Civilian Personnel Law Manual

Title I — Compensation, Supp. 1979

OFFICE OF GENERAL COUNSEL
U.S. GENERAL ACCOUNTING OFFICE

FOREWARD

In May of 1977, Title I, Compensation, of the Civilian Personnel Law Manual was issued reflecting decisions of the General Accounting Office in effect through September 30, 1976. We are pleased to announce distribution of the 1979 Supplement to Title I reflecting decisions of this Office from October 1, 1976, through September 30, 1979.

The 1979 Supplement follows the same format as the text of Title I and is intended to be filed as a single unit at the end of Title I.

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Milton J. Socolar
General Counsel

CHAPTER 1

CIVILIAN PAY SYSTEMS

A. GENERALLY

New pay systems under the Civil Service Reform Act (1-1)

The Civil Service Reform Act of 1978, Pub. L. 95-454, October 13, 1978, 92 Stat. 1111, amended title 5 of the United States Code to establish two new pay systems--the Senior Executive Service pay system and the Merit pay system.

The Senior Executive Service (1-1)

The Senior Executive Service (SES), established under the provisions of Title IV of the Civil Service Reform Act of 1978, 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 the 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.

In addition to basic pay, career appointees in the SES may earn (1) performance awards in an amount not to exceed 20 percent of basic pay (limited to 50 percent of the total number of SES positions in the agency), and (2) the rank of Meritorious Executive with a lump-sum payment of $10,000 (limited to 5 percent of the total SES) or Distinguished Executive with lump-sum payment of $20,000 (limited to 1 percent of the total SES). The pay limitations of sections 5308 and 5373 of title 5 of the United States Code do not apply to appointees in the SES, but their total compensation may not exceed the rate payable for level I of the Executive Schedule. The statute authorizes

the Office of Personnel Management to prescribe regulations governing the SES.

Employees not covered by the SES (1-1)--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 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).

The Merit pay system (1-1)

The merit pay system, created by the Civil Service Reform Act of 1978, covers supervisors and management officials in grades GS-13, 14, and 15 of the General Schedule. For each of these grades, the Office of Personnel Management establishes a range of basic pay within the minimum and maximum rates for each grade. Within-grade steps are eliminated for the employees covered by this system who may be paid at any rate within the range for their grades. They do not receive regular or quality step increases, but they do automatically receive 50 percent of the annual comparability adjustment in the General Schedule plus any additional percentage of such adjustment that the Office of Personnel Management determines to be warranted. Any other within-grade increases awarded these employees must be based on merit. The total amount of funds available for merit increases in any fiscal year is limited to the amount which would have been expended for regular and quality step increases for the covered employees plus any amount of the comparability adjustment which was not automatically granted.

An employee whose position is brought under this system may not be paid less than the amount he was receiving when his position was converted, plus the comparability adjustments referred to in the preceding paragraph, so long as he remains in the position. He may not be paid less than the minimum rate for his grade. See chapter 54 of title 5, United States Code.

D. OTHER SYSTEMS, SCHEDULES AND AUTHORITIES

Certain NASA employees (1-7)

Section 2473(c)(2), title 42, United States Code, gives NASA the authority to establish rates of pay for a specific number of scientific, engineering and administrative positions, without regard to the principles of classification by duties encompassed by the civil service laws and regulations. Under that authority, the Administrator of NASA may fix rates of compensation at amounts not in excess of the highest rate for grade 18 of the General Schedule. Since the 1970s, NASA has determined salary rates for these positions based not merely on the organizational level of the position held but on the particular employee's responsibilities, performance and contributions.

Under 42 U.S.C. § 2473(c)(2), NASA was not required to uniformly give employees who hold such positions the full amount of the 1977 increase in the maximum rate of pay for GS-18 to $47,500. There was no abuse of discretion on NASA's part in paying employees holding such excepted positions at rates ranging from $39,600 to $47,500, even though certain of the employees would have earned $47,500 had they continued in the General Schedule positions they held prior to their appointments to NASA's excepted service. B-189969, February 8, 1978.

CHAPTER 2

ENTITLEMENT TO COMPENSATION

Prior decisions affected:

31 Comp. Gen. 262 (1952) overruled in part (2-9,11)
38 Comp. Gen. 175 (1958) amplified (2-8, 9, 11)
52 Comp. Gen. 700 (1973) amplified (2-8,11)
55 Comp. Gen. 109 (1975) amplified (2-8,11)

B. APPOINTMENTS

Definitions

Competitive distinguished from excepted (noncompetitive)

President's authority to create excepted positions (2-2)--Creation of the President's Management Intern Program by Executive Order 12008 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.

By the President with the advice and consent of the Senate

Interim appointments (2-3)

Section 902 of the Department of Energy Organization Act provides that in the event an officer required to be appointed by and with the advice and consent of the Senate has not entered into office on the effective date of the organization, the President may designate as "acting" any officer whose appointment was required to be made by and with the advice and consent of the Senate. Since four of the five interim appointees designated to act were not serving in positions confirmed by the Senate, their appointments were improper. Additionally, since the positions in question had never been filled, they were not "vacated," and thus could not be filled under the Vacancies Act, 5 U.S.C. §§ 3345-3349. B-150136, May 16, 1978.

Holdover at the end of term (2-3)

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).

F. DE FACTO EMPLOYMENT

Generally (2-8)

Prior decisions have drawn a distinction between cases in which there has been no appointment or a void appointment and cases in which the appointment is merely voidable. In the former category of cases, the individual has been held to be a de facto employee, entitled to retain compensation only insofar as it has been received, but not entitled to unpaid compensation or other benefits that ordinarily attach to employment status. In the case of an appointment that is merely voidable, the individual has been regarded as an employee, entitled to all benefits of the position up to the date of his separation. This distinction is discussed in 58 Comp. Gen. 197 (1979).

In Valdez, B-191977, August 17, 1979, 58 Comp. Gen. (1979), that distinction was abandoned and 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:

(1) the appointment was made in violation of an absolute statutory prohibition, or

(2) 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.

Application of general rule

Service prior to effective date of appointment (2-8)

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 an employee of a right granted by statute or regulation, or (3) would result in the failure t` carry out a nondiscretionary administrative regulation of 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). Also see 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.

Expiration of term of office (2-8)

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 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.

What constitutes good faith (2-8)--An employee who knowingly worked beyond the expiration of her 30-day temporary appointment because she relied on statements made by her supervisors that a retroactive appointment would be forthcoming may be compensated for the

reasonable value of the services rendered. Due to a lack of knowledge concerning appointment procedures, both the employee and her supervisor believed that a retroactive appointment could be made. Thus, the employee may be considered to have been without fault and to have served in good faith. B-192836, February 20, 1979.

Employee never appointed

Not on civil service register (2-9)--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.

Too low on civil service register (2-9)--An individual was told to and did report for an HEW "summer hire" program but when the request for her appointment was submitted, her name was too low on the register to be reached. Consequently, the individual was not appointed to the summer hire program and stopped working. She may be compensated for the services rendered to HEW as a de facto employee. B-192264, April 3, 1979.

Employment application falsified (2-9)
On his application for an appointment under the Intergovernmental Personnel Act (IPA), an individual falsely stated that he was employed by the City of Waterloo, Iowa. He served under the IPA assignment for approximately 2 years after which he was given a career-conditional appointment with the Department of Labor. Since his misrepresentations related to material qualifications required by the IPA, his appointment was subsequently voided. His status is that of a de facto employee and he may keep payments already made to him for the IPA period since there is no statute either expressly prohibition payments

or requiring a refund of such payments. B-195279, September 26, 1979.

Rule inapplicable

Nepotism (2-9)

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 de jure employee. B-186453, May 2, 1977.

De facto pay

Reasonable value of services

Individual serving before appointment (2-11)--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.

Individual never appointed (2-11)--The reasonable value of the services of an individual who is never in fact appointed to the position which he purportedly filled should be established at the rate of basic compensation for the position that was ultimately advertised and filled. B-193605, January 8, 1979.

Premium pay (2-11)--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.

Retirement contributions (2-11)--Retirement contributions previously deducted from compensation paid to a de facto employee may be refunded to him, less any

necessary social security contribution, since the reasonable value of a de facto employee's services includes amounts deducted for retirement. Insofar as 38 Comp. Gen. 175 (1958) provides otherwise it should not be followed. 57 Comp. Gen. 565 (1978).

Unpaid compensation (2-11)

An individual who has been appointed to a position and whose appointment is subsequently found to be erroneous or improper is entitled to receive unpaid compensation unless--

(1) the appointment is in violation of an absolute statutory prohibition, or

(2) the employee was guilty of fraud in regard to the appointment or deliberately misrepresented or falsified a material matter.

The new rule does not apply to individuals who have never been appointed or who serve after their appointments have expired. 31 Comp. Gen. 262 (1952) overruled. 38 Comp. Gen. 175 (1958), 52 Comp. Gen. 700 (1973), and 55 Comp. Gen. 109 (1975) amplified. B-191977, August 17, 1979; 58 Comp. Gen. ___.

Leave (2-11)

Earlier decisions had held that because a de facto employee is not an "employee" within the meaning of 5 U.S.C. § 2105 he does not accrue annual leave during the period of his de facto service and, thus, is not entitled to a lump-sum payment for accrued annual leave when his services are terminated. For example, see 57 Comp. Gen. 406 (1978), 57 Comp. Gen. 565 (1978). In B-191977, August 17, 1979, 58 Comp. Gen. ___, those decisions as well as 31 Comp. Gen. 262 (1952) were overruled. Thus, an employee whose appointment is found to have been improper or erroneous is entitled to credit for service for purposes of accrual of annual leave and to lump-sum payment for unused leave upon separation unless--

(1) the appointment was made in violation of an absolute statutory prohibition, or

(2) the employee was guilty of fraud in regard to the appointment or deliberately misrepresented or falsified a material matter.

The new rule does not apply to individuals who have never been appointed or who serve after their appointments have expired.

Validity of acts of de facto employees (2-11)

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.

G. WAIVER OF COMPENSATION (VOLUNTARY SERVICES)

Compensation fixed by law (2-12)

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.

Compensation set by administrative action (2-12)

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).

CHAPTER 3

BASIC COMPENSATION

Errata: 52 Comp. Gen. 216 should be
53 Comp. Gen. 216 (3-17)

SUBCHAPTER I--COMPUTATION

A. HOURS OF WORK, DUTY

Basic 40-hour week and work schedule

Lunch and rest period (3-1)

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 within 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.

B. BIWEEKLY PAY PERIODS

Generally

Experts and consultants (3-2)

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).

Computation of pay (3-2)

Experts and consultants

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.

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

A. NEW APPOINTMENTS

Superior qualifications appointment (3-4)

An agency does not have authority under 5 U.S.C. § 5333 and 5 C.F.R. § 431.203(b) to appoint an employee at a rate above the minimum rate of grade prior to obtaining approval from the CSC. The failure of an agency to request such approval in a timely manner is neither a violation of a nondiscretionary administrative regulation or policy nor the deprivation of a right granted by statute or regulation. Therefore, an employee who was told she would be hired at a GS-15, step 9, but who was appointed at GS-15, step 1, may not receive a retroactive salary increase based on the CSC's prospective approval of the agency's request to set her pay at the higher step of grade. B-188195, January 3, 1978, and B-191817, February 5, 1979.

C. PROMOTIONS AND TRANSFERS

Effective date

Generally (3-6)

As a general rule, a promotion may not be affected retroactively so as to increase an employee's right to compensation. B-193723, September 21, 1979. There are exceptions to this rule where administrative or clerical error (1) prevents a promotion action from being effected as originally intended, (2) results in a nondiscretionary administrative regulation or policy not being carried out, or (3) deprives an employee of a right granted by statute or regulation. B-190408, December 21, 1977. The general rule and its exceptions are discussed in greater detail in the context of the remedy afforded by the Back Pay Act. See Title I, Chapter 7, Part B.

Exceptions to general rule

Personnel action not effected as intended (3-6)--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 cannot be established. 58 Comp. Gen. 51 (1978).

Nondiscretionary policy or regulation (3-6)--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.

Right granted by statute or regulation (3-6)--Under CSC regulations, an employee who is detailed to a higher grade position for a period in excess of 120 days has a right to be temporarily promoted for the period beginning with the 121st day of the detail, unless the agency obtains CSC approval to extend the detail beyond 120 days. Employees not given temporary promotions as required by regulations are entitled to retroactive temporary promotion with backpay as of the 121st day of the detail. 56 Comp. Gen. 427 (1977), affirming 55 Comp. Gen. 539 (1975). The subject of retroactive temporary promotions for overlong details is dealt with extensively in Title I, Chapter 8, Part B.

Highest previous rate rule

Generally (3-8)

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.

County committee employees appointed by Department of Agriculture (3-8)--Although the CSC regulations at 5 C.F.R. § 531.203 provided that an employee whose highest previous rate falls between two steps of his grade may be paid at the higher rate, a county committee employee appointed by the Department of Agriculture whose highest previous rate falls between two steps of the GS grade may not be paid the higher of the two steps. Under 5 U.S.C. § 5334(e) as amended, a county committee employee may only be appointed at a grade and step that does not exceed the highest previous rate earned during service with such county committee. B-193991 August 21, 1979.

Administrative discretion (3-8)

The CSC regulations vest discretion in the agency regarding application of the highest previous rate rule in establishing an employee's rate of pay. 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.

Specific determination required by agency regulation (3-8)--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.

Rate earned in a different agency (3-8)--Under VA regulations providing that the highest previous rate will not routinely be applied in effecting a transfer from another agency, an employee hired by VA, whose highest previous rate was earned while an employee of the IRS is not entitled to have that rate used in setting her pay. B-194726, July 24, 1979, and B-186554, December 28, 1976.

Demotion at employee's request (3-8)--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.

Position in which highest previous rate was earned

Position occupied less than 90 days (3-10)--5 C.F.R. § 531.203(d)(1) permits the use, as a highest previous rate, of a rate of pay received under an appointment not limited to 90 days or less, 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 breifly 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, earned just before promotion to GS-11, plus step increases

he would have earned but for the promotion. B-192890, January 10, 1979.

Position held under temporary promotion (3-10)--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 his former grade and position with time credited for within-grade increases. B-189567, November 21, 1977.

Basic pay

Tropical differential (3-12)--Although tropical differential is to be included as basic compensation of employees who are citizens of the United States for the purpose of determining other benefits which are related to basic compensation, tropical differential may not be included as basic pay for the purpose of applying the highest previous rate rule. 56 Comp. Gen. 60 (1976).

Night differential (3-12)--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.

"Two step-increases" rule

Promotion or transfer to higher grade (3-13)

The statutory language of 5 U.S.C. § 5524(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.

D. CLASSIFICATION AND RECLASSIFICATION

Jurisdiction

CSC and employing agency (3-15)

The Classification Act, 5 U.S.C. § 5101 et seq., governs classification of Federal positions in the General Schedule. Under the statute and implementing regulations in 5 C.F.R. Part 522, the employee's agency and the CSC are primarily responsible for classification of the duties of the employee's position. Thus, employees should appeal alleged improper classification to their agencies or to the Commission. B-187234, December 8, 1976, and B-190442, April 13, 1978.

GAO (3-16)

It is not within the jurisdiction of the GAO to determine whether a position has been properly classified or described. Commission regulations specifically provide that a position may not be retroactively reclassified to a higher grade except as otherwise provided. B-188211, November 17, 1977.

Effective date

Generally (3-17)

An employee of the Government is entitled only to the salary of the position to which he is actually appointed, regardless of the duties actually performed. 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. § 551.701, 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 the CSC, subject to the provisions of section 511.703, is no earlier than the date of the appeal, and not later than the beginning of the fourth pay period following the date of the decision, except that a subsequent date may be specifically provided by the Commission. B-187861, June 17, 1977.

United States v. Testan (3-17)--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 et seq., 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.

Administratively fixed (3-17)

When a position has been reclassified to a higher grade, an agency must, within a reasonable time, either promote the incumbent, if qualified, or remove him. A reasonable time is considered as expiring at the beginning of the fourth pay period following the date of the reclassification action. 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, at the end of the four pay periods, have the necessary specialized experience for promotion to GS-5, 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.

Retroactive pay adjustments allowed

Appeal from downgrading (3-17)--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.

Retroactive pay adjustments disallowed

Arbitration award of backpay for misassignment (3-18)--An arbitrator found under Navy regulations that a GS-3 employee was "misassigned" to GS-4 duties for 6 months. The arbitrator's award of backpay for the difference in pay between the two grades may not be implemented. In view of the holding in Testan, supra, that neither the Classification Act nor the Back Pay Act creates a substantive right to backpay for a period of wrongful classification, the arbitrator's finding of a violation of the negotiated agreement dealing with classification and position descriptions, does not provide a basis for retroactive pay. B-192366, October 4, 1978.

Suspension of classification action (3-18)--DOT and CSC entered into a moratorium agreement suspending classification activities affecting positions in an air traffic controller series pending issuance of new classification standards. In view of the CSC's broad authority over classification matters, including its authority to publish standards and to revise, supplement, or abolish existing standards under 5 U.S.C. § 5105, there is no basis to question the moratorium agreement. Moreover, the suspension of classification actions does not provide a basis for payment of backpay to employees whose positions might otherwise have been reclassified upward. B-189101, November 30, 1977. Also see B-181223, April 30, 1976.

Classification recommendation not implemented (3-18)--An employee's claim for retroactive promotion and backpay was denied where an agency failed to reclassify a position pursuant to a Management Survey Team recommendation. Since the Survey Team's report was advisory and the position was never upgraded, the employee is not entitled to the pay of the higher graded position. B-173783.140, March 22, 1977. See also B-186760, October 8, 1976, and June 3, 1977.

Relationship to cases on details to higher grade positions (3-19)

In 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977) it was held that an employee detailed to an established,

classified, higher grade position for more than 120 days without CSC approval, is entitled to a retroactive temporary promotion with backpay for the period beginning with the 121st day of the detail until the detail is terminated, provided the employee was otherwise qualified and could have been promoted into the position at that time. Although an employee may not be allowed backpay for the performance of duties which should be classified at a higher grade, he may be granted backpay if he is detailed to a higher grade position and retained in that detail for a period in excess of the time permitted. B-193555, January 26, 1979. The subject of details to higher grade positions is dealt with extensively in Title I, Chapter 8, Part B.

A detail does not occur merely through an employee's performance of duties that were previously or are subsequently performed by an individual whose position was or is classified at a higher grade, or by the performance of duties commensurate with those of a higher graded classification. B-193348, April 10, 1979, and B-192711, April 9, 1979. Where an employee shows that he was assigned one of many duties normally assigned to employees at a higher grade level, there is at most an accretion of duties in the position occupied. The accretion of duties is a matter involving the proper classification of positions and not an overlong detail to a higher grade position for which retroactive temporary promotion and backpay may be granted. B-192433, December 4, 1978.

E. DOWNGRADING AND "SAVED PAY" (3-19)

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 which provides broader authority for grade and pay retention incident to a change of position or 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. At that time, 5 U.S.C. § 5363 provides that the employee is entitled to backpay 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. The Office of Personnel Management's interim implementing regulations are published in FPM Bulletin 536-1, March 30, 1979.

Entitlement to saved pay prior to January 11, 1979 (3-20)

Two years continuous service (3-20)

An employee reduced in grade from GS-8 to GS-7 is not entitled to saved pay where she had held the GS-8 position for only 1 year and 11 months. Under 5 U.S.C. § 5337, one of the conditions for entitlement to saved pay is that the employee have served in the same agency in a grade higher than the grade to which demoted for 2 continuous years immediately before the reduction in grade. B-189706, May 10, 1978.

Reduction in force for lack of funds (3-20)

An employee reduced in grade in a reduction-in-force action is not entitled to saved pay where the record shows that the reduction in force was necessitated by a lack of funds. B-187221, June 21, 1977.

Demotion at employee's request

Demotion requested under employee development program (3-21)--An employee requested and was reduced in grade from GS-6 to accept a GS-5 position having greater promotion potential. Although the reduction in grade was at the employee's request, the CSC determined that it was the result of an employee

development program, such as an intern program or upward mobility program offering training and experience to develop the agency's workforce. For this reason, the reduction in grade is not considered to be at the employee's request and she is entitled to saved pay. 56 Comp. Gen. 199 (1976).

Demotion attributable to agency's special recruitement needs (3-21)--Where an employee requested a change to a lower grade from GS-11 to GS-7 following the agency's otherwise extensive but unsuccessful recruitment efforts, the employee is entitled to saved pay. Although the employee requested the change to a lower grade, the agency did not show that it did not have a special recruitment need and that that need was not the paramount factor leading to the downgrading. B-186008, May 22, 1978, and B-191229, June 1, 1978.

"Saved pay" period prior to January 11, 1979 (3-21)

An employee of the Army requested that his salary retention rights to saved pay be extended for an additional 13 months because he was not registered as a repromotion eligible employee until 13 months after receiving a downgrading due to the transfer of his former position. The request was denied because the statutory language in 5 U.S.C. § 5337(4) limits salary retention to 2 years, without exception. B-188981, March 31, 1978.

F. GENERAL SCHEDULE SUPERVISORS OF WAGE BOARD EMPLOYEES (New Heading)

Generally (3-22)

Under 5 U.S.C. § 5333(b), a General Schedule employee who regularly supervises employees whose pay is fixed and adjusted from time to time by wage boards or similar authorities 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. See 5 C.F.R. Part 531.301 et seq.

Agency discretion to adjust supervisor's pay

Initial adjustment (3-22)

A General Schedule supervisor, whose salary rate was

less than the salary rate of wage board 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 that section is within the discretion of the agency. Since there was no mandatory agency policy requiring the pay adjustment, the General Schedule supervisor, is not entitled to backpay. B-165042, December 21, 1978.

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.

Subsequent adjustment (3-22)

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. Also see B-180010.07, June 15, 1977.

Continued supervision required

Supervision terminated (3-22)

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 CSC reviews regulations to determine modifications that may be needed to implement the decision. 57 Comp. Gen. 97 (1977).

Supervision only while on temporary duty (3-22)

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.

Effective date of salary increase (3-22)

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.

SUBCHAPTER III--PERIODIC STEP INCREASES

A. GENERAL SCHEDULE (3-23)

Under the merit pay systems established by the Civil Service Reform Act of 1978, regular periodic step increases are eliminated for supervisory and management personnel in grades GS-13, 14, and 15 of the General Schedule. See Chapter 1.

Generally

Applicability (3-23)

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. § 531.402(d) as "one filled on a permanent basis, that is an appointment not designated as temporary by law and not having a definite time limitation." However, 5 C.F.R. § 316.305 provides that term employees (those appointed under certain circumstances for a period of more than 1 year but not more than 4 years) are eligible for within-grade salary increases. Thus, employees of the National Health Services Corps, Indochinese Refugee Program employees, and hearing examiners given excepted appointments for short duration are eligible for within-grade salary increases on the same basis as term employees. 58 Comp. Gen. 25 (1978) and B-193803, February 14, 1979.

Creditable service (3-24)

Employees must complete certain waiting periods for advancement between step rates consisting of 52, 104, or 156 calendar weeks of creditable service. A nonpay status for more than 2, 4, or 6 workweeks, respectively, does not constitute creditable service for the purpose of a within-grade increase, except in situations involving a work-related injury, service during a national emergency, or an assignment to a state or local government or other institution under 5 U.S.C. § 3371-6. See 5 C.F.R. § 531.404. Therefore, an employee who was on leave without pay from his position with NASA for over 4 years earned no

creditable service for that time for the purpose of determining his entitlement to a within-grade increase. B-191713, May 22, 1978.

Equivalent increase

Demotion following promotion (3-24)--Under 5 U.S.C. § 5335, an employee is eligible for periodic step increases in pay upon completion of certain time periods in different pay rates subject to the condition that the employee did not receive an equivalent increase in pay from any cause during that period. Thus, 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. 57 Comp. Gen. 646 (1978).

Repromotion to prior position (3-24)--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.

Quality step increase (3-25)

An agency has 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, for reasons unrelated to the employee's performance, was found to be improper by the agency and hence was tantamount to an unjustified or unwarranted personnel action. B-192372, January 2, 1979.

CHAPTER 4

ADDITIONAL COMPENSATION FOR CLASSIFICATION ACT POSITIONS

Errata: B-181236 should be B-181237 (4-35)

Prior decisions affected:

32 Comp. Gen. 191 (1952), no longer followed (4-40)
50 Comp. Gen. 519 (1971), modified (4-14, 11, 16, 10, 12)
B-172671, November 19, 1974, modified (4-14)
B-183751, October 3, 1975, amplified (4-35)

SUBCHAPTER I--PREMIUM PAY--OVERTIME

B. OVERTIME UNDER 5 U.S.C. § 5542

What are compensable hours of work

Regularly scheduled

Defined (4-5)--An arbitrator found that the Customs Service scheduled assignments in advance for duty on Coast Guard cutters knowing that substantial overtime was required. He concluded that scheduling 8-hour shifts with such knowledge violated the applicable negotiated agreement and awarded regular overtime pay to the officers who were already receiving pay for administratively uncontrollable overtime. The award may be implemented since the facts found by the arbitrator show that the overtime was "regularly scheduled" within the meaning of 5 U.S.C. § 5545(c)(2). B-192727, December 19, 1978. In B-191512, October 27, 1978, surveillance work performed by Customs Special Agents, which was authorized and assigned in advance, and scheduled to recur on successive days at specific 12-hour intervals over a 1-week period, was held to be regularly scheduled since the work was predictable, and followed a discernible pattern. Compensation for administratively uncontrollable overtime previously received for work during this period should be offset against the regular overtime and premium pay for night work to which the agents are entitled. Also see B-178261, July 7, 1977, concerning Customs Security Officers who served as sky marshals.

While traveling

Within duty station(4-6)--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.

Commuting (4-6)--Grading inspector's travel, in response to requests for grading services, to places adjacent to his permanent duty station, for which scheduling of requests cannot be controlled by the Agricultural Marketing Service is not compensable as overtime work if response to such requests is included in employee's regularly scheduled duties. Although requests for grading services are not controllable by the agency, it schedules the time of the employee's travel. Moreover, travel to such regular duty assignments is normal commuting travel which is not compensable under 5 U.S.C. § 5542(b)(2). B-181347, March 2, 1977.

Travel as part of regularly scheduled workweek (4-6)--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).

Performance of work while traveling

Escorts and couriers (4-7)--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).

Incident to travel that involves the performance of work while traveling (4-8)--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).

Arduous conditions

Generally (4-8)--Although it may involve certain risks, diplomatic couriers' travel is not carried out under arduous conditions. The arduous conditions contemplated by 5 U.S.C. § 5542(b)(2)(B)(iii) are those imposed by unusually adverse terrain, severe weather, etc., and do not generally include motor vehicle travel over hard-surfaced roads or travel by common carriers, including airlines. 57 Comp. Gen. 43 (1977). Driving on hard-surfaced roads, although through a high-crime area, does not constitute travel under arduous conditions. B-193623, July 23, 1979.

Although a blizzard delayed his initiation of travel, an employee who traveled the day after a blizzard did not travel under arduous conditions since the storm had ended and the roads were sufficiently clear to permit the travel. B-191045, July 13, 1978.

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

Event (4-9)--An employee scheduled to return from his temporary duty station on a Friday was delayed by a blizzard and instead traveled on Sunday. Although the blizzard was beyond the agency's control, the fact that the employee's return trip was cancelled by an event beyond the administrative control of the agency is not determinative. To meet the requirements of the statute, the event which required his return trip on a nonworkday must be one which cannot be scheduled or controlled administratively. Nothing in the record indicates that an event beyond the agency's control required the employee to return on Sunday, rather than Monday, a regular working day. B-191045, July 13, 1978.

Scheduled or controlled administratively (4-10)--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 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.

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 work-week to an unfair labor practice hearing may not be considered as hours of work for overtime compensation. B-180021, August 31, 1978.

Where there is notice of the event (4-13)--In order for travel to be compensable as overtime hours of work under 5 U.S.C. § 5542(b)(2)(B)(iv) there must be both an uncontrollable event and an immediate necessity for the employee's travel which precludes proper scheduling. An NLRB Field Attorney may not be given compensatory time off for travel to interview a witness after regular duty hours, since the interview was not of such an immediate necessity as to preclude scheduling of the travel during regular duty hours as contemplated by 5 U.S.C. § 6101(b). B-172671, March 8, 1977.

Entitlement to overtime for travel under 5 U.S.C. § 5542(b)(2)(B)(iv) depends not only on the event necessitating travel being administratively uncontrollable but also on the necessity for scheduling the travel during nonduty hours. If scheduling of the travel during regular duty hours would not result in 2 or more days of additional per diem, then travel should be scheduled during duty hours. B-172671, November 19, 1974, and 50 Comp. Gen. 519 (1971) modified. B-172671, March 8, 1977.

Where the times and dates of international conferences were not scheduled by any agency of the United States Government, such times were not administratively controllable. However, an employee may not be paid overtime or given compensatory time for traveltime to and from such conferences if there was sufficient advance notice of the times of such conferences so as to permit scheduling related travel during the employee's regular duty hours without incurring more than 1-3/4 days additional per diem expenses. B-192839, May 3, 1979.

Waiting at carrier terminals (4-14)--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 CSC 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).

Rest stops incident to travel (4-15)--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.

Standby duty

At employee's duty station (4-16)--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).

At home (4-17)--A radiology technician who, while on call, was required to be available by telephone or paging device with a range of 25 miles, either at his residence or elsewhere within 1 hour's drive to work, is not entitled to overtime compensation for standby duty under 5 U.S.C. § 5542. In view of the relative freedom of location and activity, time spent on call was not spent predominately for his employer's benefit. B-190369, February 23, 1978. Also see B-188025, July 21, 1977. holding that an employee who is required to be available by telephone, either at his residence or within 30 minutes of port, in order to perform fuel sampling and inspection of barges upon arrival at port, is not entitled to overtime pay since his residence has not been designated as his duty station and because his whereabouts and activities were not so severely limited as to make these hours compensable.

Preshift and postshift duties

Optional performance of duty (4-20)--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. 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.

Lunch periods and other duty-free periods (4-20)

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.

De minimis (4-21)

Preshift and postshift 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

postshift duties of 2 minutes daily, in view of the Court of Claims' holding that overtime work of less than 10 minutes is not compensable.

Evidence required (4-21)

Under 31 U.S.C. § 71, 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.

Officially ordered or approved

Induced to work (4-21)

Former GSA guards were transferred to another agency which paid overtime compensation for the same duties for which GSA had not paid overtime compensation. Their claim for overtime compensation for duties at GSA is denied. There is no obligation on GSA's part to pay overtime compensation since such overtime was not ordered and approved by the proper official and there has been no showing that the guards were "induced" to perform overtime by an official who was authorized to order or approve overtime. B-187602, August 11, 1977. Mere knowledge on the part of a supervisory official of the overtime worked by an employee, without affirmative inducement, is not sufficient to permit recovery by the employee. B-156407, July 14, 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.

Official ordering or approving overtime must be authorized to do so (4-22)

A former regional director of the GSA records center who purported to authorize overtime work was not one of the officials with delegated authority to do so. Employees cannot be granted compensation for overtime worked under his direction since appropriate action or active inducement by an official having the authority to order or approve overtime is a condition precedent to recovery of compensation for overtime work. However, under GSA regulations which permit post approval of overtime in certain instances, overtime compensation may be paid based on such approval by a properly authorized official. B-186297, July 11, 1977.

Although evidence presented by a VA employee tends to demonstrate that she performed additional work outside her regular tour of duty with the knowledge of her immediate supervisor, she is not entitled to overtime compensation since the Assistant Hospital Director and not her supervisor was the official authorized to order or approve overtime and there is no evidence to show that he ordered, approved, induced, or was even aware of the additional work performed. B-188023, July 1, 1977.

Administrative workweek

Day defined (4-23)

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).

Training periods (4-25)

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.

Relation to other premium pay laws (4-25)

General Schedule 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.

C. OVERTIME UNDER FLSA

GAO's authority under FLSA (4-27)

The authority of GAO to consider FLSA claims of Federal employees is derived from its authority to adjudicate claims (31 U.S.C. § 71) and to render advance decisions to certifying or disbursing officers or heads of agencies on payments (31 U.S.C. §§ 74 and 82d). Nondoubtful FLSA claims may be paid by agencies. In order to protect the interests of employees, claims over 4 years old that cannot promptly be approved and paid by the agency should be forwarded to GAO for recording. 57 Comp. Gen. 441 (1978).

Since the CSC (now OPM) is designated by law to administer the FLSA with respect to most Federal employees, great weight will be accorded the Commission's administrative determinations as to employees' entitlement under the FLSA. However, since the Commission was not given authority to settle or adjudicate claims arising under the FLSA, the GAO retains jurisdiction to finally decide the propriety of payment on such claims. B-163450.12, September 20, 1978.

Effect of FLSA

Effective date of CSC determination (4-27)

The CSC made an initial determination on May 15, 1974, that Department of Agriculture meat graders in grade levels GS-7 through GS-9 were employed in an "administrative" capacity and were therefore exempt from the overtime provisions of the FLSA.

Subsequently, on July 6, 1976, CSC reversed that initial determination. The meat graders are entitled to the benefits of the FLSA overtime provisions from and after July 6, 1976, but are not entitled to retroactive coverage for prior periods when they were classified as exempt from those provisions by the Commission. B-163450.12, September 20, 1978.

Statute of limitations (4-28)

The time limit for filing FLSA claims in GAO is the 6-year period imposed by 31 U.S.C. §§ 71a and 237. 57 Comp. Gen. 441 (1978).

Forty-hour workweek (4-28)

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.

Traveltime

Generally (4-29)

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, as amended. B-163654, April 13, 1977.

Transporting equipment (4-29)

The CSC's 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 worksites 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.

Commuting (4-29)

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 et seq., 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.

D. COMPENSATORY TIME

Statutory authority (4-30)

Compensatory time off for religious holidays

Under 5 U.S.C. § 5550a, as added by Pub. L. No. 95-390, an employee may elect to work compensatory overtime for the purpose of taking time off without charge to leave when personal religious beliefs require that he abstain from work during certain periods of the workday or workweek.

Aggregate salary limitation (4-30)

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.

Discretionary authority to grant overtime

Failure to use compensatory time

Beyond employee's control (4-32)--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.

National Guard technicians (4-32)

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.

Relationship to FLSA (4-33)

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 et seq. (Supp. IV, 1974), in giving compensatory time off under such circumstances. 58 Comp. Gen. 1 (1978).

CHAPTER 4

ADDITIONAL COMPENSATION

SUBCHAPTER II--OTHER PREMIUM PAY

A. NIGHT PAY DIFFERENTIAL

Statutory authority

Employees covered

Summer Aids (4-34)--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).

Regularly scheduled night work (4-35)

An employee may not be paid night differential for night duties that are not recurring or habitual in nature. B-188686, May 11, 1978.

B. HOLIDAY PAY

Statutory authority

Days in lieu of (4-36)

The holiday benefit provisions of Executive Order No. 10358, 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).

Hours of work compensable as holiday pay

Work within regular tour of duty (4-39)

An employee who performed extra duties during his regular tour of duty on a holiday is entitled to

holiday pay for such duty, but is to be paid overtime compensation for any such duties performed on a holiday outside his regular tour of duty. B-188686, May 11, 1978.

Nonstandard tour of duty (4-39)--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.

Shift spanning the hour of midnight (4-40)

Because holiday premium pay may only be paid for hours actually worked on a holiday, an employee whose 8-hour shift began at 11:06 p.m. of the night before the July 4 holiday may only be paid holiday premium pay for the 7.1 hours actually worked on the holiday. There is no legal requirement that an employee be permitted to work 8 hours on a holiday. B-193384/B-193544/B-194035, June 18, 1979.

Employees receiving standby premium pay (4-43)

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.

C. SUNDAY PREMIUM PAY

"Sunday" defined (4-44)

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.

Regularly scheduled Sunday work (4-44)

An employee whose Sunday duties were not recurring or habitual in nature may not be paid Sunday premium pay. B-188686, May 11, 1978. Since Sunday premium pay is payable only for work within the employee's basic 40-hour workweek, an employee whose basic workweek consisted of 5 8-hour days between Monday and Saturday and who was scheduled in advance to work 8 additional hours on Sunday may not be paid Sunday premium pay, but is entitled to overtime compensation for the Sunday work. The agency was not required to designate Sunday as part of the employee's basic workweek. B-193384/B-193544/B-194035, June 18, 1979.

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).

First-40-hour employee (4-46)

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).

Effect of daylight savings time (4-46)

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. STANDBY PREMIUM PAY

"Regularly recurring" (4-47)

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.

Excused absence from standby duty (4-47)

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).

Duty officer entitlement (4-47)

Where an employee's residence was not designated as his duty station, a DSA 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 employee's 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 schedules to provide 24-hour fire dispatcher service at their residences.

E. PREMIUM PAY FOR ADMINISTRATIVELY UNCONTROLLABLE OVERTIME

Payment possible under both 5 U.S.C. §§ 5542 and 5545(c)(2) (4-48)

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.

F. HAZARDOUS DUTY DIFFERENTIAL

Generally

Entitlement

Administrative approval (4-50)--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.

Outside of regular duty requirement (4-51)--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.

Interpretation of regulations--

Hazard defined by arbitration (4-52)

Appendix J to FPM Supplement 532-1 applicable to wage board employees 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).

Hazard determined by grievance (4-52)

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).

G. CLASS OF EMPLOYEES SPECIFICALLY NAMED

Customs Service

Overtime (4-54)

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 109 Ct. Cl. 33 (1947) will not be followed. 56 Comp. Gen. 310 (1977).

CHAPTER 4

ADDITIONAL COM ENSATION

SUBCHAPTER III--SEVERANCE PAY AND ALLOWANCES

A. SEVERANCE PAY

Generally

Entitlement

Appointment to temporary agency (4-60)--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 that limitation the employee is not entitled to severance pay. B-188819, February 8, 1979. Cf. B-136051, August 26, 1966.

Separation for misconduct (4-60)--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.

Resignation prior to separation (4-60)--An employee resigned after receiving a memorandum advising that certain positions (including his own) would be abolished if a plan were implemented to streamline the operations of his agency. Information contained in the memoranda which set forth in general terms the proposal to abolish the employee's position does not satisfy the requirements of specific or general notice found in 5 C.F.R. §§ 351.802-804, since the information did not definitely announce that all

positions in the employee's area would be abolished or transferred, nor did it state whether the employee was to be involuntarily separated. At the time of his resignation the agency reorganization plan was not definite. His claim for severance pay was disallowed since it could not be found that the employee was going to be involuntarily separated. B-193913, April 6, 1979.

Effect of entitlement to annuity

State retirement system (4-60)--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.

Reemployment of separated employee

By successor non-Federal corporation (4-61)--Just prior to the date on which a public non-Federal 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.

Contract employment (4-61)--The CSC 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.

Computation of severance pay

Effect of temporary position (4-62)

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).

Effect of years of service and age element (4-62)

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).

Effect of military service (4-62)

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

Administrative determination of necessity (4-63)

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).

C. QUARTERS

Housing discrimination (4-64)

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.

Possessory interest tax on Government quarters (4-64)

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 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

Quarters allowance

Agency determination (4-65)

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. B-170177, August 23, 1979, 58 Comp. Gen. ___.

Local hires (4-65)

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 that an individual's presence in a foreign area is not 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 nonentitlement 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 Schools 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.

Cost-of-living allowances

Separate maintenance allowance

Administrative approval (4-67)--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 Pusai, Korea, to treat his wife's condition. B-188979, July 24, 1978.

Termination of separate maintenance allowance--

Change of station (4-67)

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.

Breach of domestic relations (4-68)

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.

Post differential

Detailed employees (4-69)--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 42d day of a detail. A proposal to transfer rather than detail NSF 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 restriction on retroactively paying post differential for the first 42 days of a detail that extends for more than 42 days, insofar as the Secretary of State determines such payment will alleviate problems of assigning personnel to the Antarctic. B-187542, March 16, 1977.

Computation--

Aggregate pay limitation (4-70)

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).

Education allowance

Applicable rate (4-70)--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 276.44 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.

E. MISCELLANEOUS ALLOWANCES

Territorial cost-of-living allowance

Effect of commissary privileges (4-70)

An employees 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 10000, 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.

Remote-duty-site allowance (4-75)

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.

Physicians' comparability allowance (4-75)

The physicians' comparability allowance provided for at 5 U.S.C. § 5948 is payable to physicians employed by the Canal Zone Government as well as those employed by the Panama Canal Company, notwithstanding that subsection (g)(1) is ambiguous in this regard. The congressional intent was to extend the physicians' comparability allowance to physicians not entitled to variable incentive pay, including those employed by the Canal Zone Government. B-193910, March 8, 1979.

Court admission fees (4-75)

Costs of fees for admission to practice before a Federal Court incurred by attorneys employed by a Government agency may not be reimbursed from appropriated funds. The privilege of practicing before a particular court is one personal to the attorney and is in the nature of an expense necessary to qualify for the performance of official duties. B-161952, June 12, 1978. Also see 47 Comp. Gen. 116 (1967).

CHAPTER 5

PAYROLL DEDUCTIONS, DEBT LIQUIDATION WAIVER OF ERRONEOUS PAYMENTS OF COMPENSATION

SUBCHAPTER I--PAYROLL DEDUCTIONS AND WITHHOLDING

D. RETIREMENT

Payment of Government contribution (5-8)

Where a judgment awarding backpay specifically provides for payment of the Government's contribution to the civil service retirement funds or similar funds, that contribution may be paid from the Judgment Fund created by 31 U.S.C. § 724a. Where the backpay judgment does not specifically mention or provide for payment of the Government's contribution, the contribution may be paid from agency appropriations. 58 Comp. Gen. 115 (1978).

Deductions from retirement fund for debt liquidation (5-8)

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).

G. SAVINGS BONDS (5-11)

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).

H. ALLOTMENTS AND ASSIGNMENTS OF COMPENSATION

Generally (5-11)

Since 5 U.S.C. § 5525 is not applicable to the Architect of the Capitol, the Architect is not authorized to make fringe benefit contributions directly into employee benefit trust funds on behalf of temporary employees. B-189553, October 13, 1977.

Union dues

Erroneous overpayment to union - arbitration award (5-12)

When an Army employee was promoted out of his bargaining unit to a supervisory position, the Army failed to terminate his union dues allotment as required by 5 C.F.R. § 550.322(c). When the error was discovered, the Army refunded the erroneous deductions to the employee and deducted an equal amount from the dues payment made to the union for a subsequent pay period. Arbitrator's finding that the collective-bargaining agreement did not permit setoff of the erroneous dues payments is contrary to law and regulation and may not be implemented. B-180095, December 8, 1977.

Deduction of union dues from backpay (5-13)

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.

K. GARNISHMENT (5-16)

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). Where the EPA failed to withhold specified amounts from an employee's salary under a writ

of garnishment for child support, it may be found liable under state law for its failure to comply with the writ and if judgment should issue against it for amounts that it failed to deduct, the amounts may be paid from the Judgment Fund created by 31 U.S.C. § 724a. 56 Comp. Gen. 592 (1977).

SUBCHAPTER II--DEBT LIQUIDATION

B. ACCOUNTABLE OFFICERS

Liability and debt collection (5-17)

The Government may not withhold current salary to satisfy general debts owed by an employee. 58 Comp. Gen. 501 (1979).

Availability of Civil Service and Disability Retirement Fund (5-17)

The Government may not set off general debts of an employee against his retirement account until he withdraws his contribution or claims an annuity. However, the Government has the right to set off the indebtedness administratively against annuity payments or refund of the employee's retirement contribution based upon common law right long recognized by the Courts and the GAO. 58 Comp. Gen. 501 (1979).

F. ALIMONY AND CHILD SUPPORT (5-23)

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).

SUBCHAPTER III--WAIVER OF ERRONEOUS PAYMENTS OF COMPENSATION

A. STATUTORY AUTHORITY

Other waiver authorities (5-25)

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. For example, 22 U.S.C. § 1076a(d) provides for the waiver of overpayments of Foreign Service annuities under 22 U.S.C., subchapter VIII, when the individual is without fault and recovery would be against equity and good conscience or administratively infeasible. B-191785, August 14, 1978.

B. PERSONS DEEMED EMPLOYEES

Unknown persons (5-25)

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 to 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

Leave

Negative leave balance (5-27)

Use of leave which has been erroneously credited may only be waived where later adjustment of an employee's leave account results in a negative leave balance. B-180010.12, March 8, 1979.

Home leave (5-27)

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).

Travel, transportation and relocation expenses (5-28)

Per diem is a travel allowance expressly excluded from coverage of the waiver statute. B-189170, July 5, 1977. The waiver authority of 5 U.S.C. § 5584 does not extend to indebtedness resulting from payment of travel, transportation and relocation allowances. B-188597, January 15, 1979.

Medical treatment and examination (5-29)

Payment of medical expenses for dependents of AID employees is a form of allowance. Therefore, erroneous payments 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.

Scholarship payments (5-29)

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.

Housing (5-29)

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

Actual knowledge (5-29)

Where an employee was erroneously paid at the rate for GS-11, step 2, from June 1975 through March 1976, his request for waiver cannot be granted for the period subsequent to November 28, 1975, when he was specifically advised of the error, even though administrative delays in adjusting his pay resulted in continued overpayments through March 1976. B-188803, June 15, 1977. Acceptance of payment of post differential and separate maintenance allowance after notification of ineligibility precludes waiver. B-185458, OctOber 5, 1976.

Imputed knowledge

Position (5-30)

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.

Demonstrated knowledge of pay matters (5-30)

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 statements should have apprised him of the fact that his post differential payments had not been reduced from 25 percent. B-188802, December 30, 1977.

Reasonable and prudent person standard (5-31)

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. Where an employee was paid at a rate of pay four steps higher than his GS-5 position, his failure to make inquiry concerning the significant unexplained increase in pay precludes waiver. B-191772, December 19, 1978, and B-192283, November 15, 1978.

Where a GS-15, step 8, employee, paid at the maximum rate of pay, was erroneously paid $171.20 for unused compensatory time, the overpayment may not be waived since the employee should have known that any payment of premium pay would cause his pay to exceed the statutory maximum. B-194740, August 24, 1979.

Constructive knowledge

Employee on notice

Failure to terminate saved pay (5-32)--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.

Failure to terminate severance pay (5-32)--An employee was separated for failure to relocate with her activity and granted severance pay. Within a year she was reinstated at a lower grade. The Standard Form 50 effecting her reinstatement stated that her severance pay was discontinued; however, the payroll office continued to pay her at her former higher grade. Since she was furnished records enabling her to verify the correctness of her pay, the overpayments may not be waived since she was at least

partially at fault in failing to examine the records and report the error. B-190643, July 6, 1978.

Failure to deduct premiums--

Life insurance premiums (5-32)

Where an employee requested optional life insurance but the agency erroneously stopped deducting the premiums, request for waiver of overpayment is denied since the employee continued to be covered by the optional insurance and was not free from fault in failing to examine leave and earnings statements which would have put him on notice of the error. B-187240, November 11, 1976, and B-190564, April 20, 1978.

Health insurance premiums (5-32)

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.

Failure to deduct annuity (5-32)--Until the date of his step increase, appropriate deductions of retirement annuity were made from the pay of a reemployed annuitant. As of that date, the agency failed to make the deductions. Since the Standard Forms 50 issued him prior to that date had indicated that his annuity was being deducted, the fact that the Standard Form 50 issued incident to the step increase did not contain such an indication should have put him on notice of the overpayment and, therefore, it cannot be waived. B-188104, June 9, 1977. Compare B-194793, August 14, 1979, and B-186010, October 4, 1976.

Failure to reduce post differential (5-32)--An employee was transferred from Desful, Iran, where he was paid a 25 percent post differential, to Tehran, Iran, where no post differential was authorized. Due

to administrative error, he continued to receive the 25 percent post differential for more than 9 months. He was aware that he was not entitled to post differential in Tehran. Even though post differential was not separately stated on his leave and earnings statement, his gross pay was $1,113.78. Had he added together the three items that were reflected on the leave and earnings statement--base pay, other pay and non-tax pay--which totaled only $944.58, he would have noticed the $169.20 discrepancy. Since examination of the leave and earnings statements would have revealed the overpayment, it cannot be waived. B-189200, July 20, 1977.

Overpayment of overtime (5-32)--An employee, who was overpaid $115.46 in overtime pay while on a Navy sea trial, may not be granted waiver. Because he had been on a similar sea trial and had been paid overtime properly for a similar sea trial just 3 months earlier, he should have suspected that he was being overpaid and advised his payroll office. B-188326, February 13, 1978, and B-194594, September 27, 1979.

Overpayment of quarters allowance (5-32)

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.

Employee not on notice (5-32)

Because employee was hired locally in Vietnam more than 30 days after his resignation from a United States corporation doing business in Vietnam, the employee was not entitled to post differential and a living quarters allowance. Although the erroneous

determination of entitlement, based on his "substantially continuous employment at the time of his appointment" on April 6, 1973, was based on his imprecise indication that he was employed with the corporation until "March 1973," the employee was not at fault in the matter since it does not appear that he was informed or otherwise made aware that a 30-day hiatus in employment was critical. B-189421, September 23, 1977.

Fluctuations in pay (5-33)--Where an annuitant was reemployed as a consultant on an irregular basis and received paychecks varying greatly in amount, he was not on notice of the agency's failure to reduce his pay by the amount of his retirement annuity. B-189691, November 1, 1977.

Lack of knowledge of pay reduction method (5-33)--Where an annuitant was reemployed as a crane operator and given no orientation in connection with his reemployment, erroneous overpayments that resulted from administrative failure to reduce his pay by the amount of his retirement annuity may be waived since the record does not establish constructive knowledge of the overpayment. B-188874, August 17, 1977. To the same effect, see B-194793, August 14, 1979, waiving overpayments made to an intermittently reemployed annuitant whose pay was not reduced by the amount of his annuity where the record failed to establish actual or constructive knowledge sufficient to indicate fraud, misrepresentation, fault, or lack of good faith on his part.

Effect of employee's inquiry (5-34)

A reemployed annuitant noticed an administrative error in failing to deduct her retirement annuity and brought the overpayment to the attention of her agency on several occasions. Since the employee was aware of the requirement to have her salary reduced by the amount of her annuity and was aware of the overpayments when they began to occur, collection action would not be against equity and good conscience. Waiver, therefore, may not be granted. B-189083, September 13, 1978, and B-186002, November 30, 1976. When an employee notified his personnel office, yet did not set aside the amount of the overpayments in anticipation of refunding them, his request for waiver is denied. B-189657, August 18, 1977.

Equitable considerations

Lack of reliance on overpayment (5-35)--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.

Employee's receipt of benefits (5-35)--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.

F. STATUTE OF LIMITATION (5-36)

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.

CHAPTER 6

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

Errata: 5534(a) should be 5545a (6-3)
Delete 30 Comp. Gen. 94 (6-3)
5 U.S.C. § 3103 should be 5 U.S.C. § 3101 (6-6)

SUBCHAPTER I--PAYMENT OF COMPENSATION BY THE UNITED STATES

A. MISCELLANEOUS STATUTORY PROVISIONS

Extra pay for details prohibited (6-3)

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;

(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).

Employment of aliens

Citizenship requirement

Appropriation Act restrictions--

Citizens of allied countries (6-4)

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.

Effect of dual citizenship (6-4)

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).

Exclusion for DOD personnel (6-4)

Notwithstanding that the applicable Treasury, Postal Service and General Government Appropriation Acts restrict payments of compensation to aliens, the DOD Appropriations Acts for those years specifically provided that that prohibition shall not apply to personnel of the DOD. In view of this exclusion, an individual employed by the Navy prior to the date she became a United States citizen may properly be paid compensation. B-188507, December 16, 1977.

Supreme Court review of prohibition (6-4)

The Supreme Court's decision in Hampton v. Mow Sun Wang, 426 U.S. 88 (1976), which struck down the prohibition against hiring aliens found at 5 C.F.R. § 338.101 did not invalidate the restrictions on hiring aliens found in various appropriation acts. B-188507, December 16, 1977.

C. WHITTEN AMENDMENT

Generally (6-6)

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, Public Law 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 et seq.) 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.

D. REEMPLOYMENT OF ANNUITANTS

Withholding annuity from compensation earned

Deduction of sum equal to retirement annuity

Mandatory requirement (6-9)--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.

F. STATUTORY CEILINGS OF COMPENSATION (New)

Limitation on pay adjusted under 5 U.S.C. § 5301 et seq. (6-12)

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.

Applicability

Rates of pay fixed on the basis of General Schedule rates--

Deputy Governors of the Farm Credit Administration (6-12)

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).

Experts and consultants (6-12)

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).

Limitation on pay fixed by administrative action (6-12)

Under 5 U.S.C. § 5363, 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.

Applicability

Crews of vessels (6-12)--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 5363 and may not exceed the rate for GS-18. 56 Comp. Gen. 870 (1977).

CHAPTER 7

EMPLOYEE MAKE-WHOLE REMEDIES

Errata:

LEAVE, Chapter 5, should be LEAVE, Chapter 2 (7-1)
54 Comp. Gen. 761 should be 54 Comp. Gen. 760 (7-11)
B-163164 should be B-163142 (7-12)
42 U.S.C. § 2000-16 should be § 2000e-16 (7-13)

B. BACK PAY ACT

Determinations regarding unjustified or unwarranted personnel actions

Erroneous removal

Constructive discharge or removal--

Coerced resignations (7-4)

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. 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.

Retirement under misimpression as to annuity (7-4)

Where an employee who voluntarily retired was not entitled to an immediate annuity because he refused to waive his military retired pay, he may not be paid backpay for the period prior to which he was restored to the rolls to perfect his entitlement to an immediate annuity. The

agency determined that his voluntary retirement was not an unjustified or unwarranted personnel action inasmuch as he was counseled concerning the requirement to waive his military retired pay. B-187891, June 3, 1977. Also see B-191495, April 10, 1978, holding that an employee retired on disability who was reemployed on a part-time basis did not suffer an unjustified or unwarranted personnel action in accepting part-time rather than full-time employment based on erroneous advice that the particular status would not affect his retirement.

Improper suspension (7-4)

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.

Improper reductions in force (7-5)

Where the CSC refused to consider an employee's contention that she was improperly reduced in grade through reduction in force because she did not pursue her appeal for 9 years, she may not be awarded backpay. In the case of an employee who has suffered a reduction in force, the CSC is the appropriate authority under 5 C.F.R. § 550.803(d) to determine whether she has suffered an unjustified or unwarranted personnel action. B-187221, June 21, 1977.

Causal relationship to loss of pay (7-5)--An arbitrator found that the school system violated its collective-bargaining agreement by not finding the teacher, whom it separated by reduction in force, to be qualified for a different teaching position. The arbitrator conditioned award of backpay to the teacher on his completion of a qualifying course. For an unjustified or unwarranted personnel action to provide a basis for backpay, that action must directly cause the employee to suffer a loss or reduction of pay.

Since the arbitrator's conditional award of backpay makes it clear that the employee's lack of completion of the course and not the agency's action directly caused the employee's loss of pay, backpay may not be awarded. B-192568, December 8, 1978.

Improper reduction in grade

Failure to use adverse action procedures (7-5)--An agency's regional office promoted an employee from GS-12 to GS-13, but headquarters ordered the promotion cancelled 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.

Court order vacating promotion (7-5)--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.

Retroactive promotions

Generally (7-5)--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.

Personnel action not effected as intended (7-6)--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 effective 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.

Authority to approve promotions (7-6)

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 having been delegated authority to approve promotion and that authority had not been further delegated. 58 Comp. Gen. 51 (1978).

Lost or misplaced promotion documents (7-6)

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).

Delayed or improperly initiated promotion request (7-6)

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.

Delays in evaluating employee's qualifications (7-6)

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 CSC 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.

Nondiscretionary policy or regulation (7-6)--For purposes of the Back Pay Act, a nondiscretionary provision is any provision of law, Executive order, regulations, personnel policy issued by an agency, or collective-bargaining agreement that requires an agency to take a prescribed action under stated conditions and criteria. 5 C.F.R. § 550.802(d) (1978). See 58 Comp. Gen. 59 (1978).

Stated agency policy (7-6)

In cases of career-ladder positions it was the IRS' policy to promote agents where the supervisor had certified to the acceptability of the agency'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.

Provision of collective-bargaining agreement (7-6)

CSC 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, 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.

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).

Equal pay concepts (7-6)--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.

Agreement to "timely consider" for promotion (7-6)--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.

Right granted by statute or regulation (7-7)--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).

Equal pay concepts (7-7)

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, 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.

Career-ladder promotions (7-7)

Since the FPM specifically states that an agency may make successive career-ladder promotions, employees in such positions have no vested right to be promoted at any specific time. Thus, an employee whose promotion request was lost in the mails may not be retroactively promoted merely because he was in a career-ladder position. B-190408, December 21, 1977, and B-191392, April 20, 1978.

Retroactive temporary promotions for details (7-7)

Employees detailed to higher grade positions for more than 120 days are entitled to retroactive temporary promotion with backpay for the period beginning with the 121st day of the detail and ending when the detail is terminated. Regulations of the CSC impose a nondiscretionary duty upon an agency either to seek CSC approval to extend a detail beyond 120 days or to promote the detailed employee for a temporary period after the first 120 days. 56 Comp. Gen. 427 (1977), affirming 55 Comp. Gen. 539 (1975). The subject of retroactive temporary promotions for overlong details to higher grade positions is dealt with extensively in Chapter 8, Part B.

Promotions involving classification matters (7-7)--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 as 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 or retroactive promotion with backpay for the agency's failure to earlier reclassify an employee's position from 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, et seq. B-186758, March 23, 1977. The subject of classification or position is discussed more specifically in Chapter 3, Part D.

Retroactive change in initial appointments (7-7)

An applicant for the position of Deputy United States Marshal who was offered an appointment and advised to plan on reporting on March 25, 1974, but whose date of appointment was delayed to May 13, 1974, is not entitled to backpay for the interim period. Although the delay was inadvertent and the applicant quit his previous employment in reliance on the original advice, he had no vested right to be appointed on March 25 and the delay was, therefore, not an unjustified or unwarranted personnel action. B-191378, January 8, 1979. Compare 54 Comp. Gen. 1028 (1975) and B-175373, April 21, 1972.

Retroactive quality step increase (7-7)

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, for reasons unrelated to the employee's performance, was found to be improper by the agency and hence was tantamount to an unjustified or unwarranted personnel action. B-192372, January 2, 1979.

Retroactive adjustment of rate of pay

Pay adjustments for supervisors (7-8)--A General Schedule Supervisor whose salary rate was less than the salary rate of wage board 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 wage board 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 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) as modified by 57 Comp. Gen. 97 (1977).

Premium pay (7-8)

Based upon medical findings, an FAA employee was determined to be medically disqualified for flight control and was removed from his air traffic control duties. The FAA's Board of Review concluded that the medical evidence did not support the finding of disqualification and the employee was ordered restored to his air traffic control duties. Since the Review Board's decision is final on the matter and amounts

to a finding of an unjustified or unwarranted personnel action, the employee may receive backpay for the night and Sunday differential, holiday pay, and overtime premium pay he would have received had he not been reassigned from air traffic control functions. B-188125, October 31, 1977. However, a guard who, for medical reasons, had been disqualified to carry a firearm, but who was subsequently found to be qualified may not be given backpay for the premium pay and differential he would have received had he not been reassigned to non-gun-carrying duties. The initial reassignment was not shown to have been an improper action. B-192110, January 29, 1979.

Awards (7-19)

Where an arbitrator found that an employee had been discriminated against in violation of the agency's and union's bargaining agreement precluding 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).

Agency failure to forward claim to GAO (7-9)

Where an employee filed a claim with his agency within 6 years, but the agency failed to forward the employee's claim until after 6 years, the employee's claim is barred under 31 U.S.C. § 71a. The agency's failure to forward the employee's claim to GAO is not an unjustified or unwarranted personnel action that gives rise to a new claim that is not barred by the statute of limitations. B-190841, December 27, 1978.

D. COMPUTATION OF BACKPAY UNDER 5 U.S.C. § 5596

Generally

Premium pay (7-12)

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 of the United States Code, includes overtime pay, Sunday and holiday pay and night differential within the general category of premium pay. B-188125, October 31, 1977.

Leave (7-12)

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).

Deductions from backpay

Union dues (7-12)

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.

Lump-sum leave payment (7-12)

The lump-sum leave payment that an erroneously separated employee received upon his removal should be set off against his backpay award and the leave which that payment represents should be recredited to his leave account. 57 Comp. Gen. 464 (1978).

Severance pay (7-12)

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).

Unemployment compensation (7-12)

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).

Period of active military service (7-12)

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.

E. OTHER MAKE-WHOLE REMEDIES

Employment discrimination

GAO jurisdiction (7-13)

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.

Interest on backpay awards for discrimination (7-13)

Pursuant to 5 C.F.R. § 713.217, SEC adjusted an employee's complaint of discrimination by 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 of 1972 nor the incorporated provisions of title VII provide express authorization of interest against the Government. 58 Comp. Gen. 5 (1978).

CHAPTER 8

OTHER PROVISIONS PERTAINING TO EMPLOYEES

Prior decisions affected:

55 Comp. Gen. 539 affirmed (8-10)
55 Comp. Gen. 785 affirmed (8-10)

A. GOVERNMENT EMPLOYEES TRAINING ACT

Effect on compensation

Overtime, holiday pay and night differential (8-5)

Customs Patrol Officers attended special training courses that were conducted 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).

B. DETAILS OF GOVERNMENT EMPLOYEES

Details for more than 120 days

Temporary promotions after 120 days (8-10)

Under CSC regulations employees detailed to higher grade positions for more than 120 days without CSC approval are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail. The CSC regulations impose a nondiscretionary duty upon an agency either to seek the CSC's approval to extend a detail to a higher grade position beyond 120 days or to promote the detailed employee for a temporary period after the first 120 days. 56 Comp. Gen. 427 (1977), affirming the Turner-Caldwell line of decisions, 55 Comp. Gen. 539 (1975) and 55 Comp. Gen. 785 (1976). Note, however, that effective February 15, 1979, the Director, Office of Personnel Management,

delegated to agencies the authority to detail employees, in 120-day increments, for up to 1 year without OPM approval. FPM Bulletin 300-48.

Temporary promotion after shorter period--

Shorter period established by regulation (8-10)

Under a Customs Service regulation requiring the temporary promotion of an employee detailed beyond 60 days, employees may be granted retroactive temporary promotion and backpay for details longer than 60 days. B-183937, June 23, 1977.

Shorter period established by collective bargaining (8-10)

A collective-bargaining agreement incorporated a provision requiring temporary promotion when an IRS employee, for more than 30 working days, was assigned more than 50 percent of his cases at a level of difficulty designated for the next higher grade. The arbitrator found that two GS-9 employees had been assigned case work consisting of over 80 percent higher level difficulty and awarded them retroactive temporary promotions to GS-11, having found that the collective-bargaining agreement required promotion based on the nature of the work performed regardless of whether there was a formal detail to the higher grade. Since the arbitrator reasonably concluded that the assignment of substantially all higher grade work to a revenue officer was tantamount to a detail, the award may be implemented, consistent with the Turner-Caldwell line of decisions. 57 Comp. Gen. 536 (1978). Also see 56 Comp. Gen. 796 (1977) involving retroactive promotions under a collective-bargaining agreement requiring pay at the appropriate rate for higher level work of 2 or more hours.

Details between different types of positions

Details to supergrade positions (8-10)--Since 5 U.S.C. § 3324(a) requires CSC approval of the qualifications of the proposed appointee prior to appointment to a supergrade position, a GS-15 employee detailed to a GS-17 position may not be given a retroactive

temporary promotion to the higher grade position. 56 Comp. Gen. 432 (1977). Compare B-192084, February 23, 1979, holding that a GS-15 employee detailed to a GS-16 position was entitled to a retroactive temporary promotion beginning with the 121st day of his detail inasmuch as the CSC had, by the 121st day, approved his qualifications for promotion to GS-16.

Details between positions not in the General Schedule (8-10)

An NSF employee who held an EE-801-I position (equivalent in pay range to GS-16) and who was detailed to an EE-801-II position (equivalent in pay range to GS-17) is not entitled to a retroactive temporary promotion with backpay for the period of the detail. There is no remedy under the Turner-Caldwell line of decisions for overlong details between positions in the excepted service that are not under the General Schedule. B-194484, September 21, 1979.

Details from competitive to excepted service (8-10)--The Turner-Caldwell line of decisions applies to details within the same agency of employees serving in competitive positions, and, in the excepted service, to positions under the General Schedule. Thus, an employee holding a GS-14 position in the competitive service may be given a retroactive temporary promotion for his extended detail to a GS-15, Schedule C position in the excepted service. 56 Comp. Gen. 982 (1977). An employee detailed from a General Schedule position in the competitive service to an excepted position not under the General Schedule is not entitled to a retroactive temporary promotion. B-194484, September 21, 1979.

Details from excepted to competitive service (8-10)--

An individual employed in an excepted service position as an attorney, who was detailed to perform the duties of a GS-14 position in the competitive service may not be granted a retroactive temporary promotion. Regulations prohibit the assignment of a person serving under an excepted appointment to perform the work of a position in the competitive service without prior

approval of the CSC. 58 Comp. Gen. 88 (1978). Compare B-193959, September 21, 1979.

Details from civilian to military positions (8-10)--Civilian General Schedule employees detailed to higher level positions graded and assigned for military personnel incumbency may not be granted retroactive temporary promotions. Since they could not have been temporarily promoted to the military positions, the remedy of retroactive temporary promotions and backpay is unavailable. 58 Comp. Gen. 438 (1979); B-183086, July 12, 1977, and B-193890, May 25, 1979.

Details between wage board positions (8-10)--Arbitrator's award of backpay to an employee detailed from his WG-1 position to perform WG-2 duties, beginning 60 days after the detail commenced, may be sustained if modified to conform to our holdings in the Turner-Caldwell line of decisions. Specifically, backpay may be awarded only if based on the concurrent award of a retroactive temporary promotion and may not commence before 120 days after the beginning of the detail in the absence of a shorter period established by regulation or collective-bargaining agreement. 56 Comp. Gen. 732 (1977). Also see B-193959, September 21, 1979.

Details from wage board to General Schedule positions (8-10)--Wage board employees temporarily assigned to higher grade General Schedule positions may be given retroactive temporary promotions to the higher grade General Schedule positions under a provision in the applicable collective-bargaining agreement providing that employees qualified to perform higher level work may be required to perform such work and will be paid the appropriate higher level rate of pay for hours actually employed in such work. 56 Comp. Gen. 786 (1977).

Details between agencies (8-10)--Applicable regulations and instructions for awarding retroactive temporary promotion and backpay relate only to details within the same agency. B-193360, May 7, 1979.

Detail to a classified higher level position

Position must be established (8-10)--Since an employee cannot be promoted to a position which has not been classified, he may not receive a retroactive temporary

promotion and backpay based on his detail to an unclassified position. The fact that an employee performed duties normally assigned to a higher level position does not provide a basis for retroactive temporary promotion where the higher grade position was not classified at the time. B-187847, January 25, 1977; B-192961, July 9, 1979; and B-193834, June 13, 1979.

Detail to a cancelled position (8-10)

On July 19, 1976, an employee was detailed to a higher grade position that was cancelled on July 31, 1976, and not reestablished until April 5, 1977. The employee was not detailed to an established higher grade position until April 5, 1977, and is not entitled to retroactive temporary promotion and backpay until the 121st day thereafter. B-190335, February 14, 1978; B-194062, June 6, 1979; and B-192765, May 9, 1979. By the same token, a GS-13 employee assigned duties previously performed by his GS-14 supervisor after the supervisor's position was abolished is not entitled to retroactive temporary promotion. B-193348, April 10, 1979; B-190442, April 13, 1978; and B-193457, August 24, 1979.

Higher grade position subsequently established (8-10)

A GS-4 employee was detailed and then permanently reassigned to another GS-4 position in which she claimed to have performed the duties of a GS-7 position. Even though that position was ultimately reclassified to a GS-5, the employee is not entitled to a retroactive temporary promotion for the period prior to reclassification. The employee's detail was terminated at the date of her reassignment to the position at the same GS-4 level and the fact that she was performing at a level higher than GS-4 is a classification matter. B-192720, September 14, 1979.

A GS-12 employee detailed to an unestablished position is not entitled to a retroactive temporary promotion to a GS-13 even though the position to which he was detailed was subsequently

classified as a GS-13 position. B-187287, May 13, 1977, and B-191472, May 17, 1978.

Higher grade position subsequently downgraded (8-10)

An employee detailed to an established higher grade position is entitled to retroactive promotion and backpay beginning with the 121st day of the detail even though the higher grade position was subsequently downgraded because the duties would not support the higher grade. The classification action downgrading the position is not retroactively effective. B-190420, March 7, 1978.

Proof that position was established (8-10)

Where neither the claimant nor the agency were able to locate a job description of the higher grade position to which the employee claims he was detailed, it cannot be concluded that a higher grade position was "established" and the employee is not entitled to retroactive temporary promotion and backpay. B-185730, June 1, 1977, and B-190308, November 2, 1978.

The fact that a similar position was classified in a different office or within a different organizational structure does not provide a basis for retroactive temporary promotion with backpay for performing the duties of an unclassified position. B-190308, November 2, 1978, and B-193555, January 26, 1979.

An employee is not entitled to retroactive temporary promotion where the higher grade "audit-manager" position to which he was detailed was merely an organizational title and not an established position classified under an occupational standard to a particular grade or pay level as required by CSC instructions. B-192099, November 8, 1978. Also see B-193737, March 14, 1979, denying retroactive temporary promotion with backpay where the higher-grade position, though listed on departmental documents, had not been approved in accordance with applicable CSC and Army standards and regulations.

Position need not be vacant (8-10)--Claims of employees for backpay under the Turner-Caldwell line of decisions may be considered without a showing that the position to which the employee was detailed was vacant. 57 Comp. Gen. 536 (1978); B-183086, September 7, 1977; and B-191642, November 17, 1978. Thus, a GS-12 employee detailed to a grade GS-13 position from June 1976 to May 1977 may be granted a retroactive temporary promotion and backpay even though the incumbent of the GS-13 position returned to work in November and December 1976. Since the incumbent did not perform the duties of his GS-13 position during his return to duty, his return did not terminate the employee's detail. B-186711, April 17, 1979.

Proof of detail (8-10)

The burden of proof is on the claimant to show that he was in fact detailed to and performed the duties of the higher grade position. B-181700, January 18, 1978, and B-193618, May 9, 1979. Even where the evidence shows that he was detailed to perform the duties of a higher grade position, the employee may not be granted a retroactive temporary promotion and backpay where the evidence is insufficient to show that the employee in fact performed those duties. B-185766, June 15, 1977, and November 17, 1977.

Acceptable documentation of a detail includes official personnel documents or official memoranda, as well as written statements from supervisors or other management officials familiar with the employee's work. The employee's own uncorroborated statement, or that of a fellow employee, is not itself sufficient proof. B-193912, August 24, 1979; B-195023, August 21, 1979; and B-194369, August 24, 1979.

Details distinguished from classification matters

Accretion of duties (8-10)--A detail is the temporary assignment of an employee to a different position within the same agency for a brief specified period with the employee returning to his regular duties at the end of the detail. Claims based on details to higher grade positions are to be distinguished from claims based on classification actions; only the former may be considered for retroactive correction under the Turner-Caldwell line of decisions.

B-171855.15, May 10, 1978, and B-189642, November 17, 1978. Where an employee in a GS-11 career-ladder position claimed retroactive temporary promotion and backpay based on the fact that he performed work substantially equal to that of an established GS-12 position, the employee did not show that he was in fact detailed to the higher grade position and he is not entitled to retroactive temporary promotion and backpay. The record establishes only an accretion of duties to his lower grade GS-11 position in anticipation of his career-ladder promotion to GS-12. B-191413, May 22, 1978, and September 19, 1978.

Wrongful classification (8-10)--Where a GS-7 employee performed certain duties of a GS-9 position prior to the date on which her position was reclassified as a GS-9, there was no detail to the duties of a specific classified position and the remedy of retroactive temporary promotion and backpay is not appropriate. Although her position may previously have been improperly classified, the classification action upgrading her position may not be made retroactive. B-190636, February 8, 1978. Where an employee claims that he performed duties normally associated with a higher grade position and where he was not in fact detailed to that higher grade position, his remedy is a classification appeal. B-189205, October 3, 1977. Problems related to classification actions are discussed in Chapter 3, Part D.

Prerequisites to promotion

Time-in-grade restrictions (8-10)--Within 1 month after his promotion to GS-11, an employee began performing the higher grade duties of GS-12 and GS-13 positions. The employee, nevertheless, is not entitled to retroactive temporary promotion and backpay until he meets the time-in-grade requirements imposed by the Whitten Amendment. 55 Comp. Gen. 539 (1975); B-190648, June 16, 1978; and B-189663, November 23, 1977.

Details to positions two grades higher (8-10)

On July 1, 1974, an employee holding a GS-4 position was detailed to a GS-6 supervisory position. She continued to hold the position until July 11, 1975. In view of the Whitten Amendment

time-in-grade restrictions, the employee may not be granted retroactive temporary promotion and backpay to the GS-6 position beginning on the 121st day of the detail. However, she is entitled to retroactive temporary promotion to GS-5 beginning on the 121st day of the detail and, had she served 1 year and 120 days in the detail, she would have been entitled to retroactive temporary promotion to GS-6. Time on detail prior to a temporary promotion is not time in grade for purposes of application of the Whitten Amendment. B-190174, April 21, 1978, and B-191768, October 2, 1978.

Competitive selection (8-20)--Claims for retroactive temporary promotion and backpay are not subject to the competitive selection rules prescribed by the CSC. Thus, a GS-10 employee detailed to a WS-9 position may be granted retroactive temporary promotion beginning on the 121st day of his detail even though he was not granted a temporary promotion at the time of his detail under CSC instructions providing for competitive selection if after completing the period of service under temporary promotion, an employee will have spent more than 120 days in the higher grade position in the preceding year. B-193508, January 22, 1979.

Other qualifications (8-10)--In order to be promoted, an employee must meet the statutory and regulatory requirements for promotion. The remedy of retroactive temporary promotion and backpay is available only insofar as the employee meets those requirements. Thus, an employee holding a GS-12 position and detailed to a GS-13 position may not be given a retroactive temporary promotion with backpay where the Navy determined that she did not meet qualification requirements for the GS-13 position as outlined in the applicable CSC Handbook. B-187032, November 30, 1977.

Educational or experience requirements (8-10)

An employee detailed to a higher grade position for an extended period, who did not possess the requisite engineering degree or equivalent experience to qualify for the higher grade position, may not be granted a retroactive temporary promotion with backpay to that position. B-189663, November 23, 1977, and October 5, 1978.

Also see B-191959, October 20, 1978, denying retroactive temporary promotion where the detailed employee did not possess the minimum educational qualifications specified for the higher grade position.

Examination (8-10)

An employee assigned to higher grade duties under a training program may not be granted a retroactive temporary promotion for the period of his detail in excess of 120 days, inasmuch as he had not, during the period of that detail, passed the required examination for promotion to the higher grade position. B-191480, October 2, 1978.

Security clearance (8-10)

An employee who performed the duties of a higher grade position designated "sensitive" may not be given a retroactive temporary promotion for the period of his detail since he did not have the security clearance required for promotion. B-194220, June 28, 1979.

Presidential appointment required (8-10)

A GS-12 employee detailed to a GS-13 position in excess of 120 days may not be granted a retroactive temporary promotion with backpay to the higher level position since the law required Presidential appointment to the particular GS-13 position. The fact that the same employee was subsequently appointed by the President to the position does not constitute endorsement of his qualifications for promotion during the detail. B-192449, September 12, 1978.

Freeze on promotions (8-10)--An employee detailed to a higher grade position for an extended period was not promoted to the higher grade position because of a Presidential freeze and a subsequent agency-imposed freeze on promotions. Although an employee is ordinarily entitled to retroactive promotion with backpay for the period beyond 120 days, the employee's promotion was properly not made during the Presidential freeze. However, the agency-imposed freeze does not bar retroactive promotion and the employee is entitled

to retroactive promotion beginning on the date the Presidential freeze was lifted. B-191796, July 13, 1978, and 56 Comp. Gen. 732 (1977).

Computing the period of detail

Running of the 120-day period--

Separate details to the same position (8-10)

An employee was detailed to the same higher grade position on several separate occasions for varying periods. The separate details may not be aggregated for the purpose of determining the 121st day of the detail as of which the employee is entitled to retroactive temporary promotion. He is only entitled to retroactive temporary promotion for each individual detail which lasted more than 120 days. B-173783.200, July 31, 1978; B-193551, August 13, 1979; and B-193723, September 21, 1979.

Successive details to separate positions (8-10)

An employee who was successively detailed to two separate positions at the same higher grade must nevertheless treat each detail separately and is entitled to retroactive temporary promotion and backpay only after being detailed for 120 days to each. 57 Comp. Gen. 605 (1978) and B-193362, August 7, 1979.

Effect of organizational changes (8-10)

An employee detailed to the same higher grade position from September 1975 until July 2, 1977, is entitled to backpay from the 121st day after the beginning of the detail until July 2, 1977. The fact that the position to which he was detailed was organizationally transferred from one Army command to another does not serve to terminate the initial detail and initiate a second separate detail inasmuch as the employee continued to perform the same duties of the same position description under both commands. B-192437, September 20, 1978. Also see B-183086, September 7, 1977, holding that the redesignation of the higher grade position in a new organizational structure without a significant change in

the duties of the position did not interrupt the running of the 120 days.

Beginning to count the 120 days--

Runs from date position is classified (8-10)

If an employee performed higher grade duties after the higher grade position was classified, he may be awarded retroactive temporary promotion with backpay from the 121st day after classification to the end of the detail. B-187287, May 13, 1977. Thus, an employee who claims he was detailed to a GS-13 position from December 1970 to March 1976 is not entitled to retroactive temporary promotion with backpay since a position with the higher level duties performed by the employee was not in fact classified as a GS-13 position until December 30, 1974, and continued in existence only 114 days, until April 23, 1975, when it was cancelled. Since he was detailed to an established higher grade position for only 144 days, he is not entitled to backpay. B-187249, June 17, 1977.

Position cancelled and reestablished (8-10)--Where an employee claims to have been detailed to a higher grade position on July 19, 1976, but where the position was cancelled July 31, 1976, and not reestablished until April 5, 1977, the employee is entitled to retroactive temporary promotion and backpay only from the 121st day after April 5, 1977, when the position was reestablished. The 15 days in July 1976 during which the employee may have been detailed to that substantially identical position are not to be considered in determining the beginning date of her backpay entitlement. B-190335, February 14, 1978.

Effect of temporary promotion (8-10)

An employee who was first given a temporary promotion for 120 days, then returned to his former position and immediately thereafter detailed to the same higher grade position for an additional 132 days is entitled to retroactive temporary promotion and backpay only for 12 days.

An employee must be detailed to a higher grade without compensation at the higher rate of pay for 120 days before he is entitled to a retroactive temporary promotion. Therefore, the period the employee served under the initial temporary promotion may not be included in computing the period of his detail. 56 Comp. Gen. 401 (1979) and B-180139, April 21, 1977.

Termination of the detail--

Terminated by downward reclassification (8-10)

On May 26, 1970, a GS-14 employee was detailed to a GS-15 position. On March 7, 1975, the higher grade position was reclassified to GS-14. Two years later, the position was reclassified as a GS-15 and the employee was permanently promoted to the position. Notwithstanding the employee's claims that the position was erroneously downgraded in March 1975, the employee's right to retroactive temporary promotion with backpay terminated on March 7, 1975, when the position was classified downward. B-191801, October 20, 1978, and B-194891, August 8, 1979, 58 Comp. Gen. ___.

Terminated by permanent promotion (8-10)

A GS-14 employee was detailed to a grade GS-15 position and became entitled to a retroactive temporary promotion on October 6, 1973. He went on sick leave pending disability retirement on June 19, 1974, and the GS-15 position was filled by the promotion of another employee on October 13, 1974. The employee's retroactive temporary promotion terminated on October 12, 1974, when the agency clearly evidenced its determination that the employee's services were no longer needed in the GS-15 position by permanently appointing another employee to the position. B-189593, September 13, 1977.

Effect of retroactive temporary promotion (8-10)

On June 11, 1972, an employee was detailed from his GS-14, step 3, position to a GS-15 position. One year later, on June 10, 1973, he was promoted to the GS-15 position and his pay was set at GS-15, step 2, based

on his position at GS-14, step 4. The employee was given a retroactive temporary promotion with backpay to GS-15, step 1, on October 11, 1972, the 121st day of his detail. His backpay is to be computed on the basis of his becoming eligible for GS-15, step 2, on October 14, 1973, one year after his retroactive temporary promotion to GS-15, step 1, rather than on June 10, 1973. When a temporary promotion is made permanent, the effect of the personnel action is to remove an indefinite or temporary limitation placed on the last promotion. Where an employee is subsequently given a permanent promotion, the individual's rate of compensation is determined on the facts and circumstances in existence at the time of the initial temporary promotion, giving consideration to the time served in grade and crediting time served in the temporary promotion for purposes of determining the employee's within-grade step-increase entitlement in the higher grade position. B-187846, February 17, 1978. Also see B-189324, October 18, 1977.

Submission of claims

Statute of limitations (8-10)--Under 31 U.S.C. § 71a a claim for backpay based on an overlong detail to a higher grade position is barred unless it is received in the GAO within 6 years from the date it first accrued. A claim accrues on the date the services in question were rendered and not on the date the Turner-Caldwell decision was issued. 58 Comp. Gen. 3 (1978).

Intergovernmental Personnel Act

Assignment of State, local or university employees

Pay reimbursement to State or local government or university (8-10)--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 the 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 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).

Retirement fund contributions (8-16)--Under 5 U.S.C. § 3374(c) a Federal executive 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 ORGANIZATION

Detail versus transfer of employees

Reemployment rights (8-17)

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.

E. SETTLEMENT OF ACCOUNTS OF DECEASED OFFICERS AND EMPLOYEES

Beneficiary charged with decedent's death

Felonious intent rule (8-24)

The widow of a U.S. Forest Service employee who entered a plea of guilty to a charge of manslaughter in the death of her husband may not receive the unpaid compensation of her husband under 5 U.S.C. § 5582. The fact that the widow was convicted of manslaughter, which did not require a finding of intent, does not alone establish her lack of felonious intent in the killing of the employee. B-193743, September 28, 1979.

Compensation payable

Setoff of indebtedness (8-24)

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.

Minor children (8-26)

At the time of his death an employee was subject to a Wager 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. EQUAL EMPLOYMENT OPPORTUNITY MATTERS

Following enactment of 1972 Amendments to the Civil Rights Act of 1964

Unwarranted and unjustified personnel actions (8-30)

Regarding use of the Back Pay Act to settle Equal Employment Opportunity complaints and award backpay to complainants, a specific finding of discrimination need not be made. However, there must be a finding of an unjustified or unwarranted personnel action that results in the reduction or withdrawal of pay, allowances, or differentials of an employee in order to satisfy the requirements of the Back Pay Act. B-185239, October 8, 1976.

Payment of interest (8-30)--Where the SEC adjusted an employee's complaint of discrimination by agreement to authorize retroactive promotion and backpay plus interest, there is no authority to allow payment of interest. The rule is well settled that interest may be assessed against the Government only under express statutory authority and neither the Equal Employment Opportunity Act of 1972 nor the incorporated provisions of title VII provide express authorization of interest against the Government. 58 Comp. Gen. 5 (1978).

J. SERVICES TO EMPLOYEE (New)

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).

CHAPTER 9

SERVICE AS JUROR OR WITNESS

SUBCHAPTER I--SERVICE AS JUROR

C. PAYMENT FOR JURY SERVICE

State courts--travel expenses in lieu of fees (9-5)

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 expenses allowance of $7.50 per day, an Army employee may retain amounts received as an expenses 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.

CHAPTER 10

SERVICES OBTAINED THROUGH OTHER THAN REGULAR EMPLOYMENT

SUBCHAPTER I--EXPERTS AND CONSULTANTS

Errata: B-180698, August 19, 1975, should be 1974 (10-5)

B. FEE LIMITATION

General limitation on compensation

Pay set at an hourly rate (10-2)

Land Commissioners appointed by Federal District Courts in condemnation cases are compensated under 5 U.S.C. § 3109 and the Judicial Appropriations Act at 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 one 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.

Independent contracts (10-2)

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.

Pay limitation imposed by 5 U.S.C. § 5308 (10-2)

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. § 5504, is applicable on a pay-period basis. 58 Comp. Gen. 90 (1978).

C. INTERMITTENT VERSUS TEMPORARY

Relevance of distinction

Travel expenses

Intermittent appointment (10-5)--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.

Temporary (10-5)--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. However, he may be paid such expenses under an intermittent appointment the following year. B-187389, July 19, 1978.

D. PROCEDURAL ASPECTS

Pay administration

Biweekly pay limitation (10-6)

By virtue of 5 U.S.C. § 5308, an expert or consultant hired under 5 U.S.C. § 3109 may not, in any one pay period, receive compensation in excess of the biweekly rate for level V of the Executive Schedule. 58 Comp. Gen. 90 (1978).

E. RIGHT TO COMPENSATION

Overtime (10-8)

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).

Leave (10-8)

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).

F. SERVICES NOT CONTEMPLATED

Policy or decision-making (10-9)

OMB Bulletin 78-11, May 5, 1978, provides that work of a policy/decision-making or managerial nature is the direct responsibility of agency officials. Under that Bulletin, the function of negotiating final prices prior to an agency's award of a contract should not be made the subject of a consulting contract. B-193035, April 12, 1979. More explicit guidance as to the nature of services that may be obtained by contract is now provided by OMB Circular No. A-76, March 29, 1979.

Legal services in connection with litigation (10-9)

The Navajo and Hopi Indian Relocation Commission may employ attorneys under 5 U.S.C. § 3109 or may contract for independent legal services at rates not to exceed $150 per day, provided that there is no conflict with the Attorney General's jurisdiction over litigation, investigation of claims pending in agencies, or otherwise as expressed in 5 U.S.C. § 3106 and 28 U.S.C. §§ 514-519. B-114868.18, February 10, 1978.

SUBCHAPTER II--CONTRACT SUPPORT AND TECHNICAL SERVICES

B. PROPER CONTRACTING

Independent contract versus employer-employee relationship (10-10)

Under the court's holding in 580 F.2d 496 (1978), the "Pellerzi Standards" are applicable in determining whether contract services are improperly furnished on a basis tantamount to an employer-employee relationship as between the Government and contractor personnel. However, the critical issue is whether the Government actually exercises "relatively continuous close supervision" of the manner and performance of the details of the jobs of the individual contractor employees. Where a contractor furnishes services under circumstances that evidence the elements of the "Pellerzi Standards", a presumption is raised that the services were not performed on an independent contract basis but that the relationship between the Government and contractor personnel was tantamount to that of employer and employee. Where it is shown that actual supervision of contractor personnel was performed by the contractor rather than Government personnel, that presumption is not controlling and the contract is a proper procurement of services. B-193035, April 12, 1979.

Examples (10-11)

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 Service, Inc. for the services of a temporary secretary. B-186700, January 19, 1977. 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 "Pellerzi Standards." 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. Under the contract, the interpreter

may be paid for days the Court was not in session. 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.

CHAPTER 11

WAGE BOARD EMPLOYEES

SUBCHAPTER II--BASIC COMPENSATION

A. EFFECTIVE DATE OF INCREASES IN PAY RATES

Generally (11-3)

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.

B. UNDER PRE-EXISTING COLLECTIVE-BARGAINING AGREEMENTS

Generally (11-4)

Section 9(b) of Public Law 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).

Retroactivity (11-4)

Retroactive wage adjustments for Federal wage board 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 Public Law 92-392. Section 9(b) of that law preserves to such employees their bargained for and agreed rights under that basic bargaining agreement. Thus, wage board 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).

Pay adjustment limitation (11-4)

Pay increases of employees who negotiated their wages under Section 9(b) of Public Law 92-392 are not limited to 5.5 percent by Section 614(a) of Public Law 94-429, since the limitation that section imposes on pay adjustments applies only to pay adjustments specifically referred to in that section. B-193326, February 1, 1979.

Consequential pay adjustments of wage board supervisors (11-4)

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.

C. WITHIN-GRADE INCREASES (11-5)

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.

A wage board 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.

D. CONVERSION AND TRANSFER BETWEEN PAY SYSTEMS

Conversions of positions

Types of pay considered upon conversion

Environmental differential (11-6)--Employees whose positions are converted from wage grade to General Schedule may have environmental differential considered as included in the definition of "rate of basic pay" for the purpose of establishing their compensation in the General Schedule position under 5 C.F.R. Part 539, since the regulations state that environmental differential is part of the employee's basic rate of pay and that it is used in computation of premium pay, retirement benefit, and life insurance. 56 Comp. Gen. 624 (1977). Also see B-186977, January 2, 1979.

Night differential (11-6)--In computing an employee's rate of basic pay upon conversion of his position from wage grade to General Schedule, an agency may include the night and environmental differentials only if the employee is entitled to those differentials during the last hour that he is in a pay status prior to conversion. There is no authority in 5 C.F.R. Part 539 which permits an agency to establish an employee's rate of basic pay on the basis of a daily or annual rate or using some other form of proration. B-186977, January 2, 1979.

Conversion is a classification matter (11-7)

The decision to change a position from wage board to General Schedule is a classification matter. An arbitrator's determination that reclassification of certain employees from wage board to General Schedule positions was invalid and that backpay should be awarded, because the agency failed to consult with the union pursuant to a negotiated agreement, may not be given effect. The classification of positions is within the jurisdiction of the agency and the Civil Service Commission, and since the arbitrator did not find that the agency had to follow union advice or was precluded from converting the positions, the award of backpay does not meet the "but for" test under the Back Pay Act, 5 U.S.C. § 5596 (1976) and may not be implemented. B-192952, November 24, 1978.

Effective date of conversion actions (11-7)

The effective date of conversions of employees' positions from wage board to General Schedule may not be retroactively changed even though some employees were converted prior to the effective date of a wage grade pay adjustment, thus losing the benefit of that adjustment in setting their General Schedule rates of pay, while other employees were converted after the pay adjustment and had their General Schedule pay set on the basis of the higher wage. Federal Personnel Manual subchapter 7-1a sets the effective date of a classification action as the date the action is approved or a later date specified by the agency and prohibits its being given retroactive effect. 56 Comp. Gen. 624 (1977).

Employees claim the Air Force improperly delayed implementing classification actions moving them from wage board positions to General Schedule positions. A new General Schedule position was classified in March 1975, and more than 200 employees had to be trained for 90 days in the new duties beginning in June 1975. Subsequently, audits of each employee had to be performed and were completed on December 1, 1975, and the personnel actions were processed effective December 20, 1975. On these facts no arbitrary delay or basis to permit retroactive personnel actions was found. B-186760, October 8, 1976.

Transfers

Determining highest previous rate

Night differential (11-9)--Employees who were promoted from wage board to General Schedule positions are entitled to have night differential included in the wage board rate of pay for the purpose of determining the highest previous rate upon transfer to the General Schedule position. B-170675, August 8, 1979.

E. PAY RETENTION (11-10)

A wage board employee, who requested a change to a lower grade position prior to the effective date of the retained pay provisions of 5 U.S.C. § 5345 (1976), is not eligible for salary retention under the applicable regulations unless the record shows that the demotion was a result of

a special recruitment need or was part of an employee development program. B-185008, May 22, 1978.

It should be noted that the Civil Service Reform Act of 1978 repealed 5 U.S.C. § 5345, as well as sections 5334(d) and 5337. In its stead it enacted a new subchapter VI to chapter 53 which provides broader authority for grade and pay retention incident to a change of position or downward reclassification occurring after January 11, 1979, or in certain instances, retroactive to January 1, 1977. The new authority of 5 U.S.C. § 5362 is discussed more specifically at Chapter 3, Part E.

F. ESTABLISHMENT OF COMPENSATION INCIDENT TO PAY ACTION (New)

Promotion incident to transfer between wage areas (11-12)

Upon promotion which involved a transfer to a new wage area, an employee who had held a prevailing rate position at WS-13, step 5, had his pay set at WS-14, step 2. His argument that he was entitled to retain the step-5 level from his previous position, and thus to have his pay set at WS-14, step 5, was rejected since there is no vested right to retain step increases when an employee is transferred or promoted. B-191287, June 19, 1978.

Promotion from General Schedule to wage schedule position (11-12)

A Naval Shipyard employee was first promoted from a wage schedule to a General Schedule position and then to a wage schedule. His pay was adjusted with each promotion. The employee claims that upon promotion from the General Schedule position his pay rate should have been set at his highest previous rate in accordance with the Shipyard "repromotion" regulation rather than on the basis of the Navy's promotion policy which results in the rate of pay in the new position being set at a step that will result in an increase at least equal to one step increase. Since the employee was not first demoted and later promoted, his rate was properly adjusted under the Shipyard "promotion" regulation. B-191352, September 13, 1978.

Classification (11-12)

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 occupying a position determined to be erroneously 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.

Details to higher grade positions (11-12)

Under CSC regulations, employees improperly detailed to higher grade positions for more than 120 days are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail. 56 Comp. Gen. 427 (1977). The subject of backpay for overlong details to higher grade positions is discussed at length in Chapter 8, Part B. That 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

Actual work requirement (11-14)

Wage grade 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 thet 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 et seq. B-187181, October 17, 1977.

Labor-management wage agreements negotiated under Section 9(b) of Public Law 92-392--effect of Civil Service Reform Act of 1978 (11-14)

Section 704(b)(B) of Public Law 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 Public Law 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.

E. ENVIRONMENTAL DIFFERENTIALS (11-23)

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. For additional cases concerning environmental differential, refer to Chapter 4(II), Part F.

SUBCHAPTER IV--SIMILAR SYSTEMS

A. VESSEL CREWS (New)

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. 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 (1976).

Basic Pay

Effective date of pay increases (11-25)

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.

Limitation on compensation (11-25)

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 (1970). 56 Comp. Gen. 870 (1977).

Additional compensation

Overtime

Overtime for travel (11-25)--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 return 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.

Call-back overtime (11-25)--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 is that situation for either General Schedule or wage grade employees. B-189163, October 11, 1977.

B. EMPLOYEES OF THE GOVERNMENT PRINTING OFFICE (New)

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.

Pay increase

Effective date (11-25)

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.

Craft employees (11-25)

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.

Noncraft employees (11-25)

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 consultation 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.

Additional compensation

Overtime (11-25)

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.

* U. S. GOVERNMENT PRINTING OFFICE : 1980 316-119/0035


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