5 U.S.C. § 5544 (1976) with regard to overtime entitlement. Employees must actually work overtime hours in order to receive overtime pay and there is no

authority under 5 U.S.C. § 5544 to establish overtime rates at a figure greater than one and one-half times the basic hourly pay rate. To the extent that they are inconsistent with 5 U.S.C. § 5544, proposals of employee representatives concerning overtime may not be implemented. B-191619, May 9, 1978.

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