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[B-208662.2]

Contracts—Protests—Sustained—Corrective Action

Decision sustaining a post-award protest but not recommending corrective action is not "legally erroneous" when based on one of many factors normally taken into account in connection with a determination as to whether corrective action is appropriate. Any one factor—in this case the fact that the system had been delivered and installed and termination and site preparation costs thus would have been substantial—properly may be determinative of the feasibility of corrective action.

Contracts—Negotiation—Offers or Proposals—Preparation—Costs—Recovery Criteria

A proposal preparation cost claim is sustained where: (1) the agency's acceptance of the awardee's proposal was unreasonable, and thus arbitrary and capricious, in view of the awardee's clear failure to satisfy a material certification provision; and (2) the claimant was one of only two offerors and had a clear chance at the award, but the agency's arbitrary action makes it impossible to determine precisely how substantial that chance was.

Contracts—Negotiation—Offers or Proposals—Preparation—Costs—Time Limitations on Claims

The time limitations set forth in General Accounting Office's (GAO) Bid Protest Procedures do not apply to proposal preparation cost claims.

Contracts—Negotiation—Offers or Proposals—Preparation—Costs—Recovery

There is no requirement that a proposal preparation cost claim filed in GAO be accompanied by detailed evidence as to the amount claimed.

Matter of: System Development Corporation and Cray Research, Inc.—Request for Reconsideration, April 2, 1984:

System Development Corporation and Cray Research, Inc. (SDC/Cray) request reconsideration of our decision *System Development Corporation and Cray Research, Inc.*, B-208662, August 15, 1983, 83-2 CPD 206. In that decision, we sustained SDC/Cray's protest of a Department of Commerce contract award to Control Data Corporation (CDC) for a class VI computer system, but determined that corrective action would not be appropriate. SDC/Cray requests that we reconsider our determination in this regard. Alternatively, SDC/Cray claims it is entitled to recover its proposal preparation costs. We affirm our prior decision and sustain SDC/Cray's claim for proposal preparation costs.

We sustained SDC/Cray's protest on the ground that Commerce accepted CDC's proposal for award without first requiring CDC to fully satisfy the certification requirement under paragraph F.1.2 of the Request for Proposals (RFP). The clause plainly required each offeror to certify that its proposed computer system had been installed and accepted, had been in use in normal data processing activities for at least 6 months at three sites (one with an IBM 360/370 interface), and had operated at those sites at a 95 percent availability level. We found that CDC never satisfied the first two por-

tions of this requirement, and although it did certify to 95 percent availability at three sites, we found it unclear whether the certification was based on availability of the full 1 million words of primary memory required under the solicitation. Since the certification encompassed material system requirements, we concluded that Commerce improperly made award to CDC before it had fully satisfied the requirements under the certification clause. We deemed corrective action inappropriate, however, in view of the fact that CDC's computer system had been installed.

Reconsideration Request

SDC/Cray contends that our decision regarding corrective action is "legally erroneous" because we based it solely on the fact that CDC's system had been installed and did not address numerous other factors considered in previous decisions. Among the factors SDC/Cray argues should have been discussed are the amount of termination costs, the good faith of the parties, the extent of performance, the potential impact of termination upon the agency's mission, and the degree of prejudice to the competitive system. SDC/Cray believes that installation of CDC's system should not, by itself, have been found sufficient to render corrective action impracticable.

We do not agree. Simply stated, any one of the several factors identified by SDC/Cray may be controlling with respect to whether corrective action is appropriate. Here, it was clear that the equipment had been manufactured, delivered and installed. While we did not explicitly so state, it was also clear that this constituted substantial performance of CDC's contract ($8.5 million for purchase of the system), and that at a minimum the Government would be liable for significant costs if CDC's contract could be terminated at that point. Furthermore, as Commerce has confirmed, replacement of CDC's system would have entailed approximately $700,000 in new site preparation, training and other expenses, and would have delayed significantly the activity's efforts to improve its weather forecasting. At the same time, there was no allegation or evidence of fraud or bad faith on Commerce's part. We continue to believe that under the circumstances corrective action in this case would not be in the Government's best interest.

Proposal Preparation Cost Claim

As a preliminary matter, Commerce argues that SDC/Cray's claim should be dismissed as untimely on the ground that it was not raised in SDC/Cray's original protest submission. Alternatively, Commerce urges dismissal based on SDC/Cray's failure to submit proof as to the amount of its claim. SDC/Cray's claim is dismissible on neither ground. The time limitations set forth in our Bid Protest Procedures, 4 C.F.R. Part 21 (1983), do not apply to proposal preparation cost claims submitted in connection with timely

protests. See *Martel Laboratories, Inc.,* B-194364, August 7, 1979, 79-2 CPD 91. The claim therefore is timely. There also is no requirement that proposal preparation cost claims filed in our Office be accompanied by detailed evidence as to the amount claimed. We frequently have ruled on the issue of entitlement alone, directing the claimant to establish the amount to which it is entitled by submitting substantiating documentation to the agency. See *John F. Small & Co., Inc.,* B-207681.2, December 6, 1982, 82-2 CPD 505; *DelRalco, Inc.,* B-205120, May 6, 1982, 82-1 CPD 430. We will follow that approach here.

An unsuccessful offeror will be entitled to recover the costs of preparing its proposal where the agency has acted arbitrarily or capriciously in evaluating either the claimant's or another offeror's proposal, and the claimant would have had a substantial chance of receiving the award but for the agency's improper action. See *Heli-Jet Corporation* v. *United States,* 2 Cl. Ct. 613 (1983). We find that the facts in this case satisfy both requirements.

In considering whether improper agency action was arbitrary or capricious, we will take into account the four factors enumerated by the Court of Claims in *Keco Industries, Inc.* v. *United States,* 492 F.2d 1200 (Ct. Cl. 1974): (1) whether the action was motivated by subjective bad faith on the part of procurement officials; (2) whether there was no reasonable basis for the action; (3) the extent to which the action taken fell within the discretion of contracting personnel; or (4) whether the action violated pertinent statutes or regulations. We find the second factor relevant here.

The record shows that Commerce was cognizant of the certification requirement under paragraph F.1.2 and CDC's failure to satisfy this requirement in its initial proposal. Commerce officials advised CDC on at least two occasions—once following receipt of CDC's initial proposal and again during negotiations—that its proposal did not contain a satisfactory certification. Under these circumstances, we believe Commerce should have been aware of the deficiency in CDC's proposal. We find that Commerce's acceptance of CDC's proposal notwithstanding this deficiency was without a reasonable basis.

Commerce submits that acceptance of CDC's proposal was reasonable because its staff's examination of CDC's technical data and discussions with CDC provided satisfactory assurance that the certification requirement could be met. It also notes that this procurement was negotiated, not advertised, and that the contracting officer thus had broad discretion in conducting the competition. We reject Commerce's position.

While Commerce does appear to have investigated to some extent CDC's ability to meet the 95 percent availability portion of the certification requirement, the record nowhere establishes that Commerce determined CDC capable of satisfying the first two portions of the requirement. In any case, Commerce still offers no ex-

planation as to why CDC was not required to certify in writing or otherwise demonstrate in its proposal that its computer system satisfied the requirement. The contracting officer, even in a negotiated procurement, does not have discretion to disregard one offeror's failure to satisfy a material RFP requirement. See generally *Baird Corporation,* B-193261, June 19, 1979, 79-1 CPD 435. We conclude that Commerce's acceptance of CDC's nonconforming proposal had no reasonable basis and thus constituted arbitrary and capricious action.

We also find that SDC/Cray had a substantial chance of receiving the award. We recently held that where an agency's arbitrary action makes it impossible to calculate the claimant's chances for the award, and the claimant had a colorable chance at the award, fairness dictates that we adopt a presumption favoring the claimant. See *M.L. MacKay & Associates, Inc.* B-208827, June 1, 1983, 83-1 CPD 587. The claimant in that case was the low offeror and, we found, had been arbitrarily excluded from the competitive range. Since the contract had been completely performed at the time of the protest, it was not possible to reopen negotiations or otherwise determine the claimant's chances of receiving the award.

The facts here are comparable. SDC/Cray was the only offeror in compliance with all RFP terms, and thus was in line for award in the event CDC's proposal was found unacceptable. Because of Commerce's failure to enforce the RFP terms, it is not now possible to determine whether CDC was entitled to the award as the low conforming offeror, or whether SDC/Cray should have received the award as the only conforming offeror. Applying the rule in the above case, we believe fairness requires a finding that SDC/Cray's chance at the award was sufficient to support its claim based on Commerce's arbitrary and capricious action.

Our prior decision is affirmed and the claim is sustained. SDC/Cray should submit substantiating documentation to Commerce to establish the amount it is entitled to recover.

[B-213415]

Appropriations—Availability—Glasses

There is no authority for the agency to enter into an agreement with the employees' labor organization to expend appropriated funds to purchase eyeglasses for employees who must use video terminals since the agency finds no safety standard relates to the employees' operation of video display terminals and does not consider such operation hazardous. Further, only certain employees need glasses to operate the terminals, and there is no evidence of an immediate benefit to the Government through the use of eyeglasses.

Matter of: Department of the Army, Ohio River Division, Corps of Engineers—National Federation of Federal Employees, Local No. 892, April 2, 1984:

The Department of the Army, Corps of Engineers, has requested a decision concerning the legality of expending appropriated funds to reimburse employees who purchase special eyeglasses for use in the operation of video display terminals.[1] We conclude that funds may not be used for this purpose under the circumstances described.

Facts and Issues

The Army Corps of Engineers and Local 892 of the National Federation of Federal Employees are negotiating over the impact on affected employees of the agency's decision to install video display terminals in the Finance and Accounting Branch at the Little Miami Center, Mariemont, Ohio. We understand that certain employees who have not worn glasses may need corrective lenses to operate video display terminals. Because of the positioning of display screens others may find that their regular prescriptions do not provide proper correction and they may need glasses for intermediate range correction. Still others may require no correction or their own prescription lenses may provide the correction necessary. The glasses would be used during working hours and would be left at the worksite. Examination by an eye specialist would determine whether it would be necessary to prescribe glasses for particular employees.

The agency has concluded that the principal initial benefit from use of the glasses is to the employee, although the Government may receive a long-range benefit. The agency does not consider work with the video display terminals to be hazardous, and the chief of its occupational health unit has concluded that no greater visual acuity is required to operate the terminals than to read the fine print in a textbook. Under these circumstances, the agency is uncertain whether it may reimburse employees who find it necessary to purchase corrective lenses for use in operating video display terminals.

Analysis

Before submitting the question the agency considered four possible sources of legal authority for payment. Since eyeglasses are not part of a uniform prescribed by the agency to be worn in the per-

[1] The request was made by the Commander, U.S. Army Engineers Division, Ohio River, Cincinnati, Ohio, under authority delegated by the Secretary of the Army. See 4 C.F.R. Part 22 (1983). Since this is a matter of mutual concern to the agency and Local 892 of the National Federation of Federal Employees, the labor organization has been served with a copy of the request in accordance with 4 C.F.R. § 22.4.

formance of official duties, the agency correctly determined that 5 U.S.C. §§ 5901–5903 was inapplicable. The second authority considered by the agency was the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.* Under 29 U.S.C. § 668 the head of a Federal agency is required to establish and maintain a comprehensive occupational safety and health program consistent with standards set forth in the act. If an agency head determines that certain items of protective equipment are required under any applicable standard to protect employees from certain hazards, the agency may expend appropriated funds to procure the equipment. The Secretary of Labor's standards for protective eye equipment designed to meet particular hazards are set forth in 29 C.F.R. § 1910.133. 57 Comp. Gen. 379 (1978); 51 Comp. Gen. 446 (1972).

In this case, the agency's occupational and health unit has determined that health and safety standards do not require eyeglasses for operators of video display terminals. The agency does not consider the task of looking at video display terminals to be imminently hazardous and it has not been shown that standards have otherwise been promulgated for this purpose. Since the agency has been unable to make the determinations required, the Occupational Safety and Health Act cannot be used as authority to expend appropriated funds for eyeglasses. The General Accounting Office has no jurisdiction to question the agency's findings or to determine whether the agency has complied with the applicable standards. *Matter of Garrison,* B–193559, April 27, 1979.

The third source of authority considered by the agency is 5 U.S.C. § 7903 under which appropriations are made available for the purchase and maintenance of "special clothing and equipment for the protection of personnel in the performance of their assigned tasks." For protective equipment to be purchased under this authority, the employee must be engaged in hazardous work and the item must be "special" as opposed to an item the employee ordinarily is expected to provide for himself as a personal item rather than for the benefit of the Government. 51 Comp. Gen. 446 (1972). For this statute to apply, the agency must make a determination that the employee's job is hazardous. In this case since the agency has not determined that video display terminals pose a hazard, section 7903 may not be used as authority to pay for eyeglasses. Compare 42 Comp. Gen. 626 (1963), in which we approved use of appropriated funds for the purchase of prescription ground safety glasses where the agency, after a thorough review of its safety program, determined that the employees working with toxic chemicals, abrasives and radioactive materials were engaged in hazardous duties and that use of the glasses was required for their protection.

The fourth source of authority is the rule that appropriated funds may be spent for the purchase of certain items which could be considered personal equipment if the criteria established by a

Comptroller General decision are met. See generally 3 Comp. Gen. 433 (1924); 56 Comp. Gen. 398 (1977); 61 Comp. Gen. 634 (1982).

In applying that rule the first question is whether the Government or the employee receives the primary benefit. The test of benefit is whether, from the Government's standpoint, the purpose of the expenditure can be accomplished as expeditiously and satisfactorily without such equipment. For example, in 45 Comp. Gen. 215 (1965), we approved the use of public funds to pay the cost of special prescription filter spectacles for highly trained employees operating precision stereoscopic map plotting instruments. Although as here, there was evidence of increased long-range manpower utilization, the long-range benefit was only incidental to a finding that use of the spectacles materially increased the employees' work output. The material increase in work output satisfied the first test that the use of equipment results in the expeditious and satisfactory accomplishment of work to the immediate and continuous benefit to the Government. Speculative long-range benefit alone does not satisfy the test.

Although failure of the benefit test alone prevents approval, we note the glasses in this case also fail the second test—whether the item is personal to the employee. Here, only certain of the employees who operate the terminals will require use of the glasses and the glasses are in the nature of ordinary corrective lenses which are personal items that should be furnished by the employees who need them. See 61 Comp. Gen. 634 (1982). Therefore, because of the absence of benefit to the United States, and the personal nature of the glasses, their use fails the essential tests of 3 Comp. Gen. 433, cited above.

Conclusion

The requisite determinations for invoking authority in the Occupational Safety and Health Act, and 5 U.S.C. § 7903, have not been made by the agency. No other statutory authority is applicable to the facts. Since only certain of the employees need the glasses, and is the absence of evidence that work output of the employees operating the terminals would increase through their use, the equipment must be viewed as personal to those employees who need them, and, therefore, they do not satisfy the tests of 3 Comp. Gen. 433, cited above. Under these circumstances there is no basis for the agency to enter an agreement with the union to expend appropriated funds on the equipment.

[B-211490]

Officers and Employees—Overseas—Retirement, Separation, etc.—Return to Other Than Place of Residence

Under 5 U.S.C. 5722, civilian employees upon separation abroad are entitled to travel and transportation expenses to their place of actual residence at the time of

overseas assignment. We hold that such employees are entitled to those expenses to any alternate point of destination, within or outside the United States, provided, however, that the cost to the Government shall not exceed the constructive cost of travel and transportation to the actual place of residence. Since this represents a changed construction of the statute, it is for prospective application only, effective as of the date of this decision. 31 Comp. Gen. 389 and B-160029, Oct. 4, 1966, overruled.

Transportation—Household Effects—Overseas Employees—Election Not to Return to Continental United States

A civilian employee of the Defense Intelligence Agency upon separation overseas shipped her household goods from Denmark to Scotland. The agency disallowed her expenses based on our prior decisions since she did not return to the United States. We hold that she is entitled to travel and transportation expenses incurred in her move to Scotland, not to exceed the constructive cost to her place of actual residence in the United States.

Matter of: Thelma I. Grimes—Termination of Overseas Employment—Transportation of Household Goods to Alternate Destination, April 10, 1984:

In this case, the question is whether a civilian employee upon separation overseas is entitled to travel and transportation expenses under 5 U.S.C. § 5722 (1976) from Copenhagen, Denmark, to Scotland instead of to her place of actual residence in the United States. For the reasons stated below, we hold that she is entitled to such expenses, not to exceed the constructive cost of travel and transportation expenses to her place of actual residence.

This decision is in response to a request from Mr. Tidal W. McCoy, Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations), concerning the claim of Mrs. Thelma I. Grimes for transportation of her household goods from her last duty station in Copenhagen, Denmark, to Scotland. The request was approved by the Per Diem, Travel and Transportation Allowance Committee, and was assigned PDTATAC Control Number 83-10.

FACTS

Mrs. Grimes, a civilian employee of the United States Defense Intelligence Agency, was transferred in April 1977 from Washington, D.C., to the United States Defense Attache Office (USDAO) in London, England. In connection with this transfer, Mrs. Grimes was authorized to move her household goods from her residence in Arlington, Virginia, to her new station in London. She completed two tours of duty in London, and then was transferred to the USDAO in Copenhagen, Denmark, on May 20, 1981, for a 2-year tour of duty.

In March 1982, Mrs. Grimes informed the agency that she was planning to separate from the service in December 1982, 5 months short of tour completion, due to her impending marriage to a United States Navy member. Mrs. Grimes originally planned to

send her household goods to California, but her fiance received a change of orders to remain in Scotland to the end of August 1983. Mrs. Grimes then requested a change in her departure date, and asked that her goods be shipped to Scotland. On October 8, 1982, the agency's personnel office authorized the USDAO in Copenhagen to issue permanent change-of-station orders returning the household goods of Mrs. Grimes to her home of record or an alternate destination not more distant. These orders were issued on October 12, 1982.

When the travel orders were received in the Office of Comptroller, the agency realized that it had made an error by authorizing the shipment of household goods to Scotland. Mrs. Grimes was informed on approximately November 18, 1982, that she was not authorized to ship her household goods to Scotland. However, on November 12, 1982, before the receipt of this latest message, her household goods had been shipped to Scotland as authorized by her orders.

The Defense Intelligence Agency forwarded the case to the Per Diem Committee and requested that Mrs. Grimes be authorized the maximum amount of transportation entitlement allowable.

OPINION AND CONCLUSION

The issue of travel and transportation expenses of employees upon return from overseas posts of duty is governed by 5 U.S.C. § 5722 (1976). Section 5722(a)(2) authorizes payment of such expenses on the return of an employee from a post of duty outside the continental United States "to the place of his actual residence at the time of assignment to duty outside the United States."

Our original construction of this statute in 1952 was that it contemplated the return of the employee to the United States within a reasonable time after completion of duty at the overseas station, citing 28 Comp. Gen. 285 (1948). We, therefore, held that there was no authority to pay the employee's expenses upon separation to a point outside of the United States, or even to pay the constructive cost of return travel to his place of residence in the United States when he elects to remain abroad, 31 Comp. Gen. 389 (1952) and B-160029, October 4, 1966.

In 1965, we applied this principle to bar payment of travel and transportation expenses to an employee who elected to remain in Alaska upon completion of his service rather than return to his residence in the "continental" United States. B-156524, May 20, 1965. However, we overruled that case in 46 Comp. Gen. 838, 841 (1965) and held that an employee who elects to remain in Alaska or Hawaii upon separation may be authorized expenses to another location in any of the 50 states or the District of Columbia, not to exceed the constructive cost to the place of actual residence. See also B-107603, June 20, 1972.

The unexpressed major premise of these decisions appears to be that Congress must have intended to require civilian employees of the Government to return to the United States upon separation in order to be reimbursed their expenses. Yet, Congress in 37 U.S.C. § 404(c) (1976) has provided authority for members of the uniformed services to select a home upon separation for travel and transportation purposes, and we have construed that statute to allow such expenses to anywhere in the world. See 54 Comp. Gen. 1042, 1047 (1975); *Technical Sergeant Michael J. Mahoney,* B-195604, September 28, 1979; and *Lt. Colonel James Z. Metalios,* B-192949, June 6, 1979.

In light of the unfortunate results that may flow from our decisions relating to civilian employees, as illustrated by the Thelma Grimes situation, we have decided to reconsider this matter.

There are many reasons why employees decide to remain overseas after completing their Government service, ranging from acceptance of employment overseas to family or personal considerations. In each case, it is the individual's own choice as to where to reside and, once Government service is ended, that choice should not be a matter of concern to the employing agency or to this Office. Yet, our prior decisions impose a financial penalty upon the person who for whatever reason chooses to remain abroad after separation. This penalty is imposed despite the fact that the individual has fulfilled his or her obligations of Government service for the agreed-upon period of time and that no additional expense to the Government is involved. It is also imposed even if the individual stays overseas to work for a United States company or to marry a service member.

In contrast, the retired or separated military member or uniformed service member may choose to remain overseas at any location without financial penalty regardless of the reasons for the choice.

In order to prevent injustice and hardship and to eliminate the unfair disparity between civilian employees and service members, we have decided to change our construction of 5 U.S.C. § 5722. We, therefore, will allow payment or reimbursement of travel and transportation expenses incurred by civilian employees upon separation overseas to any alternate point of destination, whether within or outside the United States, provided however that the cost to the Government shall not exceed the constructive cost of travel and transportation to the employee's place of actual residence at the time of the overseas assignment or the tour renewal agreement.

Since this conclusion represents a changed construction of the statute on our part, we shall give it prospective application only, effective as of the date of this decision, except as to Mrs. Grimes. See *George W. Lay,* 56 Comp. Gen. 561, 566 (1977).

In accordance with the foregoing, Mrs. Grimes is entitled to her travel and transportation expenses from Denmark to Scotland, not to exceed the constructive cost of such expenses to her place of actual residence in the United States.

[B-212484]

Officers and Employees—Health Insurance—Contributions—Employee Liability—Nonpay Status

The Department of Agriculture asks whether it may pay the employee share of health insurance for tobacco inspectors in nonpay status from the tobacco user fee fund. Such expenditure may not be made. User fees collected from tobacco producers to provide tobacco inspection, certification and other services under the Tobacco Inspection Act are considered appropriated funds and are subject to laws controlling expenditure of such funds. Expenditure of appropriated funds to pay the employee share of health insurance for tobacco inspectors while they are in nonpay status is prohibited by the Federal Employees Health Benefits Act, which places a 75 percent ceiling on agency contributions, and regulations implemented by the Office of Personnel Management.

Matter of: Tobacco Inspectors, Department of Agriculture—Payment of Employee's Share of Health Insurance from Tobacco User Fee Fund, April 10, 1984:

This decision is in response to a request from the Secretary of Agriculture, The Honorable John R. Block. The Secretary asks whether the Department of Agriculture may legally authorize payment of the employee share of health insurance for tobacco inspectors in nonpay status from the tobacco user fee fund. For the following reasons, we hold that user fees may not be used to cover the employee share of health insurance.

BACKGROUND

The Tobacco Inspection Act, 7 U.S.C. §§ 511-511q (1982), authorizes the Secretary of Agriculture to provide inspection and certification (grading) services at all designated tobacco auction markets. The Agricultural Marketing Service, Department of Agriculture, employs tobacco inspection personnel to provide inspection services under the Tobacco Inspection Act. According to the request submitted to this Office, tobacco inspectors are seasonal personnel who normally work 6 to 9 months each year, depending on the grading needs during each season.

Pursuant to the Federal Employees Health Benefits Act of 1959, as amended, 5 U.S.C. §§ 8901-8913 (1982), Federal employees and annuitants may purchase health insurance as a fringe benefit of their Government employment. The Government pays part of the cost of coverage for each employee, with the employee assuming the remainder under criteria set forth in § 8906. Section 8906(b)(2) provides that "[t]he biweekly Government contribution for an employee or annuitant enrolled in a plan under this chapter shall not exceed 75 percent of the subscription charge."

In accordance with 5 U.S.C. § 8901(1)(A), and 5 U.S.C. § 2105(a), tobacco inspectors employed by the Department of Agriculture are "employees" for purposes of coverage under the Federal Employees Health Benefits Act and, as the record before us discloses, tobacco inspectors participate in the health benefits program.

The Federal Employees Health Benefits Act designates the Office of Personnel Management (OPM) as the agency responsible for the implementation of the health benefits program. 5 U.S.C. § 8913. Under OPM regulations in effect prior to August 1982, neither employees nor the Government was required to make their respective contributions to the program during periods when employees were in a nonpay status even though the health insurance remained in effect. See 5 C.F.R. §§ 890.303, 890.304, 890.501 and 890.502 (1982). Therefore, tobacco inspection personnel were provided health insurance coverage without cost during the months they were in nonpay status.

Effective August 1982, OPM revised its regulations to require employees and the Government to pay their respective contributions to the program for each pay period during which the employees' enrollment continued, whether the employees were in pay status or nonpay status. 5 C.F.R. §§ 890.501(e), 890.502(b) (1983). Therefore, under current regulations, tobacco inspectors must pay their share of health insurance while in nonpay status.

LEGAL DISCUSSION

This request raises two questions: (1) whether the OPM regulations discussed above comply with the law and are reasonable, and (2) whether user fees, collected from tobacco producers under the Tobacco Inspection Act, may be expended for payment of the employee share of health insurance for tobacco inspectors while they are in nonpay status.

First we will consider the legality of the OPM regulations. During the 30-day period allowed for comments on the revised regulations, OPM received comments stating that tobacco inspectors should be excluded from the new regulations. OPM considered these comments in developing the final regulations. They found no basis for exempting these employees from the requirement that they pay their share of health premiums while in nonpay status. In the supplementary information announcing the final regulations, OPM stated that "[t]he [tobacco inspector] employee share is not an expense to the Government for providing this service, just as it is not an expense to the Government for any other category of employees." 47 Fed. Reg. 30962 (1982).

As stated previously, OPM is directed, by statute, to implement the Federal Employees Health Benefits program. 5 U.S.C. § 8913. Regulations issued pursuant to or in execution of a statute which are within the bounds of the agency's authority have the force and

effect of law. *Recredit of Sick Leave of FBI Employee After Break in Service,* B-209068, January 20, 1983. An agency's interpretation of a statute it is charged with implementing is entitled to deference and should be upheld unless irrational, arbitrary or capricious. See *Udall* v. *Tallman,* 380 U.S. 1 (1965). OPM revised these regulations with the intention of eliminating the need for most of the premium rate loading used to cover the cost of free coverage. 47 Fed. Reg. 30962, previously cited. We find this cost savings analysis to be reasonable. In addition, there is nothing in the Federal Employee Health Benefits Act providing for free coverage of health insurance to employees in nonpay status. Therefore, this Office will defer to OPM's interpretation of the Federal Employees Health Benefits Act rather than substituting our own judgment.

We next consider the legality of utilizing the tobacco user fee fund to pay the employee share of Federal health insurance for tobacco inspectors while they are in nonpay status.

The Tobacco Inspection Act, 7 U.S.C. §§ 511-511q, as amended by section 157 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, requires the Secretary of Agriculture to fix and collect fees for tobacco inspection, certification and other services provided for under the Act. The fees, as nearly as possible, are to cover the costs of the services, including administrative and supervisory costs. When collected, the fees "shall be credited to the current appropriation account that incurs the cost and shall be available without fiscal year limitation to pay the expenses of the Secretary incident to providing services under this chapter." 7 U.S.C. § 511d. See also 7 U.S.C. § 511e.

Statutes which authorize the collection of fees and their deposit into a particular fund, and which make the fund available for expenditure for a specified purpose, have long been viewed as constituting continuing or permanent appropriations. Therefore, they are subject to the statutory controls and restrictions applicable to appropriated funds. *Fortec Constructors,* 57 Comp. Gen. 311 (1978); 35 Comp. Gen. 615 (1956). This principle has been specifically applied to statutes authorizing user fees. For example, user fee toll charges collected by the Saint Lawrence Seaway Development Corporation were held to be appropriated funds in *Saint Lawrence Seaway Development Corporation,* B-193573, December 19, 1979. In addition, user fees collected from firms utilizing the meat grading services of the Food Safety and Quality Service, Department of Agriculture, were held to be appropriated funds in *Department of Agriculture,* B-191761, September 22, 1978. Thus, it follows that this principle would apply to fees collected from tobacco producers to provide tobacco inspection, grading and other services.

In his request, the Secretary stated that the expenditure in question is necessary to carry out the purpose of the tobacco user fee fund. According to the Secretary, there is little doubt that, if the tobacco inspectors are required to pay the employee share of health

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insurance during nonpay periods, it will be difficult to recruit and retain highly qualified individuals.[1] As a result, he says it will be virtually impossible to continue to provide the same quality of service to the tobacco industry.

An agency has reasonable discretion in determining how to carry out the purposes of an appropriation. However, an expenditure cannot be justified where it is prohibited by law. 38 Comp. Gen. 758 (1959); 6 Comp. Gen. 619, 621 (1927). User fees collected from tobacco producers under the Tobacco Inspection Act are to be used to cover the costs of tobacco inspection and other services. 7 U.S.C. §§ 511d and 511e. The Department uses these fees to pay tobacco inspectors' compensation, including the cost of fringe benefits such as the Government contribution for Federal health insurance. Under the clear and unambiguous terms of 5 U.S.C. § 8906(b)(2), however, a Federal agency may not pay more than 75 percent of the subscription charges for employees enrolled in health insurance plans under the Federal Employees Health Benefits Act. Congress passed the Act to establish a comprehensive health benefits program for Federal employees and provided for a 75 percent ceiling on agencies' contributions and all participating agencies are bound by that limitation.

The Department of Agriculture is covered by and participates in the Federal Employees Health Benefits Program, and is consequently subject to the limitations on contributions set forth in 5 U.S.C. § 8906(b)(2), and the implementing regulations promulgated by the Office of Personnel Management as set forth in 5 C.F.R. § 890.501. Therefore, although the Secretary believes payment of the employee share of health insurance for tobacco inspectors while they are in nonpay status is necessary to carry out the purpose of the Tobacco Inspection Act, the expenditure is prohibited by the Federal Employees Health Benefits Act and its implementing regulations.

In view of the foregoing, the Department of Agriculture may not legally authorize payment of the employee share of health insurance for tobacco inspectors while they are in nonpay status.

[B-213408]

Bids—Qualified—Dollar Limitation

Bid including dollar limitation on award that bidder would accept was improperly rejected as nonresponsive where the solicitation did not prohibit bidders from including limitations and the limitation did not alter the bidder's obligation to perform in accordance with the terms and conditions of the solicitation.

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[1] The Department of Agriculture invests approximately $45,000 in training each tobacco inspector. Tobacco buying organizations actively seek top graders for employment. During 1982, eight of the Department's most highly qualified tobacco inspectors resigned and accepted employment with tobacco companies.

Matter of: Orvedahl Construction, Inc., April 10, 1984:

Orvedahl Construction, Inc. (Orvedahl), protests the rejection as nonresponsive of its low bid submitted in response to the Department of the Air Force (Air Force) invitation for bids (IFB) No. F32605-83-B0072.

The IFB requested bids to remove and replace windows at Grand Forks Air Force Base. The IFB divided the required work into five line items and provided that bidders were not required to bid on each line item. Bids for each line item would be evaluated independently and awards would be made to the low responsive, responsible bidder on each line item or combination of line items.

We sustain the protest.

Orvedahl submitted bids for every line item and was low at $781,000 on line item No. 3 and $622,000 on line item No. 5. However, the contracting officer determined that Orvedahl's bid was nonresponsive because the bid included a handwritten notation that Orvedahl would not accept contract awards totaling more than $1 million. Contracts for these line items were awarded to the second low bidder, Peterson Construction Company, Inc. (Peterson), at a price of $903,689 for line item No. 3 and $691,649 for line item No. 5.

Orvedahl alleges that the notation in its bid did not render the bid nonresponsive and that as the low bidder, it should have been awarded a contract for either line item No. 3 or 5. Orvedahl requests that the Air Force terminate its contracts with Peterson and award the contracts to it. In the alternative, Orvedahl requests bid preparation costs.

The Air Force responds that at the time it rejected Orvedahl's bid, it believed that the limitation Orvedahl placed on the dollar amount of the awards it would accept constituted an improper bid qualification. The Air Force relies on Defense Acquisition Regulation § 2-404.2(d) (1976 ed.) (Defense Acquisition Circular No. 76-17, September 1, 1978), which permits the contracting officer to reject a bid when the bidder has attempted to impose conditions in its bid which would limit its liability to the Government. The basis for rejecting such a bid is the prejudice to other bidders which would result from permitting a bidder to impose such conditions. The Air Force asserts that by qualifying its bid by a dollar limitation instead of refraining from bidding on all items, Orvedahl limited its potential liability to the Government by restricting the Air Force's ability to make contract awards. The Air Force also alleges that to consider Orvedahl's bid with the restriction would prejudice other bidders because Orvedahl had five separate chances to receive an award and Orvedahl could bid on each item with a higher profit margin.

The Air Force also believes that Orvedahl's bid was nonresponsive because Orvedahl's intent to be bound by the acceptance of its

bid was not evident from the face of Orvedahl's bid. The Air Force reached this result by reasoning that Orvedahl's low bids on items Nos. 3 and 5 totaled more than $1 million and the contracting officer could not tell on which item Orvedahl would be bound.

Finally, the Air Force alleges that the rejection of Orvedahl's bid was in accordance with section 10(c) of the IFB Instructions to Bidders, which states that the Government may accept any item or combination of items unless precluded by the IFB or by a restrictive limitation which a bidder includes with its bid.

A bid is responsive if the bid contains the bidder's unequivocal offer to provide the product or service requested in conformance with the material terms and conditions of the IFB and the face of the bid indicates the bidder's intent to be bound upon the Government's acceptance of its bid. See *The Entwistle Company,* B-192990, February 15, 1979, 79-1 CPD 112.

Pursuant to these principles, we have recognized that a bidder may insert, without rendering its bid nonresponsive, certain limitations if the IFB does not prohibit the bidder from doing so. For example, we have concluded that a bidder may state that it will only accept a contract for a few items of work solicited. See *Webfoot Reforestation,* B-194214, May 25, 1979, 79-1 CPD 378. In that case, we found that the limitation inserted by the bidder did not affect the Government's right to award a contract on the items for which the bidder was eligible and that the qualification did not change the bidder's obligation to perform in accordance with the terms and conditions of the IFB.

We believe that the reasoning of such cases applies to the present case. Initially, while the IFB stated the bidders need not submit a bid for each line item, the IFB did not specifically prohibit bidders from inserting limitations on the awards they were willing to accept. In this regard, we have found that an IFB which states that the Government may accept any item or combination of items unless the bidder includes a restrictive limitation in his bid expressly indicates to bidders that they may include limitations in their bids. *George C. Martin, Inc.,* B-182175, July 1, 1975, 75-2 CPD 55.

Further, the qualification did not limit the Government's right to award a contract to Orvedahl for either line item No. 3 or 5. Finally, Orvedahl's limitation on the dollar amount of award it would accept did not change Orvedahl's obligation to perform the work on any contract it was awarded in accordance with the requirements of the IFB.

Consequently, Orvedahl's protest is sustained.

The Air Force has informed us that performance on this contract has not begun yet. We therefore recommend that the Air Force terminate its contract for item No. 3 with Peterson and award the contract to Orvedahl. Since we are making this recommendation

for remedial action, we are not considering Orvedahl's request for bid preparation costs.

Since this decision contains a recommendation for corrective action, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with 31 U.S.C. § 720, as adopted by Public Law 97-258 (formerly 31 U.S.C. § 1176 (1976)). This section requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

[B-213776]

Leaves of Absence—Sick—Substitution for Leave Without Pay—Retroactive Substitution—Bought-Back Sick Leave

A retired Federal employee seeks the substitution of bought-back sick leave for leave without pay (LWOP) for the period he spent on LWOP pending a decision on his workers' compensation application. Where the employee retired during the same year in which the LWOP was taken, and his request for the leave substitution was timely made, we conclude that the employee's agency may, in its discretion consistent with normal sick leave considerations, allow the retroactive substitution of his bought-back sick leave for his LWOP. *Interstate Commerce Commission,* 57 Comp. Gen. 535 (1978)

Matter of: Larry L. Van Eerden—Retroactive Substitution—Sick Leave for Leave Without Pay, April 10, 1984:

Mr. James E. Mobley, of the Classification and Pay Group, Forest Service, United States Department of Agriculture (the Forest Service), has requested a decision from the Comptroller General. The issue is whether sick leave bought back from the Office of Workers' Compensation Programs (OWCP) may be retroactively substituted for leave without pay (LWOP). For reasons that follow, we would not object to a retroactive substitution.

FACTS

Mr. Larry L. Van Eerden sustained an injury while performing his duties as an employee of the Forest Service. Pending a decision on his workers' compensation application, he went on sick leave. After a period of sick leave, Mr. Van Eerden went on LWOP. Eventually, the OWCP granted him workers' compensation which covered the period of the sick leave, but was insufficient to cover all of the subsequent period of LWOP. Mr. Van Eerden then returned to work, and elected to buy back his sick leave. He retired at the end of that year, and now wants to retroactively substitute his bought-back sick leave for LWOP.

ARGUMENTS

In a memorandum from the Director, Personnel Management, the Forest Service says that Mr. Van Eerden could not retroactive-

ly substitute sick leave for LWOP. The Director stated that "we can find no directly applicable directives or Comptroller General decisions." Instead, there was resort to inferences drawn from Office of Personnel Management, Department of Labor, and Forest Service regulations. Thus, he concluded that (1) specific regulatory permission was required for such substitution; (2) leave must actually be in an employee's account balance to be used; and (3) bought-back leave is not available to an employee for use until such time as payment is made and that such use would only be prospective.

Mr. Van Eerden, on the other hand, refers to *Robert B. Lindsey* v. *United States,* 214 Ct. Cl. 574 (1977), and *Interstate Commerce Commission,* 57 Comp. Gen. 535 (1978). *Robert B. Lindsey* v. *United States* rejected a Comptroller General position that an employee's prior election as to leave is binding so as to preclude the substitution of sick leave for annual leave in the year of his retirement. Mr. Van Eerden argues that that case recognizes that there is no leave statute or regulation barring the result he seeks. Further, he refers to that case's acknowledgement of statutory changes to the leave policy designed to increase benefits to Federal employees and Congressional recognition that correcting inequities was a more important concern than the administrative burden which might be created by reopening employee leave records. Finally, he refers to the court's suggestion to the General Accounting Office that it reconsider its "over-all post hoc leave-substitution policy" in light of what had been discussed in the decision.

Mr. Van Eerden cites our *Interstate Commerce Commission* decision to us because it represents a liberalization of our position based on *Robert B. Lindsey* v. *United States.* He acknowledges that factually that case is different than his in that it involved the retroactive substitution of sick leave for annual leave, but he believes the principles expressed there apply broadly enough to include his situation. He refers specifically to this language from *Interstate Commerce Commission,* cited above:

> * * * we now believe that, at least in those cases where the employee retires or dies during the same year in which the leave is taken, and a timely request is made, it is appropriate to permit agencies to allow retroactive leave substitution in their discretion depending upon the circumstances of each case.

He states that the word "leave" suggests the inclusion of sick leave—not just annual leave.

DISCUSSION AND CONCLUSION

Mr. Van Eerden's circumstances are sufficiently analogous to those in *Interstate Commerce Commission* so as to make the principles expressed there applicable. In that case, an employee requested that a period of disability be charged to annual leave. He died later that same month, after which his family made a timely request to retroactively substitute sick leave for the annual leave.

This was allowed in order to increase the lump-sum leave payment to the survivor of the deceased employee.

In Mr. Van Eerden's situation, he went on sick leave pending a determination on his workers' compensation application. After a period of sick leave, he went on LWOP. Subsequently, the OWCP did grant him workers' compensation, but it was not sufficient to cover the entire period, leaving him still with a period of LWOP. He then elected to buy back the sick leave he had used and he made a timely request—at most, several months after OWCP granted him workers' compensation—to retroactively substitute his bought-back sick leave for the LWOP. Later that same year, he retired.

We have no objection to the retroactive recrediting of sick leave for the period the employee was on LWOP, if the Forest Service, in its discretion consistent with normal sick leave considerations, determines that such action is appropriate.

[B-210412]

Banks—Direct Electronic Deposit Program—Reoccurring Federal Payments—Deceased Employee's Account—Liability to Treasury Department

Upon the death of recipients of electronically transferred Government civil service retirement payments, bank becomes accountable for all subsequent deposits into account unless it satisfies Treasury regulations limiting liability to payments received within 45 days of death. Bank failed to satisfy regulations when it did not provide Treasury with names and addresses of withdrawers from the deceased's account within the times specified in the regulations.

Regulations—Constructive Notice

Even if claimant was confused by form provided by Department of Treasury, it had legal notice of regulation since publication of regulations in accordance with Administrative Procedure Act provides such notice.

Matter of: Claim Against Government—Electronic Transfer of Reoccurring Federal Payments—Bank Liability, April 11, 1984:

This is a claim against the United States for $16,433.34 presented by an attorney on behalf of the Jefferson Bank & Trust of Lakewood, Colorado (Bank). The Bank asks that the Government return to it $16,433.34 that was debited to its account with the Federal Reserve Bank at the request of the Department of Treasury (Treasury).[1] The Treasury found the Bank liable for reoccurring Government payments into an electronic funds transfer account at the Bank after the death of the individual recipient of the payments. The Bank believes that it complied with Treasury regulations that

[1] The Bank and the Treasury disagree as to the amount properly debited. Treasury debited $18,656.68 after deducting the Bank's $1,612.92 check. The Bank's claim of $16,433.34 appears to result from deducting the $1,612.92 check from $18,656.68 again. We have used the Treasury figures in this decision.

would have limited its liability to payments made within 45 days of the recipient's death. For the reasons given below, we agree with the Treasury position and deny the Bank's claim.

Facts

Until August 1981 under a direct deposit electronic transfer program, Paul A. Walter's civil service annuity payments were deposited monthly in claimant Bank. Mr. Walter died in September 1979. The Bank first became aware of the death in December 1981, when it received a copy of Mr. Walter's death certificate issued in mid-August 1981. (No explanation was provided for the long delay between the date of death and the issuance of the certificate.) Between the time of Mr. Walter's death and the date of notification to the Bank, the Bank allowed a number of withdrawals from the account. Under the agreement the Bank entered into when it accepted the direct deposit arrangement, the Bank is required to return to the Government erroneous payments made to a depositer no longer entitled to received them subject to certain specified limitations set forth in 31 C.F.R. Part 210.

In accordance with the regulations governing the Direct Deposit Electronic Deposit Program, on April 1 and 2, 1982, the Treasury Department sent first notices of accountability to the Bank. *See* 31 C.F.R. § 210.10(a). The Bank filed the form required by the Treasury (Treasury Fiscal Form 133 (TFS 133)), indicating that there were no remaining funds in the account. On April 21, 1982, Treasury returned the notice of accountability to the Bank, stating that the Bank had not provided the names and addresses of the withdrawers from Mr. Walter's account, as required by its regulations. Treasury provided another follow-up notice on May 11 (*see* 31 C.F.R. § 210.10(c)(1)), and on June 1, sent the Bank a "second notice" or request for refund (*see* 31 C.F.R. § 210.10(c)(2)). Treasury regulations provide that the second notice must be responded to within 30 days of the second notice or the Bank's account is to be debited on the Federal Reserve Bank's books. 31 C.F.R. § 210.10(c). On July 8, 37 days after the second notice, the Bank provided a completed TFS 133 to Treasury that included the missing information, along with a check for $1,612.92 covering deposits during the first 45 days after Mr. Walter's death. On August 4, 1982, however, the Treasury requested the Federal Reserve to debit the Bank's account in the amount of $18,656.68, the balance of the unrecovered withdrawals after deducting the $1,612.92 check.

Analysis

The Bank's basic disagreement with Treasury is whether its failure to provide Treasury with the names and addresses of the withdrawers from Mr. Walter's account until July 8, 1982, made it ineligible for the limited liability provided for in Treasury regulations. According to Treasury regulations, banks can limit their li-

ability to credit payments received within 45 days of its depositor's death, if they have no knowledge of the death when withdrawals are made from an account covered by the electronic deposit program and if they make "every practicable administrative effort to recover the amount which is not available in the recipient's account * * *." 31 C.F.R. § 210.9(a).

According to the Bank, it complied with Treasury's regulations by completing TFS 133 and returning it to the Treasury in response to the April 21 follow-up letter. The Bank's attorney points out that the Form TFS 133 contains no blanks calling for the names and addresses of persons withdrawing amounts from the account and concludes, therefore, it should not be penalized for failing to provide the information in timely fashion.

Treasury disagrees. Essentially, it argues, the Bank did not give the names and addresses of the withdrawers from the deceased's account until July 8, 1982, well after the deadline contained in the regulations for submission of the information. Even though the Form TFS 133 does not specifically identify a blank for this information, Treasury regulations make it clear that submission of the names and addresses of the withdrawers is part of the "administrative effort" to recover the funds withdrawn after death. As the regulations explain, the information received from the financial organization is used by the program agency to attempt to collect the withdrawals. 31 C.F.R. § 210.10(b). Accordingly, Treasury takes the position that the Bank's failure to provide this information in a timely fashion means that the Bank did not make "every practicable administrative effort to recover the amount which is not available in the recipient's account * * *." 31 C.F.R. § 210.9(a)(3). Further, the regulations establish a timetable for providing names and addresses, which under Treasury's interpretation of its regulations leaves no authority for Treasury to waive or disregard these deadlines. 31 C.F.R. § 210.10(c).

We give great weight to an agency's interpretation of its own regulations when we find, as we do in this case, that Treasury's interpretation of its regulations is reasonable. Timeliness is certainly an important factor in debt collection efforts and we think that the regulations, with their detailed specification of time periods for notices and follow-up requests, establish clearly the importance of banks responding to the requirements for information such as the names and addresses of withdrawers within the time given for response.

Regardless of the wording of the form, the regulations themselves left little doubt of what information was required. These regulations were published in the *Federal Register* (40 Fed. Reg. 47492, October 9, (1975)), and thus the Bank had legal notice of their requirements under the Administrative Procedure Act. 5 U.S.C. § 552 (1982). The regulations specifically require the names and addresses of withdrawers and explain how the Treasury will use this infor-

mation. 31 C.F.R. § 210.10(a)-(b). In addition, the entire sequence of notices and forms sent to the Bank provided it with actual notice as to what information was required. In fact, the very first follow-up notice by Treasury removes all doubt about sufficient actual notice. That form letter returned to the bank the TFS 133 for correction, with the following box checked:

You have not provided the names and addresses of withdrawers.

In summary, the Bank failed to satisfy the Treasury regulations that would have limited its liability. Treasury, therefore, properly asked the Federal Reserve to debit the Bank's account for the amount of the deposits not already returned. Accordingly, the Bank's claim is denied.

[B-211404]

Appropriations—Availability—Physical Exercise Equipment

Purchase of physical exercise equipment to be used in mandatory physical conditioning program by Bureau of Reclamation firefighters is approved. Equipment is not for "recreational" or "personal" use. Equipment is principally for benefit of Government and could not reasonably be supplied by firefighters themselves.

Payments—Voluntary—No Basis for Valid Claim—Exception—Public Necessity—Payment in Government's Interest

Employee who paid for equipment pending determination of whether purchase was authorized can be reimbursed since agency would have been authorized to pay for the equipment and was willing to do so, and the Government used and retained the equipment.

Matter of: Department of Interior—Purchase of Physical Exercise Equipment, April 17, 1984:

This decision is in response to a request for an advance decision from an authorized certifying officer of the Department of the Interior, Bureau of Reclamation (Bureau), as to whether a voucher submitted by Mr. Arthur L. Isherwood, a Bureau employee, may be certified for payment. Mr. Isherwood, an administrative officer at the Bureau's Grand Coulee Project, issued Government purchase orders for the procurement of exercise equipment for use by Bureau firefighters as part of a physical fitness program. He used $512.06 of his personal funds to pay the invoices for the equipment because doubts were raised by the certifying officer regarding the propriety of the procurement at Government expense. Mr. Isherwood is seeking reimbursement of his personal funds. We agree that the exercise equipment was neither an impermissible employee recreation expense nor an impermissible "personal expense" in view of the evidence supporting the Bureau's determination that the equipment was a necessary expense of Bureau operations, principally benefitting the Government. We therefore conclude that the voucher may be certified for payment.

The exercise equipment in question was purchased for use in a mandatory physical fitness program for firefighters at the Grand Coulee Project in the State of Washington. The program is made necessary by the high levels of strength and endurance which firefighters must maintain to fulfill their duties. The submission describes the program in detail, and includes the following information:

—Physical fitness is a requirement of the firefighters' job as mandated by position description. The program is monitored by supervisors.

—Specific levels of physical fitness for each firefighter are identified and evaluated in an ongoing program relative to established performance standards.

—The physical fitness program in use for Project firefighters is identified in the National Fire Codes which are the guidelines for all fire protection activities at this Project.

—Our program is administered and monitored by a local doctor and an annual evaluation of each firefighter is conducted by the doctor.

—The firefighters work shifts which require they be on duty 24 hours at a time. It is not practical for them to furnish their own equipment and transport it back and forth each shift. The only practical and logical means of insuring an adequate physical fitness program is for the Government to provide the necessary equipment.

—It is common practice within fire departments to provide physical fitness equipment to achieve lower injury claims and medical retirements.

The certifying officer nevertheless raises two issues: (1) is the purchase of the exercise equipment an impermissible use of appropriated funds for recreational equipment and (2) is the equipment primarily a personal expense?

In the present circumstances, we do not think that the physical fitness program contemplated for the Grand Coulee Project can be described accurately as a "recreation" program. In a 1965 case, this Office adopted a definition of "recreation" as "refreshment of the strength and spirits after toil; diversion; play; a means of getting diversion or entertainment." B–157851, October 26, 1965. Here, the equipment being purchased is not for the "diversion" or "entertainment" of the firefighters, although it may have that incidental effect, but rather is for use in a mandatory physical training program, necessary to the efficient operations of the Bureau of Reclamation.

The general rule on personal expenses is that an agency may not use appropriated funds to buy special equipment or furnishings to enable an employee to perform his or her official duties unless there is specific statutory authority. 61 Comp. Gen. 634 (1982). Obviously, this prohibition does not apply to the purchase of a great range of equipment used by employees in their work such as desks and chairs. The question of whether an expense is personal turns on whether the equipment primarily serves the needs of an individual or group of individuals that are not shared by the majority of other employees in the same circumstances. *Id.*

The record indicates that the physical training of the firefighters is an objective of the Bureau of Reclamation that cannot be accom-

plished expeditiously and satisfactorily without the equipment. Due to the nature of their job, firefighters must maintain an unusually high level of physical strength and endurance to perform satisfactorily. The exercise equipment in question appears to be reasonably calculated to maintain that high level of fitness. The equipment will be available to all firefighters. It appears that the Government, rather than the firefighters, receives the principal benefit from the equipment, in the form of improved physical capabilities on the part of its firefighters. *See* 45 Comp. Gen. 215 (1965). Moreover, the firefighters could not be expected to engage in the requisite physical training as effectively without special equipment, and we accept the Bureau's determination that, because of their schedules, it would be unreasonable to require them to furnish their own exercise equipment for use in the mandatory training program. The program must be conducted at the project site to provide the necessary monitoring and supervision.

Accordingly, the use of appropriated funds to purchase the exercise equipment in question would have been proper and the reimbursement may be made.

Finally, although the issue is not raised in the submission, we note that Mr. Isherwood used his personal funds to pay the invoices in question, and is now seeking payment on his own behalf. It has historically been the position of this Office that someone who makes a payment from personal funds, ostensibly on behalf of the Government, which he or she is not legally required or authorized to make, takes a chance that he may not be reimbursed. *See* 62 Comp. Gen. 419 (1983). In 62 Comp. Gen. 595 (1983), however, we permitted reimbursement of an employee who had paid for repairs under circumstances where the agency would have paid for the repairs but for the intervention of the employee. Similarly, here, the agency would have paid for the equipment except for the questions resolved earlier in this decision. Given the fact that the Government has received the benefit of the equipment, we have no objection to paying him for the equipment. *See* 62 Comp. Gen. 419, *id.* We must caution that had we disapproved the questioned expense, payment could not be made. Accordingly, the voucher may be certified for payment.

[B-213610]

Officers and Employees—Transfers—Real Estate Expenses—Prior to Official Notice of Transfer

Employee entered into contract to sell his residence and vacated residence prior to his selection for position under competitive procedures and Agency's formal notice of transfer. The real estate expenses claimed may not be reimbursed since the sale was not incident to his transfer, and the house for which he claims reimbursement was not his residence at the time he was officially notified of his change of station.

Matter of: James K. Marron—Claim for Relocation Expenses Incurred Prior to Notification of Transfer, April 18, 1984:

This decision is in response to a request by John R. Nienaber, an Authorized Certifying Officer of the United States Department of Agriculture, for an advance decision as to whether Mr. James K. Marron, an Agriculture Department employee, is entitled to residence transaction expenses incurred because of a permanent change of station. For the reasons that follow, we hold that he is not so entitled.

FACTS

Mr. Marron is an employee of the Soil Conservation Service (SCS), United States Department of Agriculture, and was assigned to their Snow Survey Program in Reno, Nevada. In November 1982, he became aware of a plan to reorganize the Snow Survey Program in such a way that his job, he was convinced, "would not have been the same," although the SCS insists his position was never in jeopardy. After discussing the reorganization plan with is wife, he decided he "would be happiest" in another position. Mr. Marron then applied for several new positions, none of which was in Reno, and spoke with a number of people about his desire for a new position. One of the people he spoke to was the Snow Survey Program Manager in Portland, Oregon, who assured Mr. Marron that he would do everything he could to accommodate him. Mr. Marron insists that it was during an April 20, 1983, meeting with the Program Manager that he became aware of an intent on the part of the SCS to transfer him. However, the Program Manager says that he specifically advised Mr. Marron that he had no authority to offer him the position in question, and was not in fact doing so; he was merely passing along the word that the office was trying to accommodate his request.

In the meantime, Mr. Marron had placed his home in Reno on the market and, on March 1, 1983, signed a sales agreement with a prospective buyer. The closing date, originally April 1, 1983, was postponed until May 1, then to May 20. In addition, Mr. Marron and his wife vacated the house on May 1, allowing the prospective buyers to move in so they would not "back out of the deal." Consequently, Mr. Marron was not residing in the home on May 17, the date he was finally informed of his reassignment to the Water Supply Forecasting Staff in Portland, Oregon.

The Agency denied Mr. Marron's claim for reimbursement on the basis that the sale was not related to his transfer, and the house for which he claims reimbursement was not his residence at the time he was officially notified of his change of station.

The Agency asks several questions concerning the effect of the date the sales agreement was signed (before he was officially notified of the transfer), the effect of the settlement date (after official

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notification); and the effect of Mr. Marron's vacating his residence on May 1, prior to the date he was officially notified of his transfer. A discussion of the issues follows.

OPINION

We have previously held that a contract to sell a residence before definite notice of a transfer does not in itself disqualify an employee from reimbursement for relocation expenses incurred in the sale or purchase of a residence. 48 Comp. Gen. 395 (1968). However, this decision announced a limitation concerning the time the employee incurs real estate expenses in anticipation of his transfer. It held that reimbursement is authorized only if there is an administrative intention to transfer the employee clearly evident at the time the real estate expenses were incurred. See also 52 Comp. Gen. 8 (1972). In recent cases, reimbursement has been denied when there was no clear evidence of an administrative intention to transfer the employee at the time the real estate expenses were incurred and the employing agency does not find that the sale or purchase of the residence was incident to the transfer. Further, agencies have broad discretion in deciding whether the sale or purchase was incident to the transfer. *Samuel V. Britt,* B-186763, October 6, 1976; *Joan E. Marci,* B-188301, August 16, 1977.

In this case the Agency has exercised its discretion and made a determination that the sale was not incident to Mr. Marron's transfer. We agree. Mr. Marron placed his home on the market and applied for various positions within the agency. The original settlement date for the sale of his house was extended from April 1 to May 1, when Mr. Marron did not receive a firm offer of employment. Mr. Marron then moved out of the house on May 1, and settled on May 20, 1983, 3 days after he received notification of his selection for a position in Portland. Thus, we do not believe that the sale of Mr. Marron's house was incident to his transfer. Rather, the sale was orchestrated by Mr. Marron based on a presumption that eventually he would receive a firm offer of employment, and a subsequent transfer.

Further paragraph 2-6.1d of the Federal Travel Regulations, FPMR 101-7 (September 1981), sets forth the requirement that "[t]he dwelling for which reimbursement of selling expenses is claimed was the employee's residence at the time he/she was first definitely informed by competent authority of his/her transfer to the new official station." We have held that the regulation is satisfied if the employee, in selling his house, acted on the basis of a clearly evident administrative intent to transfer him. 53 Comp. Gen. 836 (1974). What constitutes a clear intention to transfer an employee depends on the circumstances in each case. *Richard E. Fitzgerald,* B-186764, March 3, 1977.

For similar reasons previously discussed, there is no basis for concluding that there was an administrative intent to transfer Mr. Marron before he moved out of his home on May 1, 1983. He placed his home on the market sometime prior to March 1, 1983—probably at least 1 or 2 months prior to that date since the record indicates that his original listing had run out before the sales agreement was signed. The earliest date that Mr. Marron mentions any awareness of an administrative intent to transfer him was April 18, 1983, during his meeting with the Program Manager. As indicated, the Program Manager insists that he made it clear to Mr. Marron that he was not authorized to offer him a position. A firm offer was not received until May 17, 1983, after Mr. Marron had vacated his home. Thus, the home from which he claims reimbursement was not the residence from which he commuted daily at the time he was first definitely informed by competent authority of his transfer.

Accordingly, Mr. Marron's claim for reimbursement of real estate expenses pertaining to the sale of his residence is denied.

[B-214477]

General Accounting Office—Decisions—Effective Date—Retroactive

Decisions in *Overtime Compensation for Firefighters,* 62 Comp. Gen. 216 and *Gipson,* B-208831, April 15, 1983, held that where a firefighter's overtime compensation under the Fair Labor Standards Act is reduced as a result of court leave or military leave, the firefighter is entitled to receive the same amount of compensation as he would normally receive for his regularly scheduled tour of duty in a biweekly work period. The decisions in *Firefighters* and *Gipson* are retroactively effective since they involve an orignal construction by this Office of the court leave and military leave provisions. 5 U.S.C. 6322 and 6323.

Matter of: Overtime Compensation for Firefighters, April 18, 1984:

This matter is in response to inquiries to this Office concerning whether the decisions of this Office in *Matter of Overtime Compensation for Firefighters,* 62 Comp. Gen. 216 (1983) and *Matter of Gipson,* B-208831, April 15, 1983, are to be retroactively applied. It has recently come to our attention that several firefighters employed by the Department of the Air Force have filed claims for retroactive overtime compensation as a result of the *Firefighters* and *Gipson* decisions. Apparently, none of these claims have been allowed and it is the understanding of these firefighters that the Air Force has determined that the decision in *Firefighters* should only be applied prospectively. The holding in *Firefighters* and *Gipson* should be applied retroactively and any claims arising from these decisions are subject to the 6-year limitations on claims set forth in 31 U.S.C. § 3702(b).

In *Firefighters* we held that under the court leave provision, 5 U.S.C. § 6322, firefighters are entitled to receive the same amount

of pay as they would otherwise receive under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, notwithstanding periods of court leave during their regularly scheduled tour of duty. We ruled that the firefighters were entitled to receive the same compensation, including the amount of overtime pay that would have been paid under the Act, since the court leave provision, 5 U.S.C. § 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay. We noted that a similar provision pertaining to Federal employees on military leave who are engaged in training in the Reserves or National Guard is set forth at 5 U.S.C. § 6323. Accordingly, in *Matter of Gipson,* B-208831, April 15, 1983, we held that when a firefighter's overtime under the Fair Labor Standards Act is reduced as a result of military leave, the firefighter is entitled, under 5 U.S.C. § 6323, to the same amount of pay that he would otherwise receive for his regularly scheduled tour of duty in a biweekly pay period notwithstanding periods of military leave.

The view has been expressed by at least some officials of the Air Force that the decision in *Firefighters* is prospectively effective only. That is, the decision operates to allow only those claims which accrued after the date the decision in *Firefighters* was issued. The basis for this view is that we have held that where a decision of this Office has the effect of clarifying the purpose of a statute in a manner which is inconsistent with a not unreasonable interpretation of the provision by the agency responsible for its implementation, the result is a changed construction of the law and will be applied prospectively. It has been noted by these Air Force officials that, as set forth in *Firefighters*, the Office of Personnel Management had previously determined that the court leave provision did not affect the firefighters' entitlement to compensation which they otherwise would have received under the Fair Labor Standards Act and that we did not indicate that such determination was unreasonable. The Office of Personnel Management had also construed the military leave provision in the same manner as the court leave statute for the purpose of firefighters' entitlement to overtime compensation.

We wish to point out that the Office of Personnel Management's views on the effect of court leave and military leave on firefighters' entitlement to overtime compensation were not based on any regulations issued by that Office. The Office of Personnel Management has not issued any regulations to implement the court leave provision at 5 U.S.C. § 6322. Furthermore, that Office does not have any statutory authority to promulgate regulations to implement the military leave provision at 5 U.S.C. § 6323.

Generally, decisions of this Office involving the original construction of a statute, such as in *Firefighters* and *Gipson*, apply retroactively to the date that the statute first went into effect. See 40 Comp. Gen. 14, 17-18 (1960), and 39 Comp. Gen. 455, 456 (1959). As

an exception to this rule we have given prospective effect to some decisions which reversed administrative determinations by the agency responsible for implementing a provision of statute. In those cases the effect was to preclude collection action against individuals who in good faith had received payments from the Government on the basis of the invalidated administrative determinations. See 54 Comp. Gen. 890 (1975), 24 Comp. Gen. 688 (1945) and *Matter of Kornreich,* B-170589, August 8, 1974. These cases are exceptional and ordinarily a decision of first impression is effective retroactively. See *Matter of Secrest,* B-210827, September 21, 1983. The decisions in *Firefighters* and *Gipson* are not contrary to any regulations promulgated by the Office of Personnel Management and they do not overrule any determination made by that Office on the applicability of the Fair Labor Standards Act. They merely interpret the right of these employees to pay under the court leave and military leave statutes under which the Office of Personnel Management had issued no pertinent regulations.

Therefore, the decisions of this Office in *Firefighters* and *Gipson* are deemed to be retroactively effective. Claims for retroactive payment of overtime compensation based on the holdings in the decisions may be considered to the extent that the claims are not barred by the 6-year statute of limitations set forth at 31 U.S.C. § 3702(b).

[B-213973]

Bidders—Debarment—Contract Award Eligibility—Debarment Removed—Prior to Award

Award of a contract to a firm that was on the Consolidated List of Debarred, Suspended and Ineligible Contractors prior to and at the time of bid opening, but whose name was removed from the list prior to award, is proper since proper time for determining the effect of a suspension on a firm's eligibility for award is at time of award.

Bidders—Debarment—Contract Award Eligibility—Debarment Removed—Prior to Award

Bid submitted by firm that was on Consolidated List of Debarred, Suspended and Ineligible Contractors prior to and at time of bid opening need not be rejected at bid opening; therefore, determination that there is compelling reason not to reject its bid may be made any time prior to award.

Bidders—Debarment—Submission of Bids

While Defense Acquisition Regulation 604.1(a) provides that bids shall not be solicited from and contract awards cannot be made to suspended or debarred bidders, there is no proscription against a suspended or debarred firm submitting a bid, even though it cannot receive award unless removed from the list.

Matter of: Bauer Compressors, Inc., April 23, 1984:

Bauer Compressors, Inc. (Bauer), protests the award of a contract to the Davey Compressor Company (Davey) under solicitation No.

F09603-83-B-0135 issued by Warner Robins Air Force Base (Air Force), Georgia.

The protest is denied.

The solicitation, issued on July 11, 1983, covered requirements for type MC11 compressors. Bids were opened on September 14, 1983, and the low bidder was Davey. Bauer protests that at the time of solicitation of bids, as well as at the time of bid opening, Davey was on the Consolidated List of Debarred, Suspended, and Ineligible Contractors published by the General Services Administration (GSA). Bauer states that it was its understanding that Davey's bid was rejected subsequent to bid opening and that, under the circumstances, it was not possible to evaluate Davey's bid for award even though Davey's suspension was terminated on October 7, 1983.

According to the Air Force, Davey was suspended by the Air Force on June 22, 1983, pursuant to sections 1-606.2(a)(3), (4) and (c) of the Defense Acquisition Regulation (DAR), and subsequently placed on the Consolidated List of Debarred, Suspended and Ineligible Contractors. The Air Force states that it did not solicit a bid from Davey; however, Davey obtained a copy of the solicitation and submitted a bid which was opened and entered on the abstract sheet. Subsequently, Davey and the Department of Justice reached a plea agreement in which Davey pleaded guilty to 25 counts of filing false claims and agreed to pay fines of $250,000. This plea agreement, as well as a consent judgment in which Davey consented to pay restitution of $2,750,000, was to be filed with the United States District Court, Southern District of Ohio. Also, in the plea agreement and consent judgment, Davey agreed to institute certain audit and accounting procedures which would prevent a recurrence of the wrongdoing.

On the basis of the plea agreement and consent judgment, coupled with the fact that the individual responsible for the wrongdoings was no longer employed by Davey, the Air Force, on October 7, 1983, lifted Davey's suspension. Davey received award on December 13, 1983.

While DAR § 1-604.1(a) (Defense Acquisition Circular (DAC) No. 76-41, December 27, 1982) provides that bids shall not be solicited from and contract awards cannot be made to suspended or debarred bidders, we have held that there is no proscription against a suspended or debarred bidder's submitting a bid, as Davey did in the present case, even though it could not receive the award unless removed from the list. *See* B-168496, January 16, 1970. Thus, Davey's submission of a bid was proper.

Concerning the treatment of bids after receipt, DAR § 1-604.1(a)(1) (DAC No. 76-41, December 27, 1982) provides in part:

> * * * Bids received from any listed contractor in response to an Invitation for Bids shall be opened (see DAR § 2-402), entered on the Abstract of Bids (see DAR § 2-403), and rejected (see DAR § 2-404), unless the Secretary concerned or his au-

thorized representative determines in writing that there is a compelling reason to make an exception.

DAR § 2-404.2(f), (DAC No. 76-41, December 27, 1982) provides that:

> Bids received from any person or concern whose name is included in the current "Joint Consolidated List of Debarred, Ineligible, and Suspended Contractors" [this list was superseded by GSA's Consolidated List of Debarred, Suspended and Ineligible Contractors] shall be rejected if required by Section I, Part 6.

A review of section I, part 6, reveals that DAR § 1-604.1(a)(2) (DAC No. 76-41, December 27, 1982) lists several examples of compelling reasons for not rejecting a bid. One of the reasons given is when "the contractor and the Department have entered into an agreement covering the same events which resulted in the listing and agreement includes a decision by the Department not to debar or suspend the contractor." While no specific compelling reason exception was made for Davey's bid, we believe that the plea agreement and consent judgment, coupled with the Air Force's subsequent decision to lift the suspension, are analogous to the above reason and, as such, constitute a compelling reason for not rejecting Davey's bid.

However, Bauer contends that since the Government did not know at the time of bid opening that Davey's suspension would be lifted, it could not use the above reason as justification for not rejecting Davey's bid. While, admittedly, Davey was not eligible for award at bid opening time, we do not agree with Bauer's contention that Davey's bid should have been rejected at bid opening time, since the proper time for determining the effect of a suspension on a firm's eligibility for award is at award time. See *Kings Point Mfg. Co. Inc.; Gibraltar Industries, Inc.; Geonautics, Inc.*, B-210389.4; .5; .6, December 14, 1983, 83-2 CPD 683.

In this case, the contracting officer had good cause to lift the suspension. DAR § 1-601(b) (DAC No. 76-41, December 27, 1982) requires that debarment and suspension be imposed only in the public interest, for the Government's protection and not for purposes of punishment. We believe that in light of the plea agreement, consent judgment and Davey's removal of the individual responsible for the wrongdoings, the Government's interest is protected. Therefore, we believe that when the Air Force terminated Davey's suspension, it was acting within its authority to impose and terminate suspensions. Since Davey's eligibility status was changed prior to award, we believe that the contracting officer properly determined Davey to be a bidder which was eligible for award.

Accordingly, the protest is denied.

[B-210741]

Leaves of Absence—Administrative Leave—Administrative Determination—In Lieu of Holidays

Part-time employees are not covered by 5 U.S.C. 6103(b) and Executive Order 11582 which authorize designated and in lieu of holidays for full-time employees when an actual holiday falls on an employee's nonworkday. However, agencies have discretion to grant part-time employees administrative leave for these holidays.

Matter of: Shirley A. Lombardo—Part-Time Employee's Entitlement to Holiday, April 24, 1984:

The issue in this case is whether part-time employees are entitled to designated or in lieu of holidays. We hold that they are not entitled to such holidays under existing authorities, but that agencies may grant administrative leave for such holidays.

The request for an advance decision is from Virginia C. Jenkins, Director of Civilian Personnel, National Security Agency (NSA), Fort George G. Meade, Maryland, concerning the claim of Shirley A. Lombardo, a permanent part-time employee of that agency, for compensation without charge to leave for absence from work on Friday, December 24, 1982, and Friday, December 31, 1982, both designated holidays.

FACTS

Mrs. Lombardo is a permanent, part-time employee at NSA. She has a regularly scheduled workweek of Tuesday through Friday, 8 hours per day, 32 hours per week. In the 1982 holiday season, Christmas and New Year's Day fell on a Saturday. Therefore, Friday, December 24, 1982, and Friday, December 31, 1982, were observed as holidays and Mrs. Lombardo's office was not in operation. Mrs. Lombardo was charged 8 hours of annual leave for each of these days. When she inquired about it, she was advised that as a part-time employee, she was not entitled to be paid for days observed as holidays when the actual holiday fell on one of her nonworkdays.

Mrs. Lombardo requests payment for the 16 hours. She notes that she was previously employed as a permanent part-time employee at the U.S. Naval Academy and the Navy paid her for the 6 hours she was regularly scheduled to work on a Monday when Christmas and New Year's fell on a Sunday but were observed on Monday.

The agency requested a decision on this issue and notes that its policy of not compensating part-time employees for days observed as holidays when the actual holiday falls on a nonworkday is based on the Comptroller General's decisions at 32 Comp. Gen. 378 (1953) and B-192104, September 1, 1978.

DISCUSSION

As pointed out by the agency, we have previously held that part-time employees are not, as a matter of right, entitled to compensation for days observed as holidays in lieu of actual holidays. In 32 Comp. Gen. 378, cited by the agency, we reasoned that since the provisions authorizing in lieu of holidays refer to the "basic workweek" of employees, and because the definition of basic workweek refers only to full-time employees, only full-time employees are entitled to compensation for such days. See also B-192104, September 1, 1978.

We also note that 5 U.S.C. § 6103(b) and Executive Order 11582 (set out as a note following section 6103), which authorize designated or in lieu of holidays, provide very specific formulas for determining which day should be observed as a holiday when the actual holiday falls on a nonworkday. Those formulas are clearly not designed for application to part-time schedules.

For example, if part-time employees were considered to come within the scope of 5 U.S.C. § 6103 and Executive Order 11582, a part-time employee regularly scheduled to work 16 hours a week, 8 hours on Tuesday and 8 hours on Wednesday, would receive 8 hours off with pay virtually every time there was a holiday. If a holiday fell on Tuesday or Wednesday, the employee would have off because it fell on their regularly scheduled workday, consistent with 32 Comp. Gen. 378 (1953).

If a holiday fell on Sunday, under the formula in Section 3(a) of the Executive Order, the employee would get the following Tuesday off with pay. If a holiday fell on Monday, under section 6103(b)(2), the employee would have off the Wednesday of the preceding week. If a holiday fell on a Thursday, Friday, or Saturday, under section 6103(b)(2), the employee would have off the Wednesday of the same week. Thus, in the case of a part-time employee, the smaller the number of regularly scheduled workdays, the greater the proportional entitlement to designated or in lieu of holidays.

We do not believe such a strained interpretation of the statute or Executive Order is supportable. We therefore conclude that part-time employees are not covered by 5 U.S.C. § 6103(b) and Executive Order 11582.

AGENCY DISCRETION

As Mrs. Lombardo points out, however, while employed on a part-time basis at another agency, she did receive payment for designated or in lieu of holidays to the extent such holidays fell within her regularly scheduled workweek.

We note in this regard that although 5 U.S.C. § 6103(b) and Executive Order 11582 do not apply to part-time employees, an agency is not precluded from granting administrative leave to a part-time employee for the designated or in lieu of holidays of full-time em-

ployees to the extent such days fall within the regularly scheduled workweek of the part-time employee. *Roberta Sugar,* B-194821, April 24, 1980; see also *Merit Systems Protection Board,* 62 Comp. Gen. 1 (1982). In fact, we are administratively advised that, although it is not required, most career part-time employees such as Mrs. Lombardo are relieved from duty without charge to leave on the designated or in lieu of holidays of full-time employees. We favor this practice.

The administrative difficulties of requiring part-time employees to report for work when all or most other full-time employees are absent and not able to provide supervision or support services is a sufficient basis for granting administrative leave. Even in those instances where facilities may be kept in operation on weekends and holidays, agencies may give administrative leave to part-time employees for designated or in lieu of holidays where it would be in the best interest of the employees and the agency. Excusal for such brief periods is within the discretion of the employing agency. See generally, *Elmer DeRitter, Jr.,* 61 Comp. Gen. 652 (1982).

In view of the above, Mrs. Lombardo's claim is denied, but her agency is advised that it may, in its discretion, grant her administrative leave for the designated or in lieu of holidays of full-time employees which occur within her workweek.

[B-211229]

Appropriations—Reimbursement—Permanent Judgment Appropriation—Contract Disputes Act Awards

Bureau of Land Management must charge current appropriations, rather than expired appropriation "M" account, for reimbursement to permanent judgment appropriation for awards and judgments paid pursuant to Contract Disputes Act. For purposes of reimbursement requirement of 41 U.S.C 612(c), a court judgment or monetary award by a board of contract appeals is viewed as giving rise to a new liability.

Appropriations—Deficiencies—Anti-Deficiency Act—Violations—Not Established—Judicial, Quasi-Judicial Awards

Antideficiency Act violation does not occur when agency has insufficient current appropriations to satisfy award or judgment rendered against it pursuant to Contract Disputes Act. Judicial or quasi-judicial judgments or awards do not involve a deficiency created by an administrative officer and are not viewed as violations of the Antideficiency Act.

Matter of: Bureau of Land Management—Reimbursement of Contract Disputes Act Payments, April 24, 1984:

This is in response to a request for a decision from Mr. Edward P. Greenberg, an authorized certifying officer of the Bureau of Land Management (BLM) of the Department of the Interior. Mr. Greenberg requests our advice regarding the availability of appropriated funds to reimburse the permanent judgment appropriation established by 31 U.S.C. § 1304 (formerly § 724a) for contract claims charged against the permanent judgment appropriation in accord-

ance with the Contract Disputes of 1978. The claims in question arise from construction contracts negotiated prior to fiscal year 1981. BLM proposes to charge payments to an expired appropriation "M" account, but does not make clear whether it intends to restore any expired surplus obligation authority to the "M" account in order to record the obligation. As discussed below, we conclude that only appropriations current as of the date of the award are available for reimbursement of the permanent judgment appropriation by BLM.

The Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.* (Supp. IV 1980), established a mechanism for the resolution and payment of claims and disputes arising from contracts of the executive branch. Payment of judgments and awards under the Act is covered by 41 U.S.C. § 612 (Supp. IV 1980) which reads, in part:

> § 612. Payment of claims.
> (a) Judgments.
> Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 724a of title 31.
> (b) Monetary awards.
> Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.
> (c) Reimbursement.
> Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 724a of title 31 by the agency whose appropriations were used for the contract *out of available funds* or by obtaining additional appropriations for such purposes. [Italic supplied.]

Judgments against the United States by the Court of Claims and monetary awards to a contractor by a board of contract appeals are authorized to be paid and charged to the permanent judgment appropriation established by 31 U.S.C. § 1304 (formerly § 724a). The agency must then reimburse the permanent judgment appropriation "out of available funds" or by obtaining an additional appropriation.[1]

The disputed claims in question arise from BLM building, recreation, and transportation contracts entered into prior to fiscal year 1981. The claims have been presented pursuant to the Contract Disputes Act of 1978, and are expected to total approximately $1 million. According to BLM, all available appropriated funds for construction are "committed" to projects currently approved and underway, and are not available for the payment of contractor claims. However, BLM proposes to charge the reimbursement to the permanent judgment fund to its expired appropriation "M" account, discussed below, in the event the claims result in judgments or awards in favor of the contractors. An "M" account is a consolidated successor account to which obligated but unliquidated bal-

[1] Since the judgment fund is a permanent indefinite appropriation this "reimbursement" does not represent a restoration of, or an increase in, the level of the fund's obligation authority. Instead, it serves to adjust the level of appropriation authority available to the agency for otherwise authorized purposes.

ances of appropriations are transferred on September 30 of the second full fiscal year after the expiration of their availability. 31 U.S.C. § 1552 (formerly § 701). The "M" account is available to liquidate any obligation attributable to any of the appropriations from which it is derived. 31 U.S.C. § 1553 (formerly § 702). *See* B-114874, September 16, 1975.

Prior to the Contract Disputes Act, monetary awards by agency boards of contract appeals were paid directly by the contracting agency, in the same manner as settlements by a contracting officer still are. A judgment of a court, however, was paid from the permanent judgment appropriation with no requirement for reimbursement. Under this system, the concern developed that agencies might prolong litigation until ultimate resolution by a court, thereby shifting the financial burden from the agency's own appropriations to the General Fund of the Treasury. The Commission on Government Procurement created in 1969 recognized this problem, and recommended in its final report to the Congress in 1972 that court judgments on contract claims be made payable from agency appropriations.

The payment provisions of the Contract Disputes Act (41 U.S.C. § 612, quoted above) are based largely on this recommendation. The use of the permanent judgment appropriation assures a source of funds for prompt payment of final judgments and awards. Promptness in payment is desirable for the Government as well as the contractor, since interest under 41 U.S.C. § 611 runs until the award is paid. The reimbursement requirement fosters agency accountability, and removes any incentive to prolong litigation since it applies to court judgments as well as board awards. Thus, the Contract Disputes Act marked a significant change in the way monetary awards by boards of contract appeals are paid.

In a number of situations involving the administrative settlement of claims against the United States, we have held that payment is chargeable to appropriations current at the time of final action on the award. *See, e.g.,* B-174762, January 24, 1972; 27 Comp. Gen. 237 (1947). This rule is grounded on the theory that the court or administrative award "creates a new right" in the successful claimant, giving rise to new Government liability. *See* 1 Comp. Gen. 200 (1921). Accordingly, "there is no obligation on the part of the United States for payment of any amount on a claim until a final determination of the Government's liability is made" by the designated authority. 27 Comp. Gen. at 238. We have applied this rule with respect to claims under the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 3721, under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (1976), and under provisions of the Foreign Service Act of 1946, 22 U.S.C. §§ 1156(a), 1157(a) (1976), now repealed. *See* B-174762, January 27, 1972; B-80060, September 30, 1948; 27 Comp. Gen. 237 (1947).

The rule discussed in the preceding paragraph has not been applied to contract claims in the past. Rather, the question in contract claims has been whether the liability stems from a right arising out of the original contract. While we do not disturb this concept as it relates to agency settlements at the contracting officer level, our review of the Contract Disputes Act—the enhanced status of boards of contract appeals and the apparent congressional intent behind the change in the payment process—leads us to conclude that reimbursements under 41 U.S.C. §612(c) should be treated as new obligations.

The legislative history of the Contract Disputes Act supports our conclusion that current funds should be used to reimburse the permanent judgment appropriation pursuant to the Act. The report on the Senate bill included the following explanation for the reimbursement provision:

> In order to promote settlements and to assure the total economic cost of procurement is charged to those programs, all judgments awarded on contract claims are to be paid from the defendant agency's appropriations. If the agency does not have the funds to make the payment the agency is to request additional appropriations from Congress.
>
> One of the Commission's primary objectives was to induce more resolution of disputes by negotiation and settlement. Requiring the agencies to shoulder the responsibility for interest and payment of judgments brings to bear on them the only real incentives available to induce more management involvement in contract administration and dispute resolution. Either the agencies must use some part of their program funds to pay the interest and the judgment, or they must seek additional funds from Congress for this purpose. The former course can have an impact on current programs; the latter would necessitate an explanation to a congressional committee. While these are negative incentives they offer some counterpart to the economic considerations a contractor must evaluate in deciding whether to settle a claim or to litigate.

S. Rep. No. 95-1118, 95th Cong., 2nd Sess. 33 (1978).

The report's reference to "an impact on current programs" implies an understanding on the part of Congress that reimbursement of the permanent judgment appropriation was to be made from funds otherwise available for ongoing programs, *i.e.,* current funds.

In commenting on the proposed contract disputes legislation to the House Committee on the Judiciary, we supported the provision that became 41 U.S.C. §612:

> We favor this approach since it ultimately obligates the agency to account for all awards against it out of its own appropriations. This eliminates the existing incentive for agencies to avoid settlements and prolong litigation in order to have the final judgment occur in court and thus not payable out of its own appropriations. This will also provide availability to Congress as to the true economic cost of procurement programs.

B-107871, August 17, 1977, reprinted in H.R. Rep. No. 95-1556 at 86 (1978). In our opinion, the desired visibility to which we alluded in this comment is best achieved by the use of current funds.

Further, one of the primary objectives of the reimbursement provision "was to induce more resolution of disputes by negotiation and settlement." *Id.* at 33. This objective would be substantially defeated if contracting agencies were allowed to use funds from ex-

pired appropriation accounts to reimburse the permanent judgment appropriation. Payment from an expired account could often amount to a mere bookkeeping transaction for an agency. However, charging this payment to current appropriations would typically be of much more consequence to an agency because it could affect the operation of ongoing programs. If an agency knew that an award or judgment would be payable from expired appropriations, it would have little incentive to negotiate and settle claims prior to final adjudication. This is exactly the result Congress sought to avoid with the reimbursement provision.

Accordingly, we conclude that BLM may not charge reimbursements to the permanent judgment appropriation made pursuant to the Contract Disputes Act against an expired appropriation "M" account. Rather, BLM must charge the appropriation account current as of the date of the award or judgment.

Mr. Greenberg has also asked whether a violation of the Antideficiency Act, 31 U.S.C. § 1341, occurs when "an agency is required to seek an appropriation from Congress to reimburse the permanent judgment account and does not receive the appropriation" resulting in a situation in which "current funds are insufficient to cover the Court or contract board's judgment." We conclude that no Antideficiency Act violation would occur in those circumstances. It has been the position of this Office that a judicial or quasi-judicial judgment or award "does not involve a deficiency created by an administrative officer." 1 Comp. Gen. 540, 541 (1922). Accordingly, such an award would not be viewed as violating the Antideficiency Act. 62 Comp. Gen. 692 (1983).

Further, we note that the circumstances in which Congress fails to make additional appropriations out of which a judgment or award could be satisfied would be relatively rare. In our view, the phrase "additional appropriations for such purposes" in 41 U.S.C. § 612(c) refers to any subsequent appropriation available to the agency to pay the claim in question, not necessarily to a specific "line item" appropriation made to satisfy a particular judgment. Accordingly, unless funding for a particular agency function were discontinued by the Congress, it is unlikely that further appropriations to pay a given judgment or award would not ultimately be available.

[B-213903]

Bidders—Invitation Right—Mailing List Omission

Alleged cumulative impact of failure to include on appropriated fund activity's bidders mailing list a protester leasing similar items to nonappropriated fund activity on same base, and of an untimely, allegedly misclassified, Commerce Business Daily notice of the procurement which understated the quantity being procured, does not require reversal of agency determination not to resolicit where protester fails to show that agency deliberately attempted to exclude it from competition and where, although only one bid was received, the agency made a significant effort to obtain

competition and protester has failed to show that award was made at an unreasonable price. Distinguishes 54 Comp. Gen. 973.

Matter of: Solon Automated Services, Inc., April 24, 1984:

Solon Automated Services, Inc., protests the award of a contract by the Department of the Navy to the sole bidder under invitation for bids (IFB) No. N00140-83-B-1238 for the lease of washers and dryers for use at the United States Naval Base, Philadelphia, Pennsylvania, and at the Naval Regional Medical Center in Philadelphia. Solon complains that it did not receive a copy of the solicitation. We deny the protest.

As issued on August 15, 1983, the IFB requested bids for the lease, with maintenance, of a total of 101 washers and 98 dryers. Bid opening was set for September 9, 1983. By a request dated August 16, the Commerce Business Daily was furnished with a suggested synopsis of the procurement. However, the suggested synopsis indicated that only 89 washers and 93 dryers were being procured, while the CBD notice actually published on August 26 only mentioned the 15 washers and 15 dryers to be used at the medical center. The CBD notice also provided, as did the suggested synopsis, that requests for copies of the IFB must be received no later than 14 days after publication of the notice, and specifically warned bidders that the requests must be transmitted by letter or telegram rather than by telephone. However, the notice failed to mention that the fourteenth day—September 9—was the date of bid opening.[1]

Copies of the IFB were sent to two firms which had responded to previous solicitations for this requirement, to two firms located through a commercial publication, the Thomas Register, and to three additional firms which requested copies pursuant to the CBD notice. However, only one bid, that of Coin Automatic Laundry Equipment Co. (CALECO), was received. Award was made to CALECO at its bid price of $18.50 per month for each of 5 double-capacity dryers and $9.25 per month for each of the remaining 194 washers and dryers. When Solon, which was not on the bidders mailing list, subsequently learned of the solicitation and award, it filed this protest with our Office.

Solon contends that certain errors and omissions in the procurement require termination of the contract with CALECO and resolicitation of the requirement. In particular, Solon alleges that

[1] This procurement was initiated prior to the effective date of Pub. L. No. 98-72, 97 Stat. 403 (1983), and therefore was not covered by the amendments which that statute made to section 8(e) of the Small Business Act, 15 U.S.C. § 637, including the provision that:

(2) Whenever a Federal department is required to publish notice of procurement action [in the Commerce Business Daily], such department shall not—

(A) Issue a solicitation until at least fifteen days have elapsed from the date of publication of a proper notice of the action in the Commerce Business Daily * * *.

Such notice is to include "a clear description of the * * * services to be contracted for * * *."

it was omitted from the bidders mailing list. Solon finds its failure to receive a copy of the solicitation particularly difficult to understand, since it was already providing similar services for the base exchange. Solon further alleges that the CBD notice was defective, contending: (1) that it was untimely because the procurement was synopsized 11 days after issuance of the solicitation rather than the 10 days prior to issuance which Defense Acquisition Regulation § 1-1003.2 (Defense Acquisiton Circular No. 76-46, August 24, 1983) requires, if possible; (2) that the notice was misclassified because it should have been published under Section W, "Lease or Rental, except Transportation and ADP Equipment," rather than under the section suggested by the Navy and selected by the CBD, that is Section S, "Housekeeping Services;" and (3) that it was misleading because the misstatement of the number of machines to be leased deterred participation by larger contractors interested only in larger quantities and because the 14-day deadline for submission of requests for copies of the IFB expired on September 9, the date set for opening bids.

We have previously held that neither the omission of a firm from the bidders mailing list nor the alleged inadequacy of a CBD notice prevents award and requires resolicitation, even though only one bid was received, provided that there was no deliberate attempt to exclude the protester from competition, there was a significant effort to obtain competition, and a reasonable price was obtained. See *Blast Deflectors, Inc.,* B-212610, January 9, 1984, 84-1 CPD 56.

The Navy has determined that there was no deliberate attempt to exclude Solon or any other potential bidder from competition, that there was a significant attempt to obtain competition, and that a reasonable price was obtained. The Navy denies that Solon was ever on a bidders mailing list maintained by the Naval Regional Contracting Center, which conducted the procurement; states that there is no indication that Solon had ever requested to be placed on any such list; and therefore concludes that Solon was never omitted from such list. The Navy also reports that the exchange is a nonappropriated fund activity for which the contracting center, an appropriated fund activity, conducts no procurements, and declares that no one at the center was award of Solon's contract with the exchange. Further, we believe that the public advertising, though flawed, of the procurement weighs against any inference that contracting officials deliberately sought to exclude Solon from competition. See *Culligan Incorporated, Cincinnati, Ohio,* 56 Comp. Gen. 1011 (1977), 77-2 CPD 242 (misclassified CBD announcement); see also *Valley Construction Company,* B-185684, April 19, 1976, 76-1 CPD 266. Likewise, the public advertising and the solicitation of all firms on the bidders list, supplemented here by use of the Thomas Register, has been held to constitute a significant attempt to obtain competition. See *Culligan Incorporated, Cincinnati, Ohio, supra*; see also *Blast Deflectors, Inc., supra; Hartridge*

Equipment Corporation, B-209061, March 1, 1983, 83-1 CPD 207. As for the agency's determination of the reasonableness of CALECO's bid price, this is a matter of administrative discretion which our Office will not question unless the determination is unreasonable or there is a showing of bad faith or fraud. See *Introl Corp.; Forster Enterprises,* B-209096, B-209096.2, June 9, 1983, 83-1 CPD 633. That CALECO's bid price of $9.25 per month per regular size machine is the same as or less than the contract price obtained under the previous four procurements for this requirement suggests the reasonableness of the price and Solon has presented no evidence to the contrary.

However, Solon contends that, even if under the case law resolicitation might not be required where a procurement was marred by only one of the errors alleged here, nevertheless the cumulative impact of all of these errors is sufficient to require resolicitation. In support of this contention, Solon cites our decision in *Scott Graphics, Incorporated, Photomedia Corporation,* 54 Comp. Gen. 973 (1975), 75-1 CPD 302, wherein we held that, given the cumulative impact of the agency's deletion of the incumbent contractor from the bidders mailing list, the failure to synopsize, and the small number of manufacturers for the item being procured, we would not object to the agency's decision to resolicit the procurement. However, we find the facts of *Scott Graphics, supra,* to be distinguishable. Contracting officials here, unlike those in *Scott Graphics,* synopsized the procurement. Although Solon argues that, given the cumulative effect of the alleged errors, the CBD notice was of little or no value, we note that the CBD notice in fact drew three requests for copies of the IFB and we believe that the public advertisement of the procurement tends to show that contracting officials did not deliberately exclude Solon or any other potential competitor but instead made a significant effort to obtain competition. Finally, in contrast to *Scott Graphics,* where we refused to object to the agency's exercise of its discretion to resolicit the requirement, here the agency has exercised its discretion and determined that resolicitation was not in the best interest of the Government. See *Preventive Health Programs, Inc.,* B-195877, January 22, 1980, 80-1 CPD 63.

We instead find that the facts here more closely resemble those in *Preventive Health Programs, Inc., supra,* where we did not overturn the agency refusal to resolicit, even though the agency had omitted a previous supplier from the bidders mailing list and had failed to synopsize the procurement, because it appeared that no deliberate attempt had been made to exclude the protester and the agency had made a significant effort to obtain competition which in fact secured a reasonable price. See also *Blast Deflectors, Inc., supra* (agency determination not to resolicit upheld despite omission from bidders list of firm which had expressed interest in the

procurement, a CBD notice allegedly rendered inadequate by misclassification, and the receipt of only one bid).

Since Solon has failed to show that the Navy deliberately attempted to exclude it from competition or that the Navy's significant efforts to obtain competition did not produce a reasonable price, the protest is denied.

[B-193068]

Compensation—Night Work—Regularly Scheduled Night Duty—Duty of Particular Employee Requirement—Intermittent Overtime

Night differential under 5 U.S.C. 5545(a) may not be paid to employees who worked occasional overtime at night during a regularly scheduled tour of duty, but not their own, on or after Feb. 28, 1983. Effective that date, regulations implementing 5 U.S.C. 5545(a) limit the payment of night differential for "regularly scheduled" work to nightwork performed by an employee during his own regularly scheduled administrative workweek.

Compensation—Night Work—Regularly Scheduled Night Duty—Not Necessarily That of Particular Employee—Intermittent Overtime

Night differential under 5 U.S.C. 5545(a), as interpreted by decisions of this Office, may be paid to employees who worked overtime at night during a regularly scheduled tour of duty, but not their own, prior to Feb. 28, 1983. Implementing regulations effective on that date which limit payment of night differential for "regularly scheduled" work to nightwork performed during an employee's own regularly scheduled administrative workweek will not be applied retroactively since, in the absence of obvious error, regulations may be amended to increase or decrease rights on only a prospective basis.

Compensation—Premium Pay—Sunday Work Regularly Scheduled—Not Overtime Duty

Employees who performed work on Sundays in addition to their basic 40-hour workweeks and who were paid overtime compensation for additional hours are not entitled to premium pay under 5 U.S.C. 5546(a), which authorized such pay only for nonovertime hours worked on Sundays.

Matter of: James Barber, et al.—Night Differential and Sunday Premium Pay Entitlement, April 25, 1984:

The National Treasury Employees Union (NTEU), on behalf of 11 employees of the Internal Revenue Service (IRS), National Computer Center, appeals our Claims Group settlements disallowing the employees' claims for night differential and Sunday premium pay. For the reasons stated below, night differential may be paid for the period prior to February 28, 1983.

FACTS

The claimants, employed as Resident Programming Analysts at the National Computer Center (NCC) in Martinsburg, West Virginia, create computer programs which analyze data on taxpayers.

The analysts' regular tours of duty are 8:15 a.m. to 4:45 p.m., Monday through Friday.

Computer operators in the Martinsburg office are responsible for transferring programs created by the analysts onto computer tapes. Since the computers operate continuously, operators are regularly scheduled to work 8-hour shifts which continue around-the-clock, 7 days a week. Occasionally, an operator encounters a problem transferring a program onto computer tape outside of an analyst's regular duty hours, and the analyst is called in to provide assistance. Analysts are paid overtime compensation for additional hours worked at night and on weekends, but do not receive night differential or Sunday premium pay. Apparently, IRS has concluded that the analysts are not entitled to premium pay for night and Sunday work since such work is not included in their regular tours of duty.

On February 21, 1980, NTEU submitted the employees' claims to our Claims Group requesting night differential and Sunday premium pay for overtime worked prior to January 1, 1978.[1] By settlements dated May 22, 1980, our Claims Group disallowed that protion of the claims arising prior to February 21, 1974, based on the statute of limitations which precludes our Office from considering claims received more than 6 years after the date they first accrued. 31 U.S.C. §3702(b), as codified by Public Law 97-258, 96 Stat. 877, September 13, 1982 (formerly contained in 31 U.S.C. §71a). With respect to the period February 21, 1974, to January 1, 1978, our Claims Group found that the employees failed to provide evidence demonstrating that they performed work which would entitle them to night differential or Sunday premium pay. Our Claims Group indicated that this Office would reconsider the employees' claims when they submitted records showing the frequency and amount of work performed at night and on Sundays.

The NTEU has submitted copies of time and attendance records showing overtime hours the employees work at night and on Sundays between January 1977 and August 1983. The union argues that the employees are entitled to night differential on the basis of 5 U.S.C. §5545(a), which authorizes a differential of 10 percent of an employee's basic compensation to be paid in addition to basic pay for any "regularly scheduled" work between 6 p.m. and 6 a.m. Specifically, NTEU maintains that the employees performed "regularly scheduled" nightwork within the meaning of 5 U.S.C. §5545(a), since they were called in to work during regularly scheduled night shifts established for the computer operators. In support of this position, the union cites our decisions in 36 Comp. Gen. 657 (1957), and 34 Comp. Gen. 621 (1955), which state that any occasion-

[1] On January 1, 1978, NCC began to schedule analysts to work 8-hour shifts continuing around-the-clock, 7 days a week and to pay them night differential and Sunday premium pay. Three months later, the analysts were returned to their former tours of duty (8:15 a.m. to 4:45 p.m., Monday through Friday), and denied premium pay for night and Sunday work.

al overtime performed by an employee between the hours of 6 p.m. and 6 a.m., which falls within a regularly scheduled tour of duty, but not necessarily his own scheduled tour, qualifies for the payment of night differential.

The union further points out that provisions of the Federal Personnel Manual and the Internal Revenue Manual authorize payment of night differential to an employee who is temporarily assigned to a tour of duty which includes regularly scheduled nightwork. Additionally, the union cites several Court of Claims decisions holding that an employee who works overtime between 6 p.m. and 6 a.m. is entitled to both night differential and overtime compensation.

The NTEU next argues that the employees are entitled to Sunday premium pay (25 percent of basic pay) under 5 U.S.C. § 5546(a), which authorizes such pay for employees who perform nonovertime work during a regularly scheduled 8-hour period of service, any part of which falls on Sunday. The union maintains that, under the provisions of 5 U.S.C. §§ 5546(d) and (e), Sunday premium pay is payable in addition to overtime compensation and night differential. Additionally, citing our decisions in 36 Comp. Gen. 657, and 34 Comp. Gen. 621, pertaining to night differential, the union contends that the employees are entitled to premium pay for Sunday work which is included in the operators', but not their own, scheduled tours of duty.

DISCUSSION

As indicated by the union, 5 U.S.C. § 5545(a) authorizes the payment of night differential for "regularly scheduled" work performed between the hours of 6 p.m. and 6 a.m. The term "regularly scheduled" is not defined in the statute, and, until recently, the Office of Personnel Management's (OPM) implementing regulations contained in 5 C.F.R. Part 550 did not address the subject. See the discussion of OPM's revised regulations, below. In the absence of statutory or regulatory guidance, we consistently held that any occasional overtime performed by an employee between the hours of 6 p.m. and 6 a.m., which falls within a regularly scheduled tour of duty, but not necessarily his own, results in the payment of night differential. 59 Comp. Gen. 101 (1979); 41 Comp. Gen. 8 (1961); 34 Comp. Gen. 621, cited previously. In 59 Comp. Gen. 101, we stated that the scheduled tour of duty must be in the same office or unit in order to qualify for night differential.

Effective February 28, 1983, OPM revised several provisions of the regulations in 5 C.F.R. Parts 550 and 610, governing pay administration and hours of duty. The stated purpose of the revised regulations, published in 48 Fed. Reg. 3931, January 28, 1983, is to clarify the relationship between an agency's responsibility to establish regularly scheduled administrative workweeks for its employ-

ees, and an employee's entitlement to premium pay for regularly scheduled night, Sunday, and holiday work, and for overtime outside of his regularly scheduled administrative workweek. The relevant provisions define the concept of a "regularly scheduled administrative workweek" as an administrative workweek scheduled in advance and corresponding to the employee's actual work requirements. 5 C.F.R. §§ 550.103(n), and 610.121(b)(1). The payment of night differential for "regularly scheduled" work is limited to work the employee performs during his regularly scheduled administrative workweek. 5 C.F.R. § 550.103(e).

Commenting on the revised regulations when they were first proposed, we advised OPM that the changes would have an impact on our decisions interpreting 5 U.S.C. § 5545(a), to allow payment of night differential to an employee who is not scheduled to perform nightwork but works overtime during a regularly scheduled night shift. See 59 Comp. Gen. 101, cited above. We pointed out that, under the revised regulations, an employee would be entitled to night differential only for nightwork performed during his own regularly scheduled administrative workweek. Work at night outside the employee's scheduled workweek would be considered irregular or occasional, with no entitlement to night differential. 5 C.F.R. §§ 550.103(e) and (f). We noted that the only exception to this limitation would be provided by 5 C.F.R. § 550.122(d), which authorizes night differential for an employee who is temporarily assigned to a different tour of duty that includes nightwork.

The OPM concurred with our analysis in commentary accompanying the final regulations, stating that:

> GAO commented that OPM's definition of the term "regularly scheduled" would impact on prior decisions * * * holding that a General Schedule employee who works occasional overtime at night during a regularly scheduled tour of duty, but not his tour of duty, is entitled to night differential (See 59 Comp. Gen. 101 (1979));* * *
>
> OPM agrees. Under OPM's definition of the term "regularly scheduled," it is the employee who must be scheduled to perform the work, including nightwork, and the work must be scheduled in advance of the administrative workweek as part of the employee's regularly scheduled administration workweek to be considered "regularly scheduled." Accordingly, these prior decisions would no longer be controlling. 48 Fed. Reg. 3931.

ENTITLEMENT TO NIGHT DIFFERENTIAL ON OR AFTER FEBRUARY 28, 1983

Applying the revised regulations as interpreted by OPM and our Office, it is clear that the claimants are not entitled to a 10 percent differential for nightwork performed on or after February 28, 1983, the effective date of the regulations, since such work was not scheduled as part of their own administrative workweeks. Further, although the union maintains that payment of night differential is warranted because the employees were temporarily assigned to the operators' tours of duty which include nightwork, the revised provi-

sions of 5 C.F.R. § 550.122(d) narrowly define the term "temporary assignment" for night differential purposes as follows:

> (d) *Temporary assignment to a different daily tour of duty.* An employee is entitled to a night pay differential when he or she is temporarily assigned during the administrative workweek to a daily tour of duty that includes nightwork. *This temporary change in a daily tour of duty within the employee's regularly scheduled administrative workweek is distinguished from a period of irregular or occasional overtime work in addition to the employee's regularly scheduled administrative workweek.* [Italics supplied.]

Since the agency did not change the analysts' daily tours of duty to include nightwork during the relevant period, but required them to work night hours in addition to their regularly scheduled administrative workweeks, the employees were not "temporarily assigned" to a different tour of duty within the meaning of 5 C.F.R. § 550.122(d). Accordingly, we hold that the employees are entitled only to overtime pay, with no night differential, for nightwork performed on or after February 28, 1983.

RETROACTIVE APPLICATION OF REVISED REGULATIONS

The next question for our determination is whether the revised regulations should be applied retroactively, so as to preclude payment of night differential for work the employees performed prior to February 28, 1983. In commentary accompanying the final regulations, OPM states that the regulations serve only to clarify terms, such as "regularly scheduled," which appear in the Federal Employees Pay Act of 1945, as amended. The OPM further states that the Court of Claims in *Bennett* v. *United States,* No. 565–78 (Ct. Cl. September 30, 1982), adopted OPM's interpretation of the term "regularly scheduled." On this basis, OPM concludes that, "all claims for the payment of premium pay for 'regularly scheduled' work (including work performed during prior periods) should be settled based on the definition of this term as clarified in these regulations." 48 Fed. Reg. 3933.

We note that *Bennett* v. *United States,* No. 565–78 (Ct. Cl. September 30, 1982), cited by OPM, was an interlocutory order in which the Court of Claims adopted its Trial Division's recommendations concerning overtime claims filed by Deputy United States Marshals, and remanded the case for further proceedings. For an outline of the procedural history, see *Bennett* v. *United States,* No. 565–78C (Ct. Cl. January 20, 1984), a memorandum decision in which the Court of Claims finally dismissed the plaintiffs' complaints for failure to demonstrate damages. The deputy marshals, who had been paid for overtime worked between 1972 and 1978 at rates prescribed for administratively uncontrollable overtime, claimed that they should have been paid at the higher rates applicable to regularly scheduled overtime.

As part of its determination that overtime worked by the deputy marshals did not qualify as regularly scheduled overtime, the Trial

Division reviewed our decisions and various court cases defining the term "regularly scheduled" for overtime purposes. *Bennett* v. *United States,* No. 565-78 (Ct. Cl. August 4, 1982). The Trial Division noted that our decisions, as well as Court of Claims cases including *Aviles* v. *United States,* 151 Ct. Cl. 1 (1960), interpreted the term "regularly scheduled" as referring to overtime work which is authorized in advance and recurs on a regular or habitual basis. On the other hand, the Trial Division noted that the Court of Claims decision in *Anderson* v. *United States,* 201 Ct. Cl. 660 (1973), defined "regularly scheduled" overtime as overtime which is regularly prescribed in accordance with the applicable statutes and regulations. The Trial Division chose to apply the *Anderson* definition of the term "regularly scheduled" with respect to the deputy marshals' overtime claims. While the Trial Division recognized that OPM had adopted the *Anderson* definition in amendments to 5 C.F.R. Parts 550 and 610, its determination turned on the *Anderson* decision itself and not on a retroactive application of the amended regulations.

Furthermore, we have consistently held that regulations may be amended prospectively to increase or decrease rights under them, but, in the absence of an obvious error, they may not be amended retroactively. B-205237, March 15, 1982; 32 Comp. Gen. 527 (1953). The OPM's regulations amending 5 C.F.R. Parts 550 and 610 do not correct any error in the prior regulations; rather, the revised regulations represent a changed interpretation of the statutes governing overtime and night differential pay which tend to decrease entitlements to this premium pay. Accordingly, we hold that the revised regulations may not be applied to defeat claims for night differential which accrued before February 28, 1983, the effective date of the regulations.

ENTITLEMENT TO NIGHT DIFFERENTIAL PRIOR TO FEBRUARY 28, 1983

Since the revised regulations may not be applied retroactively, the principles stated in our decision 59 Comp. Gen. 101 govern the employees' entitlement to night differential for work performed between January 1977 and February 28, 1983. As discussed above, we held in 59 Comp. Gen. 101 that occasional overtime performed by an employee between the hours of 6 p.m. and 6 a.m. which falls within a regularly scheduled tour of duty, but not necessarily the employee's own, results in the payment of night differential. Additionally, we stated that the scheduled tours of duty must be in the same office or unit in order to qualify for night differential.

As indicated previously, analysts employed in the Martinsburg office have been called in at night to assist computer operators working in the same office. Since shifts established for the operators continue around-the-clock, 7 days a week, any work performed

by the analysts between the hours of 6 p.m. and 6 a.m. necessarily must have fallen within a regularly scheduled tour of duty. Accordingly, we hold that the employees are entitled to be paid a 10 percent differential for nightwork performed between January 1977 and February 28, 1983.

ENTITLEMENT TO SUNDAY PREMIUM PAY

The union also contends that the employees are entitled to Sunday premium pay under 5 U.S.C. § 5546, even though the work they performed on Sundays did not fall within their own scheduled adminstrative workweeks. As a fundamental basis for this contention, the union interprets 5 U.S.C. § 5546(d) as authorizing Sunday premium pay in addition to overtime compensation.

The entitlement of an employee to Sunday premium pay is governed by 5 U.S.C. § 5546(a) (1982), which provides:

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

As the language of section 5546(a) plainly states, Sunday premium pay is payable only for that time which is not overtime. See *Civilian Nurses,* B-200354, December 31, 1981, 61 Comp. Gen. 174. Section 5546(d), cited by the union, does not prescribe a conflicting rule, but simply states that an employee who performs overtime on a Sunday is entitled to overtime compensation under 5 U.S.C. § 5542. The provisions of section 5542 authorize overtime pay at one and one-half an employee's basic rate of compensation for authorized or approved hours of work which exceed 40 hours in an administrative workweek, or 8 hours in a day.

The record shows that the claimants have performed Sunday work in addition to their basic 40-hour workweeks and that they have been paid overtime compensation for the additional work. Accordingly, under the provisions of 5 U.S.C. § 5546(a), the employees are not entitled to Sunday premium pay.

Payment of night differential should be made in accordance with the above.

[B-213895]

Uniformed Services Former Spouses' Protection Act—Retired or Retainer Pay—Apportionment—Tax Withholdings—Propriety

In computing the amount of the net monthly military "disposable retired or retainer pay" which is subject to apportionment under the Uniformed Services Former Spouses' Protection Act, in the absence of specific directions in the Act or regulations, the deductions of regular and additional Federal income tax withholdings from gross retired pay may not be fixed at a combined percentage rate exceeding the retiree's projected effective tax rate, that is, the ratio of the retiree's anticipated total income taxes to his anticipated total gross income from all sources.

Uniformed Services Former Spouses' Protection Act—Retired or Retainer Pay—Apportionment—Tax Withholdings—Propriety

If retired military personnel request additional income tax withholdings beyond the regularly required withholdings in the computation of the net or "disposable" military retired pay which is subject to apportionment under the Uniformed Services Former Spouses' Protection Act, they are required by statute to present factual evidence demonstrating the existence of a tax obligation warranting the additional withholdings. Consequently, no additional tax withholding may be allowed in the computation of disposable retired pay in the case of a retired Air Force colonel who gave only a rough estimate or opinion of his projected tax obligations and presented no financial records as evidence in support of the estimate.

Taxes—Federal—Income—Jurisdiction—Internal Revenue

Although the Comptroller General has jurisdiction to resolve questions relating to the computation of net military "disposable retired or retainer pay" under the Uniformed Services Former Spouses' Protection Act, revenue rulings concerning the withholding of Federal taxes from income, as well as rulings concerning the income tax liabilities and withholding credits of individual taxpayers, are reserved by statute for determination primarily by the Department of the Treasury, Internal Revenue Service. Thus, even though a retired Air Force colonel may not have the additional tax withholdings he requested included in the computation of disposable retired pay to be apportioned under the Act, the concerned revenue authorities may well determine that additional withholdings should be placed on the retired pay remaining to his credit following the apportionment.

Matter of: Uniformed Services Former Spouses' Protection Act, April 25, 1984:

The general issue presented in this case is whether a retired Air Force colonel may have nearly all of his retired pay withheld for Federal income taxes thus reducing the amount of retired pay available for apportionment between him and his former spouse under the Uniformed Services Former Spouses' Protection Act.[1] We conclude that in the circumstances of this case, this is impermissible.

Background

In 1981 the United States Supreme Court held that in the absence of specific authority granted by Federal statute, State courts could not properly treat military retired pay as marital community property in divorce proceedings. *McCarty* v. *McCarty*, 453 U.S. 210.

The Congress responded in 1982 by passing the Uniformed Services Former Spouses' Protection Act.[2] This Act added section 1408

[1] This action is in response to a request from Lieutenant Colonel William F. Flynn, Jr., USAF, Accounting and Finance Officer, Air Force Accounting and Finance Center, for an advance decision concerning the propriety of approving a voucher in the amount of $827.40 in favor of the colonel's former spouse, representing the additional amount due her for the month of July 1983 if it is concluded that the colonel may not be allowed additional tax withholdings in the computation of "disposable retired or retainer pay" under that Act. The request was forwarded here by the Headquarters, United States Air Force, after it was approved and assigned Submission Number DO-AF-1429 by the Department of Defense Military Pay and Allowance Committee.

[2] Title X, Public Law 97-252, approved September 8, 1982, 96 Stat. 730, 10 U.S.C. 1401 note. See, generally, S. Rep. No. 502, 97th Cong., 2d Sess., *reprinted in* 1982

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to title 10 of the United States Code, which grants State courts the authority under certain specified conditions to treat military "disposable retired or retainer pay" either as property solely of the retired service member or as property of the member and his spouse, in accordance with the law of the jurisdiction of the particular State court concerned. 10 U.S.C. § 1408(c). Section 1408 also provides that the department concerned shall, subject to prescribed limitations, begin to make payments directly to the spouse or former spouse of the "disposable retired or retainer pay" provided for in the State court order as child support, alimony, or a division of property, within 90 days of the date of effective service of the court order on the department. 10 U.S.C. § 1408(d).

The term "disposable retired or retainer pay" is defined in 10 U.S.C. § 1408(a)(4) as the total monthly retired or retainer pay to which a member is entitled (other than disability retired pay), less certain deductions including those which:

> (C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled; [and]
> (D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

Under 26 U.S.C. § 3402(i) the Secretary of the Treasury is authorized to provide by regulation for increases in the amount of Federal income tax withholdings otherwise required in cases where certain taxpayers, including retired military personnel, request the additional withholdings.[3] The implementing regulations provide that after September 30, 1981, those taxpayers may request the deduction and withholding of an additional amount from their wages or retired pay, and "(t)he employer must comply with the * * * request * * * to the extent that the amount * * * does not exceed the amount that remains after the employer has deducted and withheld all amounts otherwise required to be deducted and withheld by Federal law."[4]

The deductions described by the quoted provisions of 10 U.S.C. § 1408(a)(4) (C) and (D) parallel comparable deductions permitted from the gross retired pay of military personnel before subjecting their net retired pay to garnishment for alimony or child support

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U.S. Code Cong. & Ad News 1596-1625; and H.R. Conf. Rep. No. 749, 97th Cong., 2d Sess. 165-168, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1569, 1570-74.

[3] This provision is derived from section 203 of the Revenue Act of 1951, Public Law 183, 82d Congress, approved October 20, 1951, 65 Stat. 480, 26 U.S. Code 3402(a), which was designed to encourage generally increases in withholding at the source. See H.R. Rep. No. 586, 82d Cong., 1st Sess., *reprinted in* 1951 U.S. Code Cong. & Ad. News 1781, 1891; S. Rep. No. 781 (Part 2), 82d Cong., 1st Sess. 12.

[4] 48 Fed. Reg. 44,072-75 (1983) (adding 26 C.F.R. § 31.3402(i)-2). In a letter opinion dated May 31, 1983 (CC:IND:I:1:2-3E9612), the Internal Revenue Service advised the Department of Defense that military retired pay should be treated as wages solely of the member for tax withholding, and amounts paid directly to a former spouse under the Uniformed Services Former Spouses' Protection Act should not again be processed for Federal income tax withholding.

arrearages under provisions of the Social Security Act codified at 42 U.S.C. §§ 659-662. Statements contained in the legislative documents relating to the passage of the Uniformed Services Former Spouses' Protection Act indicate that because net military retired pay was then already subject to garnishment under 42 U.S.C. §§ 659-662, Congress concluded that parallel rules should govern the computation of the net "disposable retired or retainer pay" which may be apportioned under 10 U.S.C. § 1408 in divorce proceedings.[5]

Request for Additional Federal Income Tax Withholdings

In the present case, the colonel's former spouse applied to the Air Force Accounting and Finance Center in April 1983 for direct payment of 41.37 percent of the colonel's retired pay under 10 U.S.C. § 1408(d), by serving a State court order so apportioning that pay on the Commander of the Finance Center. The first payment to the former spouse was made in June 1983 in the amount of $900.92. This payment was based on 41.37 percent of $2,177.71 in disposable retired pay for that month computed as follows: gross pay of $2,204.80, less a regular Federal income tax withholding deduction of $10.59 and a National Services Life Insurance premium deduction of $16.50.

On June 15, 1983, the colonel sent a letter to the Air Force Accounting and Finance Center requesting that an additional $2,000 per month be deducted from his retired pay for Federal income tax withholding purposes. In support of his request he said that he and his current wife expected to file a joint Federal income tax return for 1983, and he estimated that their combined gross income for the year would amount to about $132,000, broken down as follows: $26,000 from his Air Force retired pay; $60,000 from his earnings as an investment broker; $10,000 in fees for his consulting and lecturing services; and $36,000 from his wife's earnings as a real estate agent. He further estimated that he and his wife would be able to subtract about $40,000 in personal exemptions, adjustments, and itemized tax deductions from their gross income on their annual income tax return, so that their net taxable income would be about $92,000.

The colonel suggested that under the 1983 Federal progressive income tax rate schedules a portion of this net taxable income would be included in a 49-percent tax bracket, so that the gross amount of the Air Force retired pay for 1983 should be regarded as being subject to a Federal income tax obligation of 49 percent. He said that since is did not matter from which source he had the majority of his tax withholdings taken, until his former wife's claim against his retired pay arose he had earlier arbitrarily elected to

[5] See S. Rep. No. 502, cited above (footnote 2), at page 14, *reprinted in* 1982 U.S. Code Cong. & Ad. News at page 1609.

have most of his regular Federal income tax withholdings taken from civilian earnings rather than the military retired pay.[6] He suggested that this had resulted in a large underwithholding of income taxes from the military retired pay during the first 6 months of 1983, in view of the projected 49-percent income tax obligation on that pay, so that proper coverage of this tax obligation would require the gross retired pay to be reduced by about 98 percent, or $2,000, during each of the last 6 months of 1983 in computing the net disposable retired pay apportionable between him and his former spouse under 10 U.S.C. §§1408(a)(4) (C) and (D).

The Air Force Accounting and Finance Officer observes that granting the colonel's request for the additional $2,000 income tax withholding for the month of July 1983 would have the effect of reducing the amount of the disposable retired pay apportionable between him and his former spouse that month from $2,177.71 to $177.71. The amount payable to the former spouse would in turn be reduced from $900.92 to $73.52 (that is, to 41.37 percent of $177.71). The voucher presented for decision in the amount of $827.40 in favor of the former spouse represents the balance payable to her for that month (that is, 41.37 percent of $2,000), if it is concluded that the colonel's request cannot properly be granted.

Issues Presented

The Accounting and Finance Officer notes that additional income tax withholdings requested by a retired service member can be deducted from the member's gross pay in the computation of net "disposable retired or retainer pay" under the provisions of 10 U.S.C. §1408(a)(4)(D), only "if such member presents evidence of a tax obligation which supports such withholding." The accountable officer generally questions whether, in this case, the colonel has presented sufficient "evidence" of a "tax obligation," within the meaning of those terms as they appear in 10 U.S.C. §1408(a)(4)(D), in support of his request for the additional $2,000 monthly withholding.

Concerning the term "tax obligation," the Accounting and Finance Officer specifically asks, in essence, whether the method proposed by the colonel using anticipated civilian earnings to suggest the existence of a 98-percent Federal income tax obligation on the retired pay is acceptable, and if not, what method should be used instead.

As to the "evidence" required to verify a tax obligation, the Accounting and Finance Officer essentially notes that the colonel's estimates of his and his wife's anticipated gross and net taxable

[6] This election involved the filing of withholding allowance or exemption certificates (IRS Forms W-4) in which he claimed withholding allowances for estimated tax deductions on the military retired pay rather than the civilian earnings. See 26 C.F.R. §§3402(f)(1)-1 *et seq.*; 26 C.F.R. §31.3402(m)-1(c)(2).

income for 1983 are stated in broad figures, and that those figures are not supported by any verifying documentation. The accountable officer asks whether verifying documentary evidence of a tax liability is required under 10 U.S.C. §1408(a)(4)(D), and if so, whether finance center personnel have any duty to request employers, banks, the Internal Revenue Service, etc., to furnish that documentary evidence.

The Term "Tax Obligation" in 10 U.S.C. §1408(a)(4)(D)

The term "tax obligation" as used in 10 U.S.C. §1408(a)(4)(D) is not expressly defined in the Uniformed Services Former Spouses' Protection Act, or in the proposed implementing regulations published by the Secretary of Defense.[7] In the particular statutory context in which it is used, however, the term obviously refers to a Federal income tax obligation warranting additional tax withholdings from military retired pay, beyond the regular withholdings authorized or required by law which are referred to in 10 U.S.C. § 1408(a)(4)(C). While generally under 26 U.S.C. § 3402(i), and implementing Internal Revenue Service regulations, an employee is entitled to have the employer withhold additional amounts from his wages, the language used in 10 U.S.C. § 1408(a)(4)(C) and (D) indicates that for the purpose of computing the member's disposable retired pay the tax withholding was not to be without limit. Moreover, we generally recognize that the purpose of deducting taxes from wages at the source is to cause the withholding of the approximate amount of the ultimate tax liability which will be imposed on that income. The proposed regulations of the Secretary of Defense are consistent with that principle in providing that in the computation of net monthly disposable retired or retainer pay, deductions of tax withholdings from gross retired pay under 10 U.S.C. § 1408(a)(4)(C) and (D) are authorized only "to the extent that the amount deducted is consistent with the member's tax liability." [8] Consequently, our view is that in computing monthly "disposable retired or retainer pay," the deductions of Federal tax withholdings from gross retired pay under 10 U.S.C. § 1408(a)(4)(C) and (D) may not be fixed at a combined percentage rate exceeding the reasonably estimated rate of the Federal income tax liability that will be imposed on the gross retired pay. We therefore find that the additional "tax obligation" under 10 U.S.C. § 1408(a)(4)(D) may properly be expressed in terms of the difference between the anticipated ul-

[7] 48 Fed. Reg. 4003 (1983) (to be codified at 32 C.F.R. pt. 63) (proposed January 28, 1983, under the authority of 10 U.S.C. § 1408(h)). Likewise, the parallel provisions of the Federal garnishment statutes and regulations contain no express definition of a "tax obligation." 42 U.S.C. § 662(g) and 5 C.F.R. § 581.105(c).

[8] See proposed 32 C.F.R. § 63.6(e)(2)(iv) at 48 Fed. Reg. 4006. The military and naval departments at 48 Fed. Reg. 4004 were ordered to follow the provisions of the proposed regulations throughout 1983 pending the issuance of final regulations.

timate rate of taxation and the rate of the regular tax withholdings prescribed by 10 U.S.C. § 1408(a)(4)(C)

Thus, we agree with the colonel that the anticipated civilian earnings of both him and his wife are to be taken into account in determining the rate of the additional "tax obligation" on the gross amount of the military retired pay under 10 U.S.C. § 1408(a)(4)(D), since the amounts of those civilian earnings will affect the overall rate of taxation ultimately imposed on the retired pay. We are unable to agree, however, with the method proposed by the colonel to suggest that the July 1983 retired pay in question might be subject to Federal income taxes at the rate of 98 percent.

If, as the colonel stated his and his wife's combined 1983 gross income could reasonably have been estimated at $132,000, and their net taxable income at $92,000, then their Federal income tax computed under the applicable 1983 tax rate schedule [9] could have been expected to be $30,342. Their projected effective tax rate—that is, the ratio of their anticipated total income taxes ($30,342) to their anticipated total gross income ($132,000)—could thus have been reasonably estimated at 22.99 percent.

Our view is that in the absence of more specific guidance in the statute or regulations, in this case a projected effective tax rate so estimated should be used as the maximum limit on combined Federal income tax withholding deductions which may be allowed from gross retired pay in the computation of net "disposable retired or retainer pay" under 10 U.S.C. § 1408(a)(4)(C) and (D). While we realize that the retired member may be entitled to subtract amounts apportioned to the former spouse as separate property or alimony from his gross income on his income tax return,[10] we nevertheless find that the use of the member's projected effective tax rate in the computation is the best method available of providing a reasonable estimate of the ultimate Federal income tax obligation that may be imposed on the gross retired pay. We also find that this method is consistent with the position of the Internal Revenue Service and the provision of the Department of Defense proposed regulations that tax withholdings on retired pay under the Uniformed Services Former Spouses' Protection Act are to be predicated on the concept that the retired pay constitutes "wages" earned solely by the member and are to be based solely on the tax liability of the member. See footnotes 4 and 8.

In this case, therefore, if the evidence presented by the colonel regarding his and his wife's anticipated gross income and income tax liability for 1983 were acceptable, then the combined deductions of Federal income tax withholdings from the July 1983 gross retired pay under 10 U.S.C. § 1408(a)(4)(C) and (D) would be limited

[9] 26 U.S.C. § 1(a), "Married individuals filing joint returns."

[10] See, generally, 26 U.S.C. §§ 61, 62, 71, 215. As will be discussed in greater detail, however, we have no jurisdiction to render authoritative decisions concerning taxpayers' ultimate income tax obligations.

to the projected effective tax rate as applied to that pay, i.e., to 22.99 percent of $2,204.80, or $506.88. Since the colonel took no action for the month of July to change the number of withholding allowances relative to the regular Federal income tax withholdings required or authorized by law, the amount of the regular income tax withholdings deductible under 10 U.S.C. § 1408(a)(4)(C) remains the same as in the previous month, $10.59. The difference between the total projected tax obligation ($506.88) and the regular tax withholdings ($10.59), amounting to $496.29, would be the maximum deduction allowable as an additional tax withholding under 10 U.S.C. § 1408(a)(4)(D) to cover the remaining, additional portion of the total tax obligation. Hence, it is our view that while the colonel's request for an additional monthly income tax withholding in the amount of $2,000 could not be fully granted under 10 U.S.C. § 1408(a)(4)(D), it could be allowed to the extent that he has asserted the existence of an additional tax obligation in the lesser amount of $496.29, provided it may properly be concluded that he has presented sufficient evidence in support of his assertions concerning that additional $496.29 tax obligation.

Concerning the method advanced by the colonel, we find that his election to reduce the regularly required withholdings on the retired pay to a minimum during the first half of 1983 may not serve as a proper basis for doubling the withholding rate allowable under 10 U.S.C. § 1408(a)(4)(D) for the rest of the tax year. While we are not prepared to say that mid-year adjustments to tax withholding may not be recognized if the retiree demonstrates a change in his projected tax liability, the shifting of the tax burden to that part of the year when the former spouse's withholding is in effect would inappropriately defeat the court-ordered apportionment of retired pay. Therefore, the doubling of tax liability for the second half of the tax year in this case should not be permitted.

Evidence of a Tax Obligation Under 10 U.S.C. § 1408(a)(4)(D)

The evidence of a tax obligation which 10 U.S.C. § 1408(a)(4)(D) requires a retired service member to present in support of a request for additional Federal income tax withholdings is not specifically described or defined in either the Uniformed Services Former Spouses' Protection Act or in the proposed implementing regulations published by the Department of Defense. As indicated, however, our view is that the requested additional tax withholdings may be allowed only to the extent the member is able to demonstrate that his projected effective tax rate is in excess of the rate of the regular income tax withholdings prescribed by 10 U.S.C. § 1408(a)(4)(C). Since that effective tax rate represents the ratio of the retiree's anticipated total Federal income taxes to his anticipated total gross income for the year, it follows that the retiree has a duty to furnish statements concerning his intended filing status

(single, married filing jointly, etc.), with estimates of his anticipated total gross income and net taxable income for the currrent year. Furthermore, because the statute plainly places the burden on the retiree to present factual evidence in support of his request for additonal withholdings, the retiree also has a duty to furnish sufficient documentary evidence to substantiate reasonably these estimates underlying his request. In the absence of definitive regulations on the subject our view is that, at a minimum, this documentary evidence should consist of copies of unaltered tax records, wage statements, or other appropriate financial certificates, ledgers, or accounts, which the retiree certifies or affirms are true and correct, and which in the service's view are sufficient to support the additional withholding requested. It is also our view that additional withholdings allowed under 10 U.S.C. § 1408(a)(4)(D) may not be continued beyond the date the retiree is required to file his next Federal income tax return unless the retiree renews his request for additional withholdings by submitting new estimates and evidence concerning his then current financial situation. Failure of the retiree to furnish all of the necessary supporting evidence will require the concerned accountable officer to deny or terminate additional withholdings under 10 U.S.C. § 1408(a)(4)(D). Under the statute's provisions obtaining the supporting evidence is the retiree's responsibility and not the service's.

In the present case, as indicated, the colonel submitted estimates of his and his wife's combined gross and net taxable income for the year which if acceptable would justify the deduction of additional tax withholdings of $496.29 in the computation of net "disposable retired or retainer pay" under the provisions of 10 U.S.C. § 1408(a)(4)(D). However, since he has not submitted sufficient evidence to support the additional withholding, his request for additional tax withholdings under the provisions of 10 U.S.C. § 1408(a)(4)(D) may not be allowed.

Income Tax Consequences

We wish to emphasize that the conclusions reached in this decision relate solely to the computation of net "disposable retired or retainer pay" as that term is defined under 10 U.S.C. § 1408(a)(4). Authoritative revenue rulings concerning the withholding of Federal taxes from income, as well as rulings concerning the income tax liabilities and withholding credits of individual taxpayers, are reserved by statute for determination primarily by the Department of the Treasury, Internal Revenue Service, and are not within our jurisdiction.[11] Hence, while in this case we have decided that the colonel's request is not a proper basis for a reduction in the amount of the disposable retired pay apportionable between him

[11] 26 U.S.C. §§ 3402(a), 3403, 3404, 6301, 6302, 7801, and 7802. Compare, e.g., *Matter of Martin,* 58 Comp. Gen. 528 (1979), and cases there cited.

and his former spouse under the provision of the Uniformed Services Former Spouses' Protection Act,[12] the concerned revenue authorities may well determine that the colonel's request for additional income tax withholdings from the amount of retired pay remaining to him after the apportionment to his former spouse should otherwise be granted to the maximum extent allowable under 26 U.S.C. § 3402(i) and 26 C.F.R. § 31.3402(i)-2.

Conclusion

The questions presented are answered accordingly. The voucher presented for decision is returned for payment, if otherwise correct.

[B-214196]

Appropriations—Defense Department—Annual Provision v. Permanent Legislation

The provisions of 10 U.S.C. 1466(a) expressly provide that amounts paid into the Department of Defense Military Retirement Fund under that subsection are made available from annual appropriations for the pay of members of the armed forces under the jurisdiction of the Secretary of a military department.

Appropriations—Defense Department—Annual Provision v. Permanent Legislation

Amounts paid into the Department of Defense Military Retirement Fund under 10 U.S.C. 1466(b) are made available by a permanent appropriation which that subsection establishes. Subsection (b) directs that "the Secretary of the Treasury shall promptly pay into the Fund from the General Fund of the Treasury" an amount which the Secretary of Defense has certified to him. 31 U.S.C. 1301(d) (formerly 31 U.S.C. 627) permits a statute to be construed as making an appropriation if it contains a specific direction to pay and a designation of the funds to be used. Subsection 1466(b) makes a permanent appropriation because it contains both the requisite direction and designation. 13 Comp. Gen. 77 (1933); B-26414, Jan. 7, 1944; B-114808, Aug. 7, 1979.

To The Honorable Mark O. Hatfield, United States Senate, April 30, 1984:

This responds to your request, dated January 11, 1984, for our opinion on whether amounts paid into the Department of Defense Military Retirement Fund under 10 U.S.C. § 1466 are made available to the Fund through annual appropriations or whether such payments are funded by a permanent appropriation. Upon receiving your request, we solicited the views of the Department of Defense (DOD) concerning the question you raise. We have considered the Department's comments in formulating our response. As explained below, payments into the Fund representing benefits attributable to military service performed on or after the effective date of section 1466 are to be funded generally by annual appropriations. A permanent appropriation provides the funds for pay-

[12] This decision is rendered under the authority of 31 U.S.C. §§ 3526 (a) and (d), 3529, and 3702.

ments to cover retirement benefits earned up to the section's effective date and to cover increases in fund liability due to changes in benefits or in actuarial assumptions.

Background

As you are aware, 10 U.S.C. § 1466 was enacted as part of section 925 of the Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, 97 Stat. 614, 644-648 (September 24, 1983) (codified at 10 U.S.C. §§ 1461-1467). Section 925 amended title 10 of the United States Code by adding sections 1461 through 1467 as a new Chapter 74. Before the enactment of section 925, the Government funded military retirement benefits on a "cash" basis; that is, it paid the benefits using funds appropriated each fiscal year to DOD for the purpose of paying those retirement benefits which became due and payable during that fiscal year.[1] The amendment's purpose was to change the way in which the Government funds military retirement benefits from the "pay as you go" method to an accrual system. H.R Rep. No. 107, 98th Cong., 1st Sess. 225 (1983).

To accomplish this change, section 925 creates a statutory scheme whereby funds are accumulated on an actuarial basis and then paid to recipients as their benefits become due through the use of a separate fund in the Treasury. Specifically, 10 U.S.C. § 1461(a) establishes the Department of Defense Military Retirement Fund to "be used for the accumulation of funds in order to finance on an actuarially sound basis liabilities of the Department of Defense under military retirement and survivor benefit programs." 10 U.S.C. § 1463 provides that the Fund shall be used to pay the retired pay of persons on the retired lists of the armed forces under DOD, the retainer pay of Fleet Reserve and Fleet Marine Corps Reserve members, and benefits payable under specified DOD survivor and former members annuity programs. It also makes the Fund's assets available for such payments. Thus, disbursements out of the Fund for benefit payments can be made in the future without further appropriation action by the Congress.

As you note, 10 U.S.C. § 1462 defines the assets of the Fund as consisting of three elements—amounts appropriated to the Fund, any return on investment of the assets of the Fund, and "amounts paid into the Fund under section 1466 of this title." Your question concerns this latter item.

Section 1466 is divided into two subsections. Subsection (a) concerns payments into the Fund made by the Secretary of Defense to cover DOD's liability for benefits accruing for military service per-

[1] The cash basis funding of retirement benefits actually continues through fiscal year 1984. This is because the new benefit payment provisions do not go into effect until fiscal year 1985. Pub. L. No. 98-94, § 925(b)(2), 97 Stat. 648. Congress so provided presumably to give the Secretary of Defense and the DOD Retirement Board of Actuaries (to be discussed) sufficient lead time to complete their duties which are preparatory to implementation of the new provisions.

formed on or after the section's effective date, October 1, 1984 (referred to as the DOD contribution). Subsection (b) governs payments into the Fund which are made to amortize the Fund's liability for benefits attributable to military service performed before the section's effective date (the original unfunded liability), and to cover changes in the Fund's liability resulting from changes in benefits (the cumulative unfunded liability) and in actuarial assumptions. The issue you raise within the context of this background discussion is whether it is necessary for the Congress to enact an appropriation each year in order for these payments to be made into the Fund, or whether section 925 establishes a permanent appropriation for their payment.

Payment into the DOD Military Retirement Fund under 10 U.S.C. § 1466(a)—the DOD Contribution

As discussed above, subsection (a) of 10 U.S.C § 1466 is concerned with payments into the Fund to cover actuarially determined liability for benefits attributable to military service performed on or after October 1, 1984. The subsection's provisions, particularly when read together with 10 U.S.C § 1465, clearly indicate that the DOD contribution is to be made from funds to be appropriated annually to the military departments.

Section 1465 is entitled "Determination of contributions to the Fund." Subparagraph 1465(b)(1) directs the Secretary of Defense annually to determine (based on a prescribed actuarial formula) the amount of the DOD contribution to be made during the following fiscal year, and to make his determination "in sufficient time for inclusion in budget requests for the following fiscal year." Subparagraph (2) provides:

> The amount determined under paragraph (1) for any fiscal year is the amount needed to be appropriated to the Department of Defense for that fiscal year for payments to be made to the Fund during that year under section 1466(a) of this title. The President shall include not less than the full amount so determined in the budget transmitted to Congress for that fiscal year * * *.

We note that the President's fiscal year 1985 budget, citing the Defense Authorization Act, 1984, as authority, requests appropriations to the various armed services to be used for Fund contributions.[2]

The new 10 U.S.C. § 1466(a) directs the Secretary of Defense to make payments into the Fund each month to cover the actuarial liability (again determined pursuant to a prescribed formula) which accrued during the month. It specifies the source of the Secretary's monthly payments as follows:

> Amounts paid into the Fund under this subsection shall be paid from funds available for the pay of members of the armed forces under the jurisdiction of the Secretary of a military department.

[2] Starting with FY 1985, the "Retired Pay, Defense" appropriation will be discontinued and the Fund contribution appropriations included in the "Military Personnel" appropriations for the various branches.

Accordingly, since annual appropriations provide the funds for the pay of members of the armed forces, and in light of the clear import of the provisions of sections 1465 and 1466(a) discussed above, we conclude that the DOD contribution to the DOD Military Retirement Fund under 10 U.S.C. § 1466(a) requires annual appropriations.

Payments Into the DOD Military Retirement Fund Under 10 U.S.C. § 1466(b)—the Original and Cumulative Unfunded Liabilities

Before addressing the issue of whether contributions under subsection 1466(b) are funded by annual or permanent appropriations, it may be helpful to briefly explain what the original and cumulative unfunded liabilities are. As noted above, when the Congress created the DOD Military Retirement Fund it provided that the Fund's assets would be used to pay all of the covered retirement benefits becoming payable after October 1, 1984. However, no funds were readily available to cover benefit payments attributable to service performed before that date because previously, military retirement system benefits were funded directly through appropriations made for the year in which they became due. The original unfunded liability is the total amount that would need to be placed in the Fund on October 1, 1984, to pay for the retirement benefits earned to that date.

Theoretically, the Congress could have appropriated an amount equal to the entire original unfunded liability to the Fund at the time it created it.[3] Instead, the Congress decided to provide for the amortization of the original unfunded liability through annual payments into the Fund.

The cumulative unfunded liability is liability which arises as a result of unanticipated benefit changes which occur after the Fund is created. As with the original unfunded liability, the Act provides for the cumulative unfunded liability to be amortized.

Under the Act, the DOD Retirement Board of Actuaries, established by 10 U.S.C. § 1464, determines the amount of the original unfunded liability and an amortization schedule for the liquidation of the liability over the period of time it deems proper. 10 U.S.C. § 1465(a). The Secretary periodically determines an amortization methodology and schedule for the cumulative unfunded liability and also for any cumulative gain or loss to the Fund which may result from changes in actuarial assumptions. 10 U.S.C. § 1465(c)

[3] That amount has been estimated to be $431 billion. H.R. Rep. No. 107, 98th Cong., 1st Sess. 228 (1983).

(2), (3). The Act then requires the Secretary to determine, at the beginning of each fiscal year, the amount of that year's payment for the original unfunded liability plus that year's payments for the cumulative unfunded liability and the cumulative gain or loss under their respective amortization schedules. 10 U.S.C. § 1466(b)(2). The Secretary "promptly" certifies the amount so determined to the Secretary of the Treasury. 10 U.S.C. § 1466(b)(3).

Of particular importance to the issue you raise, subparagraph 1466(b)(1) provides:

> At the beginning of each fiscal year the Secretary of the Treasury shall promptly pay into the Fund from the General Fund of the Treasury the amount certified to the Secretary by the Secretary of Defense under paragraph (3). Such payment shall be the contribution to the Fund for that fiscal year required by sections 1465(a) and 1465(c) of this title.

On the basis of 31 U.S.C. § 1301(d) and our decisions interpreting it, we construe 10 U.S.C. § 1466(b)(1) as establishing a permanent appropriation for subsection 1466(b) payments into the Fund. Section 1301(d) (formerly 31 U.S.C. § 627) provides that "a law may be construed to make an appropriation out of the Treasury * * * only if the law specifically states that an appropriation is made * * *." Thus, under section 1301(d), the making of an appropriation must be expressly stated.

It is not necessary, however, that the statute being construed actually use the word "appropriation." We have long held that section 1301(d) permits a statute to be construed as making an appropriation if it contains a specific direction to pay (as opposed to a mere authorization), and a designation of the Funds to be used. 13 Comp. Gen. 77 (1933); B-26414, January 7, 1944; B-114808, August 7, 1979.

Subsection 1466(b) contains both the requisite direction and designation. It specifically directs the Secretary of the Treasury to pay into the Fund the amount the Secretary of Defense certifies to him pursuant to 10 U.S.C. § 1466(b)(3), and it designates the General Fund of the Treasury as the source of the payment. Therefore, it may be construed as permanently appropriating the amounts necessary to pay into the Fund the amounts certified each year by the Secretary of Defense under 10 U.S.C. § 1466(b)(3).

Conclusions

In view of the foregoing, we conclude that amounts paid into the Department of Defense Military Retirement Fund under 10 U.S.C. § 1466(a) require annual appropriations. However, amounts certified under 10 U.S.C. § 1466(b)(3) may be paid into the Fund without

the need for further action by the Congress. As agreed with your staff, this opinion may be released immediately and we are sending a copy to the Secretary of Defense.

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