CIVILIAN PERSONNEL LAW MANUAL

SECOND EDITION * JUNE 1983/SUPPLEMENT 1985

UNITED STATES GENERAL ACCOUNTING OFFICE

OFFICE OF GENERAL COUNSEL

FOREWORD

In June 1983, the Second Edition of the Civilian Personnel Law Manual was issued. It reflects Comptroller General decisions of the General Accounting Office issued through September 30, 1982. In April 1984, we issued the 1984 Supplement to the Second Edition of the Civilian Personnel Law Manual, covering Comptroller General decisions from October 1, 1982 to December 31, 1983. We now issue the 1985 Supplement to the Second Edition of the Civilian Personnel Law Manual, covering Comptroller General decisions from January 1, 1984 to December 31, 1984.

The 1985 Supplement follows the same format as the Second Edition of the Civilian Personnel Law Manual and its 1984 Supplement -- an Introduction and four titles: Title I-Compensation, Title II-Leave, Title III-Travel, and Title IV-Relocation. Each unit has been separately bound, but wrapped together for distribution purposes. Each unit of the 1985 Supplement can be filed with the corresponding units of the Second Edition of the Civilian Personnel Law Manual and its 1984 Supplement. The information in the parentheses next to the headings in the text refers to the page numbers on which those headings can be found in the Second Edition of the Civilian Personnel Law Manual, unless otherwise indicated.

As always, we welcome any comments that you have regarding any aspect of the Second Edition of the Civilian Personnel Law Manual, its 1984 Supplement, or its 1985 Supplement. We hope that it will be a useful source of information concerning our personnel law decisions.

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INTRODUCTION

PART I

Statutory time limitations on claims (2)

See also Jack C. Smith, et al., 63 Comp. Gen. 594 (1984) and Mary J. Kampe and Martha R. Johnson, B-214245, July 23, 1984.

Administrative basis of claims adjudiciations (3)

Hypothetical questions (New)

The GAO generally will not consider hypothetical questions. Such questions are usually deferred for future consideration in the context of a specific claim. See, e.g., Virginia M. Borzellere, B-214066, June 11, 1984.

Record retention (See INTRODUCTION, Supp. 1984, p.1)

Note that in Sherwood T. Rodrigues, B-214533, July 23, 1984, in the intervening period between the accrual of the claim and the date the claim was presented to GAO for consideration, the Government records necessary to establish or refute the claim were lost or destroyed. The burden of proof is on the claimant. In the absence of these Government records -- or any other documentation substantiating the claim -- the claim was disallowed.

Burden of proof (3)

See also Josie W. Thomas, B-200460, July 10, 1984.

Estoppel against the Government (10)

See also Jay L. Haas, B-215154, November 29, 1984.

INTRODUCTION

PART II

GAO RESEARCH MATERIALS AND FACILITIES

GAO Civilian Personnel Law Manual (11)

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Civilian Personnel Law Manual

Second Edition • June 1983/Supplement 1985
Title I • Compensation

OFFICE OF GENERAL COUNSEL
U.S. GENERAL ACCOUNTING OFFICE

CHAPTER 1

CIVILIAN PAY SYSTEMS

C. SENIOR EXECUTIVE SERVICE

Performance awards (1-6)

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

Meritorious and Distinguished Executive Awards (1-6)

Where the agency can conclusively establish the actual date the employee first took possession of the check, the date of possession shall govern whether the payment is subject to the fiscal year limitation. Elizabeth Smedley, 64 Comp. Gen. 114 (1984).

D. MERIT PAY SYSTEM (1-6)

See also Chapter 3, Subchapter III, C, Merit Pay Increases (New).

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Panama Area Wage Base (New)

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

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BASIC COMPENSATION

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A. HOURS OF WORK, DUTY (3-1)

Home Work Sites (New)

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

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

A. NEW APPOINTMENTS

Superior qualifications appointment (3-7)

Failure to obtain OPM approval (New)

Employee was hired with the understanding she would be appointed at step 3 of grade GS-14. After actual appointment at minimum step of that grade, it was discovered that prior approval of the higher rate was not obtained from the Office of Personnel Management (OPM), due to administrative oversight. Although the employee was later granted a higher step placement by OPM, she is not entitled to a retroactive increase since such appointments are discretionary and not a right. Susan E. Murphy, 63 Comp. Gen. 417 (1984).

Erroneous determination (New)

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

Higher rates for supervisors of prevailing rate employees

Agency discretion (3-8)

See also James L. Davis, B-212581, May 16, 1984.

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Regulation concerning prior service (3-11)

Bobby M. Siler, B-202863, January 8, 1982, sustained on reconsideration, B-202863, February 8, 1984.

C. PROMOTIONS AND TRANSFERS (See also Chapter 7, Employee Make Whole Remedies.)

Effective date (3-11)

Failure to counsel (New)

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

Exceptions (3-12)

See also Department of Agriculture, B-211784, May 1, 1984.

Mandatory Training Requirement (New)

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

Highest previous rate rule

Agency regulation and policy (3-15)

Although Air Force regulations are contradictory as to whether this employee should or should not have been given benefit of highest previous rate rule, the final decision

was discretionary with the local commander. In the absence of an abuse of discretion, we find no entitlement to receive the highest previous rate upon reemployment. Carma A. Thomas, B-212833, June 4, 1984.

Delay in appointment (New)

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

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Rule applies to salary rate not grade (3-23)

Army employee, who was formerly employed in the Philippine Islands as a local hire, claims highest previous rate based on grade and step of equivalent authority to position held in Philippine Islands. His claim is denied since his Army salary exceeds the highest rate he previously earned. The highest previous rate rule applies only to salary rate earned, not his level of job responsibility. Banaag S. Novicio, 64 Comp. Gen. 17 (1984).

See also Ronald L. Fontaine, B-214885, August 20, 1984, involving an employee who transferred from the Navy to TVA and back to the Navy. The highest previous rate rule applies to the salary earned, not the relative step level attained before reemployment.

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See also Ronald S. Wong, B-202643, February 7, 1984.

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A. PERIODIC STEP INCREASES

Applicability (3-34)

Employees of the Cuban and Haitian Refugee Program, Department of Health and Human Services, were appointed in May 1980, to Schedule A excepted service positions under the General Schedule

for periods not to exceed September 30, 1983. Employees whose appointments were for more than one year, and employees whose initial appointments were not-to-exceed one year or less, with a single extension of more than one year, are eligible for within-grade salary increases under 5 U.S.C. § 5335 (Supp. IV 1980), on the same basis as term employees since they occupied permanent positions as defined in OPM regulations. Cuban and Haitian Refugee Program Employees, B-212483, February 23, 1984.

Nonapplicability (3-34)

Employees of the Cuban and Haitian Refugee Program whose initial appointments were not-to-exceed 1 year or less, with extensions for periods not-to-exceed 1 year or less, are not eligible for within-grade salary increases since they did not hold permanent positions as defined in OPM regulations. Their initial appointments, and extensions, were, singularly, not for periods of more than 1 year. Cuban and Haitian Refugee Program Employees, B-212483, February 23, 1984.

Waiting period (3-35)

An employee, who was reduced in grade twice due to reductions in force, was granted saved pay at grade GS-13, step 8, for 2 years under 5 U.S.C. § 5337 (repealed in 1978). The employee was subsequently granted a within-grade increase to step 9 at the end of the 3-year waiting period between steps 8 and 9 of grade GS-13. This within-grade increase was erroneous since the then-applicable regulation, 5 C.F.R. § 531.515 (1976), provided within-grade increases only in the grade in which the employee was serving and only on the rate selected at the time of demotion. Alfred P. Feldman, B-212631, February 13, 1984.

Equivalent increase (3-36)

COLA earned at TVA (New)

Navy employee transferred to position with Tennessee Valley Authority (TVA) and later transferred back to a position with the Navy. The cost-of-living allowance (COLA) and the within-grade increase he received at TVA constitute an "equivalent increase" under 5 U.S.C. § 5335(a) (1982) and 5 C.F.R. § 531.403 (1984). Ronald L. Fontaine, B-214885, August 20, 1984.

C. MERIT PAY INCREASES (New)

Coverage under Merit Pay System

An employee's position under the General Schedule was to be converted to Merit Pay in October 1981. However, in September 1981, his position was removed from those to be converted to Merit Pay. This occurred after the employee's rating period had concluded resulting in a rating of "highly successful" which

would have qualified him for a merit pay increase. We hold that the employee is not entitled to the merit pay increase since his position was not converted to merit pay and he was not under merit pay when the merit pay increases were awarded in October 1981, as required by applicable regulations. Louis J. Derdevanis, B-210859, April 19, 1984.

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

CHAPTER 4

ADDITIONAL COMPENSATION FOR CLASSIFICATION ACT POSITIONS

SUBCHAPTER I -- PREMIUM PAY -- OVERTIME

B. OVERTIME UNDER 5 U.S.C. § 5542

What are compensable hours of work

Actual work requirement

Two-thirds rule (4-5)

The two-thirds rule does not apply to shifts of less than 24 hours. Thus, Federal firefighters who work irregular or occasional overtime of 12 hours are not subject to the application of the two-thirds rule, but bona fide meal periods may be excluded from their overtime hours. Thomas A. Donahue, 64 Comp. Gen. 1 (1984).

Regularly scheduled (4-6)

For the application of the new OPM regulations defining "regularly scheduled," see James Barber, 63 Comp. Gen. 316 (1984).

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

Event (4-12)

See Hankins and Archie, B-210065, April 2, 1984.

Schedulable or controllable

Travel to hearings (4-15)--See Hankins and Archie, B-210065, April 2, 1984.

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

Where there is notice of the event (4-16)

See Hankins and Archie, B-210065, April 2, 1984.

Return Travel (4-17)

See Hankins and Archie, B-210065, April 2, 1984.

Standby duty

At employee's duty station (4-22)

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

At home (4-22)

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

Two-thirds rule (4-24)

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

Relation to other premium pay

Under 5 U.S.C. § 5545(c)(1)

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

Officially ordered or approved

Induced to work

Inducement not present (4-28)

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

C. OVERTIME UNDER FLSA

GAO's authority under FLSA

Claims settlement (4-36)

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

Paid absences

Court leave (4-40)

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

Sleep and mealtime (New)

Between February 2 and February 12, 1977, certain Plum Island employees worked 24-hour shifts because of adverse

weather conditions. The Office of Personnel Management (OPM) determined that the shifts consisted entirely of "on-duty" time qualifying for overtime compensation under the FLSA, but that 8 hours of sleep and mealtime must be deducted from each shift. We hold that the employees are entitled to compensation for sleep and mealtime for the 10-day period in question because, at the time the employees' claims accrued, there were no OPM regulations or instructions providing a basis for deduction of sleep and mealtime from irregular or occasional overtime hours worked. Plum Island, B-213179, October 2, 1984.

See also FPM Letter 551-14, May 15, 1978.

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

Burden of proof, evidence (4-40)

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

Traveltime

Outside/within working hours (4-41)

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

Firefighters (Supp. 1984, 4-7)

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

D. COMPENSATORY TIME

Aggregate salary limitation (4-43)

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

Discretionary authority to grant overtime (4-45)

An investigator for the Air Force whose rate of pay was not in excess of maximum rate of grade GS-10, should have received overtime compensation for call-back overtime work instead of compensatory time off if he did not request the compensatory time off. Richard F. Briggs, B-215686, December 26, 1984.

SUBCHAPTER II -- OTHER PREMIUM PAY

A. NIGHT PAY DIFFERENTIAL

Regularly scheduled night work

Special shifts (4-50)

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

Application of revised OPM regulations (New)

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 February 28, 1983. Implementing regulations issued by OPM and effective on that date which limit the 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. James Barber, 63 Comp. Gen. 316 (1984).

B. HOLIDAY PAY

Shift spans two calendar days (4-57)

Kenneth W. Swartley, B-202626, June 15, 1982, sustained on reconsideration in Kenneth W. Swartley, B-202626, September 4, 1984.

C. SUNDAY PREMIUM PAY

Regularly scheduled Sunday work

Work outside basic 40-hour workweek (4-63)

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

D. STANDBY PREMIUM PAY

Administrative approval requirement (4-65)

See also Richard F. Briggs, B-215686, December 26, 1984.

F. HAZARDOUS DUTY DIFFERENTIAL

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See also Robert J. Michels, B-214205, July 17, 1984.

SUBCHAPTER III -- SEVERANCE PAY AND ALLOWANCES

A. SEVERANCE PAY

Nature of appointment (4-82)

Intermittent appointment (New)

Employees with intermittent appointments and no regularly prescribed tour of duty are not entitled to payment of severance pay incident to their involuntary separation from their intermittent positions. Georgia and Leonie Mallory, B-209349, April 9, 1984.

D. OVERSEAS DIFFERENTIALS AND ALLOWANCES

Post differential

Computation (4-99)

Nonworkdays excluded (New)

An employee of the Air Force qualified for payment of 20 percent post differential while on extended detail in Saudi Arabia. Since post differential is based on a percentage of basic pay, the post differential payment after acquiring eligibility is computed on the basis of the days entitled to basic pay rather than on the basis of every calendar day which would include weekends and other nonwork days. Robert B. Mellen, B-215449, December 26, 1984.

CHAPTER 5

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

SUBCHAPTER I -- PAYROLL DEDUCTIONS AND WITHHOLDING

B. TAXES

Federal and state income taxes

Backpay (5-1)

See also Georgia and Leonie Mallory, B-209349, April 9, 1984.

C. SOCIAL SECURITY AND MEDICARE TAX (5-5)

Severance pay (New)

Two employees, who were separated from their positions, were paid severance pay. The agency properly deducted FICA from their severance pay where they later became subject to FICA withholding as a result of their reemployment in intermittent positions. Georgia and Leonie Mallory, B-209349, April 9, 1984.

F. FEDERAL EMPLOYEES HEALTH BENEFITS (5-12)

Tobacco inspectors (New)

Seasonal tobacco inspectors employed by the Department of Agriculture are "employees" for the purposes of the Federal Employees Health Benefits Act (FEHBA). Under revised regulations effective August 1982, OPM requires contributions to the program for each pay period of coverage, whether the employees are in pay status or nonpay status. See 5 C.F.R. §§ 890.501(e), 890.502(b) (1983). We hold that these revised regulations comply with the law and are reasonable. In addition, we hold that the Department of Agriculture may not utilize the tobacco user fee fund to pay the employee share of the federal health insurance for tobacco inspectors while they are in nonpay status. Tobacco Inspectors, 63 Comp. Gen. 285 (1984).

H. ALLOTMENTS AND ASSIGNMENTS OF COMPENSATION

Union dues

Agency erroneously continued to withhold allotment (5-15)

Union dues allotments under section 7115(b) must terminate when an employee is no longer in the bargaining unit. Neither the agency nor the union should knowingly continue or permit dues withholding for an employee who is no longer in the bargaining unit. Local 3062, AFGE, 63 Comp. Gen. 351 (1984.)

When an employee transfers out of the bargaining unit, the right to have his union dues paid through allotment ceases. If the agency continues to withhold the dues, the employee is not entitled to repayment of that amount if the employee fails to take steps necessary to cancel the allotment. In addition, agencies are cautioned not to take recoupment action against the union in such circumstances. If the amount is collected from the union, such collection may be waived under 5 U.S.C. § 5584. Local 3062, AFGE, 63 Comp. Gen. 351 (1984).

K. GARNISHMENT (5-19)

The United States Supreme Court has ruled that the U.S. Postal Service must honor a state tax board order garnishing the wages of Postal Service employees. The Court held that where the state tax board's orders are identical to the judgment of a court, the issuance of such orders constitutes a lawsuit against the Postal Service within the meaning of 39 U.S.C. § 401(1) which authorizes the Postal Service to sue and be sued. Franchise Tax Board of California v. United States Postal Service, ____ U.S. ____, 81 L Ed 2d 446 (decided June 11, 1984).

This Supreme Court opinion noted that the Postal Service abandoned the argument that 5 U.S.C. § 5517 prohibited the issuance of an order to collect delinquent tax liabilities by garnishment. The Court's opinion, however, did not decide the case on the basis of 5 U.S.C. § 5517 but rather on the Postal Service's statute, 39 U.S.C. § 401(1) which permits the Postal Service to sue and be sued.

SUBCHAPTER III -- WAIVER OF ERRONEOUS PAYMENTS OF COMPENSATION

B. PERSONS DEEMED EMPLOYEES

Unions (5-30)

See also Local 3062, AFGE, 63 Comp. Gen. 351 (1984).

C. WHAT CONSTITUTES COMPENSATION

Leave

Lump-sum payments (5-32)

An employee, who was separated from his position due to a RIF, was later reinstated retroactively. In computing his backpay entitlement of over $21,000, the agency deducted his refunded retirement contributions (over $34,000), severance pay (over $20,000), and lump-sum annual leave (over $7,000). His indebtedness for the lump-sum leave payment may be waived where there is no indication of fault by the employee in accepting the payment. Angel F. Rivera, 64 Comp. Gen. 86 (1984).

Refund of civil service retirement deductions (5-34)

An employee, who was separated from his position due to a RIF, was later reinstated retroactively. In computing his backpay entitlement of over $21,000, the agency deducted his refunded retirement contributions (over $34,000). His net indebtedness resulting from this deduction may not be waived under 5 U.S.C. § 5584 since the refund did not constitute an erroneous payment of "pay or allowances" within the meaning of section 5584. Only OPM may waive erroneous payments from the Civil Service Retirement Fund. Angel F. Rivera, 64 Comp. Gen. 86 (1984).

D. EFFECT OF EMPLOYEE'S FAULT

Actual Knowledge (5-36)

See also Kathleen M. Legault, B-214740, October 2, 1984.

Constructive notice -- receipt of documents

Employee not on notice of error (5-42)

Employee erroneously received step increase from grade GS-13, step 8 to step 9 following two reductions in grade to grade 12 and grade 11. Overpayment is waived since the employee may not reasonably be expected to have been aware of regulation governing step increases and retained rates of pay. Alfred P. Feldman, B-212361, February 13, 1984.

An employee, who received severance pay following separation due to a reduction-in-force, was later granted a retroactive disability retirement. Payment of the retroactive retirement annuity resulted in an erroneous overpayment of the severance pay. Repayment of the total amount of severance pay is waived under 5 U.S.C. § 5584 (1982) where there is no evidence the employee knew or should have known of the overpayment either when he received the severance payments or when he received the retroactive annuity payments. B-166683, May 21, 1969, distinguished. Henry B. Jenkins, 64 Comp. Gen. 15 (1984).

An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Deductions from backpay for payments of severance pay and a lump-sum leave payment resulted in a net indebtedness which is subject to waiver under 5 U.S.C. § 5584. Waiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper. Angel F. Rivera, 64 Comp. Gen. 86 (1984).

CHAPTER 6

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

SUBCHAPTER I -- RESTRICTIONS ON PAYMENT OF COMPENSATION BY THE UNITED STATES

E. STATUTORY CEILINGS OF COMPENSATION

Limitation on pay adjusted under 5 U.S.C. § 5301 et seq.

Rates of pay fixed on the basis of the General Schedule (6-14)

Land commissioners (New)

Land commissioners appointed by the Federal District Courts pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure and paid at daily rates not to exceed the highest rate payable under the General Schedule are not limited in the amount they may be paid on a biweekly basis under 5 U.S.C. § 5504. They are, however, subject to the maximum annual limitation contained in 5 U.S.C. § 5308 which prohibits payment of compensation in excess of that allowable in level V of the Executive Schedule. Land Commissioners, B-193584, May 1, 1984.

Limitation on Senior Executive Service Awards (New, Supp. 1984)

Performance awards

See Elizabeth Smedley, 64 Comp. Gen. 114 (1984), digested above at Chapter 1, C.

Limitation on prevailing rate employees (New)

Supervisors of prevailing rate employees who negotiate their pay increases are subject to statutorily-imposed pay limitation which applies to most prevailing rate employees. These supervisors are within the express terms of the pay increase limitation and are not covered by the specific exclusion from the limitation. 60 Comp. Gen. 58 (1980), distinguished. Voice of America, 64 Comp. Gen. 100 (1984).

Limitation by appropriation act (New)

Section 205 of Public Law 94-462, 20 U.S.C. § 964 (1982), provides that the Director, Institute of Museum Services, will be compensated at the rate provided for Executive Level V positions. However, each Appropriation Act funding the Institute since it was created in 1976 has prohibited the use of its funds to

compensate Executive Level V or higher positions. We hold that the appropriations restriction does not apply to the Institute Director's position. Statutes in apparent conflict are to be harmonized whenever possible. Executive Level V positions are only those listed in 5 U.S.C. § 5316 or established by the President under 5 U.S.C. § 5317. Since the Institute Director's position is on neither list, it is not an Executive Level V position and the statutes are deemed harmonious. Therefore, the Director may be paid at rate of $63,800 annually, effective December 17, 1982, and $66,400 annually, effective in January 1984. Institute of Museum Services, B-213786, May 18, 1984.

CHAPTER 7

EMPLOYEE MAKE-WHOLE REMEDIES

B. BACK PAY ACT

Effect of MSPB decision (7-3)

An employee was discharged from his position on June 15, 1979. Such action was found to be unjustified by the Merit Systems Protection Board (MSPB), which ordered that his separation be canceled. Employee claims entitlement to pre-June 15, 1979, backpay and benefits under the MSPB ruling. The only issue before the MSPB was the propriety of the agency removal on June 15, 1979. Since there were no allegations made to the MSPB that the agency had taken other unjustified actions prior to that date, the ruling does not support a backpay claim for an earlier period. Gregorio Natividad, B-213316, February 23, 1984.

Veterans Administration employee's claim for backpay for period of suspension incident to arrest on criminal charges is denied. Although charges were eventually dismissed, agency's indefinite suspension had been affirmed by final order of the Merit Systems Protection Board. Since there has been no finding under Back Pay Act (5 U.S.C. § 5596) by appropriate authority that suspension was unjustified or unwarranted, and since this Office will not review decisions and orders of MSPB, there is no legal basis to consider claim for backpay. Arthur Drake, B-213690, April 16, 1984.

Determinations regarding unjustified or unwarranted personnel actions

Suspension (7-9)

Placing an employee on involuntary leave pending OPM approval of a disability retirement is not an unjustified or unwarranted personnel action if the action is based on competent medical evidence and such evidence is not overturned by an appropriate authority. Isma B. Saloshin, 63 Comp. Gen. 156 (1984); and Memphis Defense Depot, B-214631, August 24, 1984.

Retroactive promotions

Personnel action not effective as intended

Delayed or improperly initiated promotion request (7-13)-- Employee contends that as a student trainee under the Co-operative Education Program, he was not properly counseled regarding his right to seek an entry-level, career-conditional appointment at the grade GS-7 level, and his promotion was therefore delayed. Although the agency failed

to properly advise him, the delays that occurred did not deprive him of any rights granted by statute or regulation nor was there any violation of nondiscretionary regulation or policy which would be the basis for a retroactive promotion and backpay. Gregory A. Walter, B-208397, March 6, 1984, sustaining upon reconsideration Gregory A. Walter, B-208397, August 29, 1983.

Nondiscretionary agency policy

Stated agency policy (7-14)--Eight employees whose promotions were delayed due to a clerical error which occurred prior to approval of the promotion request by the authorized official may be retroactively promoted because of failure to carry out a nondiscretionary agency policy. Although not committed to writing, there was an established nondiscretionary agency policy to promote entry level plant protection and quarantine officers on their earliest eligibility date. This policy was implemented by established procedures, and was routinely communicated to affected employees. The agency's failure to carry out its nondiscretionary policy was an unjustified or unwarranted personnel action under the Back Pay Act. Department of Agriculture, B-211784, May 1, 1984.

Retroactive change in initial appointments (7-18)

A GSA employee who interviewed for a grade GS-8 position at the MSPB, claimed a retroactive promotion when her appointment/transfer was at the grade GS-7 level. Generally, personnel actions may not be made retroactively effective so as to increase an employee's compensation, and this case does not fall within the limited exceptions to that rule. Doris J. Lindstrom, B-214531, August 24, 1984.

Retroactive increase in advance-step placement (7-21)

Employee of EEOC was hired with the understanding she would be appointed at step 3 of grade GS-14. After actual appointment at minimum step of that grade, it was discovered that prior approval of the higher rate was not obtained from the Office of Personnel Management (OPM), due to administrative oversight. Upon subsequent, but prospective approval of higher step placement by OPM, a claim for retroactive increase in that pay was denied. Under 5 U.S.C. § 5333, the applicable regulations, and our decisions, appointments to grades GS-11 and above may be made at a rate above the minimum rate of the grade, but only with prior OPM approval. Since such an appointment is discretionary and not a right, the employee may not receive a retroactive increase. Susan E. Murphy, 63 Comp. Gen. 417 (1984).

Premium pay

Overtime (7-21)

Employee, who was improperly discharged but later reinstated retroactively with backpay, claims night differential pay. His claim is denied since at the time of his removal he was assigned to the day shift and upon restoration he was returned to the day shift. Gregorio Natividad, B-213316, February 23, 1984.

Attorney fees (New)

Generally

As noted in the 1984 Supplement, the Back Pay Act was amended in 1978, effective January 11, 1979, to allow the payment of reasonable attorney fees where an employee is found to have been affected by an unjustified or unwarranted personnel action.

In the interests of justice

The union representing the employee failed to demonstrate that the agency knew or should have known it would not prevail on the merits of a case. Therefore, payment of attorney fees is not warranted in the interest of justice. Elias S. Frey, B-208911, June 10, 1983, sustained on reconsideration in Elias S. Frey, B-208911, March 6, 1984.

Prevailing party

Employee who prevailed on appeal before MSPB was awarded attorney fees in connection with that appeal. His subsequent claim for attorney fees in connection with negotiating the amount of his backpay is denied since he was not a "prevailing party" on this issue. Jack M. Haning, 63 Comp. Gen. 170 (1984). See also Gregorio Natividad, B-213316, February 23, 1984.

Not under the Back Pay Act

Employee claimed refund of retirement contributions which agency improperly attempted to set off against indebtedness discharged in bankruptcy. However, claim for attorney fees in connection with this matter is denied since the original claim is not within the scope of the Back Pay Act. Leland M. Wilson, B-205373, April 24, 1984.

Appeals before MSPB

An employee was discharged from his position on June 15, 1979. Such action was found to be unjustified by the MSPB, and the MSPB restored the employee to his position but

denied his claim for attorney fees under 5 U.S.C. § 7701(g). This Office has no authority to review MSPB decisions, and therefore, the denial under section 7701(g) must stand. If an attorney fees claim is being asserted under 5 U.S.C. § 5596(b)(A)(ii), then that claim is also denied, since claimant has not prevailed on any of the backpay computation issues raised with the agency or this Office. Gregorio Natividad, B-213316, February 23, 1984.

C. REMEDIES NOT ALLOWED UNDER THE BACK PAY ACT

Interest on backpay (7-23)

See also Isma B. Saloshin, 63 Comp. Gen. 156 (1984); Jack M. Haning, 63 Comp. Gen. 170 (1984); and Leland M. Wilson, B-205373, April 24, 1984.

Attorney fees and other litigation expenses (7-23)

See also the discussion in section B, above.

An employee subject to an Inspector General investigation, caused by a third party, may not be reimbursed charges he incurred for microfilming and research of his banking records after he produced the records at the Inspector General's request. There is no authority for reimbursement of the expenses that were voluntarily incurred, and for which there was no obligation to incur. Moreover, attorney's fees incurred by the employee may not be paid since the agency, having decided to investigate the employee, did not have a common interest with him. B-212487, April 17, 1984.

Consequential damages (7-24)

See also Jack M. Haning, 63 Comp. Gen. 170 (1984).

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

Generally (7-26)

An air traffic controller who was selected for promotion to a higher grade position at another air traffic control facility claims backpay on the basis of the salary of the higher grade position where the agency improperly removed him prior to his promotion. The employee's backpay for the period of improper separation should be computed on the basis of the salary of the higher grade position where the record clearly establishes that the employee would have been promoted if he had not been improperly removed. George F. Ackley, B-214828, October 11, 1984.

Setoff of outside earnings from backpay

Severance pay (7-28)

See also Georgia and Leonie Mallory, B-209349, April 9, 1984.

E. OTHER MAKE WHOLE REMEDIES

Employment discrimination (7-30)

Federal Communications Commission (FCC) employee temporarily detailed to higher grade position filed complaint alleging race, sex, and age discrimination because she was not temporarily promoted to the higher grade level. The FCC made a proposed finding of no discrimination and reached settlement agreement with employee. Because proposed settlement award exceeds amount the employee would be entitled to receive under Title VII of the Civil Rights Act of 1964, as amended, if discrimination had been found, it must be reduced. Backpay for the period employee was ineligible for promotion to higher grade because of insufficient time in grade, may not be included in settlement. Additionally, backpay for period employee was performing duties of position to which she was officially appointed, during which period no discrimination is alleged may not be included in settlement. Mary Anna Cole, B-215311, December 4, 1984.

CHAPTER 8

OTHER PROVISIONS PERTAINING TO EMPLOYEES

B. DETAILS OF GOVERNMENT EMPLOYEES

Details to higher graded position for more than 120 days

Temporary promotions after 120 days

Cases decided after May 25, 1982 (8-9)

An employee's claim for a retroactive promotion and backpay for a detail in 1976 and 1977 to a higher grade position is denied on the basis of Turner-Caldwell III, 61 Comp. Gen. 408 (1982). The fact that the employee's agency lost or misplaced his claim for a considerable time does not constitute a basis for consideration of the claim after the holding in Turner-Caldwell III that no further payments would be made to individuals detailed to higher grade positions for more than 120 days. Herbert M. DeLano, B-216752, November 14, 1984.

Details between executive agencies (8-10)

Nonreimbursable details barred (New)

Except under limited circumstances, nonreimbursable details of employees from one agency to another violate the law that appropriations must be spent only for the purposes for which appropriated (31 U.S.C. § 1301(a)), and such details unlawfully augment the appropriations of the agencies using the detailed employees. To the extent that they are inconsistent with this decision, prior decisions such as 13 Comp. Gen. 234 (1934) and 59 Comp. Gen. 366 (1980) will no longer be followed. Since this decision represents a change in our views on nonreimbursable details, it will apply prospectively. B-211373, March 20, 1985, 64 Comp. Gen. ___ .

Nonreimbursable details of employees from one agency to another or between separately funded components of the same agency will continue to be permissible where the details pertain to a matter similar or related to those ordinarily handled by the loaning agency and will aid the loaning agency in accomplishing a purpose for which its appropriations are provided or when the fiscal impact on the appropriation supporting the detail is negligible. B-211373, March 20, 1985, 64 Comp. Gen. ____.

E. SETTLEMENT OF ACCOUNTS OF DECEASED OFFICERS AND EMPLOYEES

Beneficiary designation

Surviving spouse as designated beneficiary

Illegality of marriage (8-22)

Deceased employee, James A. Smalls, entered into ceremonial marriage with Juanita Stephens on March 1, 1955, in South Carolina, and there is no record of divorce between James and Juanita in that jurisdiction. James Smalls entered into ceremonial marriage with Susie (now Susan) Wright on March 12, 1959. Although second marriage is presumed to be valid, such presumption is rebutted by showing that there is no record of divorce between James and Juanita. Under South Carolina law, all marriages contracted while either of the parties has a former wife or husband living are void. Hence, James' marriage to Susan is void, and she is not the legal widow of the deceased employee, and is not entitled to payment of his unpaid compensation. James A. Smalls, B-212148, July 23, 1984.

Sufficiency of evidence (New)

A claim for the unpaid compensation of a deceased employee filed by his daughter on behalf of herself and her brother and sister of the whole blood was previously denied because of insufficient evidence that they were the legal beneficiaries of the claimed pay and that they constituted the entire class of individuals entitled to the payments. Joe Marvin (Deceased), B-207143, December 30, 1982. Although the issues then in doubt are unresolved, the other potential beneficiaries have failed to file claims for the unpaid compensation within 3 years of the former employee's death. Under the rule stated at 4 C.F.R. § 33.6(d), payment of the claim may be issued to the deceased employee's children on whose behalf the claim has been filed. Joe Marvin (Deceased), Reconsidered, B-207143, December 26, 1984.

CHAPTER 9

SERVICE AS JUROR OR WITNESS

SUBCHAPTER I -- SERVICE AS JUROR

B. PAYMENT FOR JURY SERVICE

Per diem allowance (9-2)

By a 1979 amendment to the Texas statute which authorizes pay of jurors, the term "per diem" was substituted for the term "compensation," which was used in the derivative statute. In spite of this change in the statutory terminology, federal employees who are entitled to leave for jury duty while serving as jurors in Texas state courts may not retain any amount received for such jury service under the relevant Texas statute, because there is no indication in that statute that the fees, or any portion thereof, are intended to be an expense allowance or reimbursement for travel. Texas State Court Juror Fees, B-214863, July 23, 1984.

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CHAPTER I

GENERAL PROVISIONS

B. EMPLOYEES COVERED

Type of appointment (1-1)

Consultant (New)

An individual consultant whose services were procured under a contract which established an employer-employee relationship with the Government rather than an independent contractor relationship, is entitled to accrual of annual and sick leave, where it appears he had a regularly scheduled tour of duty. In addition, the consultant is entitled to compensation for holidays on which he did not perform any work since his contract contained an express provision to that effect. Lynn Francis Jones, B-214432, July 25, 1984 (63 Comp. Gen. 507).

CHAPTER 2

ANNUAL LEAVE

B. ACCRUAL

During suspension or separation (2-4)

Violation of Equal Employment Opportunity Act of 1972 (New)

A U.S. District Court found that an employee had been removed from his position with the Defense Mapping Agency (DMA) in violation of the Equal Employment Opportunity Act of 1972 and ordered the DMA to reinstate the employee with backpay. As a part of that award the employee is entitled to restoration of the annual leave and the sick leave he would have earned during the period of his discriminatory separation as an element of backpay. Francis J. Pinkney, III, B-213604, May 15, 1984.

C. CREDITABLE SERVICE

Noncreditable service (2-8)

Employee on temporary disability retired list (New)

A service member who received an appointment as a civilian employee during the time his name was on the Temporary Disability Retired List (TDRL) is considered a "retired member of a uniformed service" under 5 U.S.C. 6303(a) and is, therefore, not entitled to credit for annual leave purposes for his active military service since his disability does not meet the criteria of 5 U.S.C. § 6303(a) (A)(i) or (ii) nor does his service time qualify under 5 U.S.C. § 6303(a) (B) or (C). Such service may be credited only if his name is removed from the TDRL by virtue of his separation with severence pay. In that event his service may be credited as of the date his name is removed from the TDRL. Daniel F. Cejka, B-212738, February 14, 1984 (63 Comp. Gen. 210).

F. RESTORATION OF LEAVE

Under Public Law 93-181

Administrative error

What constitutes an administrative error--

Failure to act upon request (2-26)

See also George A. Raub, B-212548, January 24, 1984.

Employee on Extended Illness (2-28)

An employee of the Department of the Army who was absent from work from June 21, 1982, through January 23, 1983, due to a work injury, and received worker's compensation under the Federal Employees Compensation Act (5 U.S.C. Chapter 81) during the period, forfeited 47 hours of annual leave in the 1982 leave year. Employees only received annual notices warning them in advance, and the employee was not specifically notified that in his case he would forfeit the leave if it were not scheduled. It may be presumed that the employee would have scheduled leave to avoid forfeiture if he had been properly notified and the 47 hours of leave may be restored. Leonard J. Milewski, B-212294, January 24, 1984 (63 Comp. Gen. 180).

An employee who went on sick leave on October 23, 1981, through the end of leave year 1981 and forfeited 104 hours of annual leave is not entitled to restoration of the forfeited leave and additional lump-sum leave since the leave was not scheduled. This case does not fall within our decisions which presume scheduling of the leave during an extended period of absence due to illness. This employee's illness was of shorter duration, he was aware of his leave balance and knew that he was responsible for scheduling the leave to avoid forfeiture, and, in any event, it was not clear that he would have scheduled the leave. John E. Brady, B-214337, August 6, 1984.

What does not constitute administrative error (2-30)--

Failure to promptly credit annual leave (New)

An employee who transferred from the Social Security Administration (SSA) to the Department of Labor was erroneously given a lump sum leave payment. He returned the payment, but his leave balance from SSA was not credited to his account until 2 years later. Even though it was an error not to have promptly credited the annual leave upon his transfer, since the employee had sufficient time to schedule and use the excess leave after it was credited, he may not be recredited with the leave which he forfeited at the end of the leave year. Wallie Breig, B-213849, May 14, 1984.

Sickness

Employee on extended illness (2-33)--See Leonard J. Milewski, B-212294, January 24, 1984 (63 Comp. Gen. 180) and John C. Brady, B-214337, August 6, 1984 at Administrative Error, Employee on Extended Illness.

Use of restored leave

Forfeiture (2-34)--An employee has no rights to further restoration and lump-sum payment of unused forfeited and restored 1977 leave, which was forfeited again at the end of the 1980 leave year. Although agency personnel gave him erroneous advice concerning his restored leave and failed to fix the date, as required by the regulations, for the running of the 2 years in which to use-or-lose his restored leave, no legal authority exists for further restoration of leave once it is forfeited a second time. William Cocoran, B-213380, August 20, 1984.

Under Back Pay Act of 1966

Involuntary leave

Disability retirement (2-36)--See also Memphis Defense Depot, B-214631, August 24, 1984.

Based upon medical evidence from an employee's personal physician and an examination by agency physician that the employee could not perform the duties of her position, the agency placed the employee on involuntary leave and submitted an agency initiated disability retirement application. After an initial rejection of this application by a bureau within the Civil Service Commission (CSC), the agency appealed to the full CSC, which approved the retirement application. The employee then appealed to the Merit Systems Protection Board (MSPB), which ruled that the employee was not totally disabled. The employee claimed backpay for the entire period she was on involuntary leave. The claimant is entitled to backpay for the period between the initial denial of the application and the CSC granting of retirement. Once the application was granted it was appropriate for the employee to be retired. The fact that MSPB ultimately found the employee not to be disabled did not make improper the agency action in placing the employee in a non-pay status based on the original medical evidence and the later CSC approval of the retirement application.

CHAPTER 4

SICK LEAVE

B. TRANSFERS AND REEMPLOYMENT

Evidence to support claim

Generally (4-6)

See also Mark Radke, B-212670, January 17, 1984, involving annual leave as well as sick leave.

C. ADMINISTRATION OF SICK LEAVE

Substitution of sick leave

For leave without pay (4-19)

Pending decision on workers compensation application (New)--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. Larry L. Van Eerden, B-213776, April 10, 1984 (63 Comp. Gen. 291).

Involuntary sick leave

Incapacitated for performance of assigned duties (4-20)

An employee who was placed on involuntary sick leave after an agency physician found there were limiting conditions to the employee's continued employment in his assigned position is not entitled to backpay and recredit of sick leave since an agency may place an employee on involuntary sick leave when medical evidence indicates that he is incapacitated for performance of his assigned duties. Jack L. Hamilton, B-213789, May 18, 1984 (63 Comp. Gen. 372).

CHAPTER 5

OTHER LEAVE PROVISIONS

A. ADMINISTRATIVE LEAVE

Other specific situations (5-5)

Advice to federal credit unions (New)

The granting of administrative leave to federal employees to render advice and support to federal credit unions is a proper exercise of administrative authority. The amount of administrative leave granted is a matter of administrative discretion, and an agency may establish limits as to the amount of administrative leave which may be granted each employee during specific intervals of time. Grants of administrative leave are usually for short periods of time. Also, the types of activities for which excused absences may be granted are matters of administrative discretion and may be specified or listed in agency regulations. Administrative Leave - Federal Employees Providing Advice and Support to Federal Credit Unions, B-212457, August 23, 1984 (63 Comp. Gen. 542).

Holiday good-will gesture (New)

On the last workday before Christmas, an Installation Commander released the Installation's civilian employees for the afternoon as a "holiday good-will gesture". The Civilian Personnel Officer found the action to be a humbug stating that the Commander had no authority to release employees as a holiday good-will gesture. The Installation Commander's exercise of the discretionary authority to grant excused absence in the circumstances was a lawful order under existing entitlement authorities. It follows that the employees in question are entitled to administrative leave - everyone of them. A Christmas Case, B-215039, December 24, 1984 (64 Comp. Gen. ____).

B. HOLIDAYS

"In lieu of" holiday (5-11)

Although 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, agencies have the discretion to grant part-time employees administrative leave for those holidays falling within the part-time employee's regularly scheduled workweek. Shirley A. Lombardo, B-210741, April 24, 1984 (63 Comp. Gen. 306). See also Part-time employees, B-214156, May 29, 1984.

C. COURT LEAVE

Service as a witness (5-17)

Appearance in juvenile court proceedings (New)

An employee summoned to appear on several occasions in juvenile court proceedings in Pennsylvania concerning her son is not entitled to court leave under 5 U.S.C. § 6322 since she was summoned as a party to the proceedings rather than as a witness, under a Pennsylvania statute which provides that the court shall summon the parents, guardian, or custodian, and any other persons as appear to the court to be "proper or necessary parties to the proceeding." Court Leave, B-214719, June 25, 1984.

D. MILITARY LEAVE

Administration of military leave

Under section 6323(a) (5-22)

Calendar-day basis (New)--Military leave should be charged on an calendar-day basis rather than on a workday basis despite disparate results based upon the type of schedule worked by the employee, and regardless of the type of schedule the employee may work, military leave may not be charged in increments of less than 1 day. National Guard Technicians, B-216641, December 17, 1984 (64 Comp. Gen.___).

Use of annual leave (5-26)--See also Charles W. Haas, B-212851, January 4, 1984.

E. HOME LEAVE

Entitlement (5-27)

Generally See 5-4 of 1984 Supplement

An employee who executed an agreement to remain in the service of the IRS in Puerto Rico for 24 months but who obtained an appointment in Puerto Rico with HUD only 5 months later, did not satisfy the terms of his original agreement by remaining with HUD for an additional 19 months. Based on information evidencing his intent to relocate to Puerto Rico on a permanent basis, HUD properly determined that the employee's residence at the time of his appointment was Puerto Rico. Therefore, since his place of residence was the same as his post of duty, his employment in Puerto Rico does not constitute "service abroad" under 5 U.S.C. § 6305(a). Because of that residency determination he was not given a return travel agreement and therefore, he fails to meet

the condition of 5 U.S.C. § 6304 (b)(2)(ii) for entitlement to a 45-day leave ceiling. Miquel Caban, B-214282, September 5, 1984 (63 Comp. Gen. 563).

Return to overseas post requirements (5-28)

Failure to complete service under new agreement (New)

An employee who had been stationed in Montreal, Canada, for 2 years, used home leave to perform renewal agreement travel. She then returned to her duty station in Montreal for approximately 18 months before transferring to a position in the United States. The employee is not indebted for home leave since she had served in Montreal for a continuous period of 24 months prior to the home leave, the agency allowed home leave with the expectation that she would return for further duty in Montreal and she did, in fact, return to Montreal immediately after using home leave. Her entitlement is not affected by her failure to complete a 2-year sevice agreement she signed before departing Montreal on home leave. Virginia M. Borzellere, B-214066, June 11, 1984.

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CHAPTER 2

B. Specific classes of persons covered

Witnesses

Nonemployees (2-1)

Merit Systems Protection Board Hearing--An individual who was separated through a reduction-in-force prior to the expiration of her term appointment in March 1982, appealed the separation in hearings before the Merit Systems Protection Board in May 1982. The appellant prevailed, was awarded backpay for the unexpired period of her appointment, and now claims travel expenses for her attendance at the hearings. The appellant may not be allowed travel expenses authorized for a Government employee under 5 U.S.C. §§ 5702 and 5704, since she traveled to the hearings after the expiration of her term appointment. Furthermore, she is not eligible for travel expenses payable to non-employee witnesses under 5 U.S.C. § 5703, since she was a party to the proceeding. Gracie Mittelsted, B-212292, October 12, 1984.

Experts and Consultants

Intermittently employed expert or consultant defined --

Generally (2-4)

Where an individual consultant's services were procured under a contract which established an employer-employee relationship with the Government rather than an independent contractor relationship, his entitlement to travel and relocation expenses is determined by the statutes and regulations concerning reimbursement for travel and relocation expenses of Government employees. Where the consultant was apparently employed in a manpower shortage position, he may be allowed reimbursement under 5 U.S.C. § 5723 for his travel expenses and for the transportation of his household goods and dependent from his residence at the time of his initial employment to his duty station, but not for return to his residence upon completion of the contract. Lynn Francis Jones, 63 Comp. Gen. 507 (1984). See also page 2-13 "Manpower shortage positions".

Intergovernmental Personnel Act

Federal Government employees

Per diem versus station allowances (2-16)--Upon reconsideration of decision B-207447, June 30, 1983, the employee may be allowed per diem as authorized by the agency for the period of his extended assignment under the Intergovern-

mental Personnel Act (IPA). In view of the absence of clear guidance from this Office and the Office of Personnel Management on the authorization of per diem for such assignments at the time the agency authorized the per diem, the authorization of per diem is deemed to be valid. However, the principles set out in the June 30, 1983 decision and recent Office of Personnel Management guidance should be followed for subsequent IPA assignments. William T. Burke, B-207447, March 30, 1984.

SUBCHAPTER II-GENERAL RULES AND DEFINITIONS

C. Travel Agencies

Restriction on use (2-28)

An employee who pays for travel on official business with more than $100 of personal cash, contrary to Federal Travel Regulations para. 1-10.2b (September 1981), may be reimbursed if he provides a receipt or other evidence of purchase.

Employee who purchased airline ticket for travel in March 1984, from travel agent, may be reimbursed to the extent amount paid does not exceed cost of ticket procured directly from carrier, even though change to Federal Travel Regulations (Supp. 9, May 14, 1984) (FTR), specifically allowing this result was issued after travel was completed. This addition of FTR para. 1-3.4b(2)(b) was not revision of regulations, but instead was a clarification to bring FTR into accord with GAO cases and provisions of Joint Travel Regulations. Since record shows that employee had no alternative but to use travel agent, reimbursement is allowed as limited above. Joel L. Morrison, 63 Comp. Gen. 592 (1984).

CHAPTER 3

PURPOSE FOR WHICH TRAVEL MAY BE AUTHORIZED

H. Temporary Duty

Return to headquarters on nonworkdays

Voluntary return to headquarters (3-2)--An employee on temporary duty rented lodging by the month rather than by the day, but actually occupied them for a lesser period because he voluntarily returned home on weekends. He may be reimbursed for his weekend return travel under para. 1-8.4f of the Federal Travel Regulations up to actual subsistence expenses which would have been allowable had he remained at his duty site for the weekend, including the average cost of lodging based on the monthly rental. Coleman Mishkoff, B-212029, August 13, 1984.

Authorized return to headquarters

Limited to headquarters or place of abode (3-5)--An employee who is stationed in Portsmouth, New Hampshire, and resides in Portland, Maine, was assigned to temporary duty in Arlington, Virginia. Based on agency officials' verbal approval, which was later confirmed in writing, the employee traveled to Kansas City, Missouri, on the Thanksgiving holiday weekend for personal reasons. The employee may not be reimbursed for his transportation expenses to and from Kansas City, since such travel was not to the employee's headquarters or place of abode from which he commutes daily to his official station. FTR paragraphs 1-7.5c and 1-8.4f. Furthermore, the Government cannot be bound by the erroneous acts or advice of its agents. Michael K. Vessey, B-214886, July 3, 1984.

Hearings (3-12)

To Attend Merit Systems Protection Board Hearing (NEW) --

An individual who was separated through a reduction-in-force prior to the expiration of her term appointment in March 1982, appealed the separation in hearings before the Merit Systems Protection Board in May 1982. The appellant prevailed, was awarded backpay for the unexpired period of her appointment, and now claims travel expenses for her attendance at the hearings. The appellant may not be allowed travel expenses authorized for a Government employee under 5 U.S.C. §§ 5702 and 5704, since she traveled to the hearings after the expiration of her term appointment. Furthermore, she is not eligible for travel expenses payable to non-employee witnesses under 5 U.S.C. § 5703, since she was a party to the proceeding. Gracie Mittelsted, B-212292, October 12, 1984.

J. Routing of Travel

Amount reimbursable when travel by circuitous route results in net savings to Government

Constructive cost of direct transportation by common carrier (3-19)--

An employee stationed in California appeals the settlement which denied certain per diem and transportation expenses incident to his temporary duty travel to Florida, where travel was by an indirect route and reimbursement was based on constructive travel by a direct route. Denial of the employee's claim for additional meal and lodging expenses is sustained, since there is no authority to pay subsistence expenses where travel by an indirect route increases traveltime or where the employee is in an annual leave status when the expenses are incurred. Although the employee may not be reimbursed for a rental car on days when no official business is performed, he may be reimbursed for allowable transportation not to exceed the cost of the rental car. Vincent L. DiMare, B-212087, February 7, 1984.

CHAPTER 4

TRANSPORTATION

SUBCHAPTER I--TRANSPORTATION ALLOWABLE

A. Authorized modes of travel

Use of other conveyance reimbursable

Limousine (4-14)--Employee on temporary duty took a limousine from the airport to her hotel although a hotel courtesy limousine was available. Federal Travel Regulations para. 1-2.3c permits agencies to limit or restrict transportation claims where courtesy transportation is available. However, where the employee was unaware of the availability of the courtesy transportation, her claim for the limousine service she used may be paid. Pat Young, B-213765, March 6, 1984.

B. Other Expenses incident to transportation (4-17) --

Transportation Request Issued for Wrong Destination (NEW)--Through administrative error in temporary duty travel arrangements, an employee was issued an airline ticket for travel to the wrong destination. He discovered the error en route, and spent $284 in personal funds to secure a ticket for the proper destination. The employee may be reimbursed for the full cost of the airline ticket, notwithstanding the $100 cash limitation stated in the Federal Travel Regulations, since the cash purchase resulted from administrative error, related to circumstances which were not within the employee's control, and documentation of the cost of the transportation has been submitted. Patrick G. Orbin, B-215550, October 23, 1984.

G. Gifts or prizes acquired in the course of official travel (4-39) --

Discount Coupons and Other Benefits Received in the Course of Official Travel (NEW) --

The general rule is that a Federal employee is obligated to account for any gift, gratuity or benefit received from private sources incident to the performance of official duty. This rule applies to situations where an employee enters a promotional program sponsored by an airline, and, while traveling on official business, receives a discount as a result of entering that promotional program.

A bonus ticket received by an employee as a result of trips paid by both appropriated funds while on official travel and personal funds, is the property of the Government and must be turned into the appropriate official of the Government. If employee wishes to participate in the bonus program and retain the benefits from the program, he should make certain that all trips included in the bonus program are paid from personal funds.

An employee who enters a promotional program sponsored by airlines which includes free upgrade of service to first class, membership in clubs, and check-cashing privileges, does not have to turn in such benefits to the Government. The Government is unable to use such benefits, and there is no reason for employee not to use such benefits. Discount Coupons and Other Benefits Received in the Course of Official Travel, 63 Comp. Gen. 229 (1984).

Promotional Gifts Received as a Result of Official Travel (NEW) --

An employee received and used a bonus ticket and a free hotel room for personal travel as a result of trips paid by both personal funds and Government funds. Such promotional gifts which were received because of travel paid by Government funds belong to the Government. The employee must pay the full value of the tickets and benefits received to the Government. Since this employee used these gifts prior to the issuance of guidance on the use of such materials, he may reduce his liability for repayment based on the percentage of travel paid by personal funds. Any future use of promotional gifts will result in liability for the full value of the bonus or gift. John D. McLaurin, 63 Comp. Gen. 233 (1984).

SUBCHAPTER IV--REIMBURSEMENT FOR USE OF PRIVATELY-OWNED CONVEYANCES

A. Mileage Payments

Official business travel

Residence to place of duty at official station (4-41)--A Navy employee claims mileage for travel from home to work. As part of his assigned duties as a handler of a Drug Detection Dog, he transports it in his privately-owned automobile between his residence and permanent duty station. He claims mileage on the basis that his commuting expenses increased by the requirement to transport the dog because he was deprived of cost advantages of public transportation or carpooling. Disallowance of the claim is sustained, because employees must bear the cost of transportation between their residence and duty station absent statutory or regulatory authority to the contrary. Richard H. Foster, B-202370, April 2, 1984.

Discretionary authorized or approval

Travel in the vicinity of headquarters (4-44)--Two employees were assigned to perform duty 30 miles from their duty station for a 2-week period. The employees claimed actual subsistence expenses and mileage as prescribed in their travel orders. The agency denied subsistence reimbursement since the agency considered the assignment to be local travel. We hold that payment may be allowed where subsistence expenses and mileage were properly authorized and were not specifically precluded by agency regulations defining the local travel area. Jack Mohl and Jerry W. Elliott, B-213816, May 22, 1984.

CHAPTER 5

OTHER EXPENSES ALLOWABLE

C. Miscellaneous travel expenses

Other Expenses (5-10)

Loss on Currency Exchange (NEW)

An employee on official travel may not be reimbursed for loss he sustains in reconverting travelers checks and cash, drawn in British pounds, into United States dollars. As a general rule, the risk of incurring an exchange loss while on temporary duty in a foreign country lies with the employee. 23 Comp. Gen. 212 (1943). Absent statutory or regulatory authorization, losses incurred on a currency exchange may not be reimbursed. Similarly, there is no authority for the agency to recoup any gain in currency conversion from the employee. Chester M. Purdy, 63 Comp. Gen. 554 (1984).

Miscellaneous Expenses (5-10)

Expenses incurred by an employee for re-licensing and re-titling his privately-owned vehicle upon return to his permanent duty station in one state from a temporary duty training assignment in another state whose laws required initial re-licensing and re-titling are reimbursable as miscellaneous expenses. Robert H. Chappell, B-214930, October 1, 1984.

CHAPTER 6

PER DIEM

A. General provisions

New appointees (6-9)

Where orders assign newly appointed seasonal employees to a duty station where they are fed and lodged and all their duties are to be performed at that station, they cannot be viewed as itinerant employees for travel per diem purposes.

Where newly appointed employees report to an administrative headquarters merely for personnel processing and perform all duties at an assigned duty station in the field, the reporting station cannot be considered their duty station for travel per diem purposes even though the agency designates it as such on the employees' orders. There is no authority to pay per diem to the employees from the time they departed the reporting station. Daisy Levine, et al., 63 Comp. Gen. 225 (1984).

E. Computation of per diem

Traveltime

"Two-day rule"

Avoiding travel on weekend (6-29)

The "2-day per diem" rule limiting per diem which is outlined in 56 Comp. Gen 847 (1977) and 55 Comp. Gen. 590 (1975) is not applicable where an employee's travel is extended by 2 or more days, not due to his personal desire to avoid working on nonworkdays, but rather due to Government orders based upon an administrative determination that it would be cost effective to extend the employee's traveltime in lieu of requiring weekend overtime work. Gerald F. Krom and James A. Bosch, 63 Comp. Gen. 268 (1984).

F. Rates

Lodging at family residence

Generally (6-34)

Employee claims reimbursement for reduced per diem rate (no lodging cost) while staying at his residence which is near his temporary duty site. When working at official duty station 65 miles from his residence, employee does not commute from his residence but stays at his in-laws' house. His travel orders authorized payment of per diem in accordance with Joint Travel Regulations (JTR). Both JTR and

agency's own regulations provide for payment of reduced per diem (no lodging cost) in this situation. We hold that these regulations require payment of a reduced per diem rate under these circumstances. Durel R. Patterson, B-211818, February 14, 1984.

The location of an employee's official station is a question of fact, and the factors to be considered are: the administrative designation; the place where the employee performs the major part of the duties; and the length and nature of the employee's duties and assignments. Here, the employee performed some duties at the administratively determined official station, but performed a majority of his duties at another station. However, since the nature of his employment was itinerant with assignments to many different temporary duty stations, we hold that the administratively determined official station was, in fact, his official duty station. B-211818, February 14, 1984, sustained. Durel R. Patterson-Reconsideration, B-211818, November 13, 1984.

Meals or lodgings furnished by the Government

Rate should be reduced (6-35)--Five employees of the Forest Service performed temporary duty at seasonal worksites in Boise National Forest. They were denied per diem allowances because they were furnished Government quarters in lieu of per diem in accordance with Forest Service regulations. Since the employees maintained residences at their permanent duty stations and incurred additional expenses for meals and miscellaneous items during their temporary duty assignments, they are entitled to payment of a reduced per diem. Jack C. Smith et al., 63 Comp. Gen. 594 (1984).

Increases and decreases in per diem rates

Decreases in per diem rates

Lower rate, regardless of notice (6-38)--Civilian employee of the Defense Logistics Agency assigned to long-term training at the Armed Forces Staff College in Norfolk, Virginia, was authorized and paid a per diem rate that included a housing allowance for Government family quarters.

Agency now seeks to limit the per diem housing allowance to the single occupancy rate thereby placing the employee in debt to the Government. There is no legal justification to revoke and retroactively modify the employee's per diem entitlement, which vested at the time the assignment was performed under competent travel orders, where employee's authorized per diem entitlement at family quarters rate

incident to long-term training did not clearly conflict with law or regulation and agency's unwritten, unarticulated policy, which was not ascertainable by employee, is not "apparent error" to justify retroactive modification of travel order. Betty D. Gardner, B-214482, September 7, 1984.

CHAPTER 7

ACTUAL SUBSISTENCE EXPENSES

C. Types of expenses covered

Excessive meal cost (7-3)

An Internal Revenue Service (IRS) employee who had been in an actual subsistence expense travel status submitted claim for meal expenses which was found to be excessive based on survey of meal expenses of other employees on same temporary training assignment. IRS's reduction of employee's meal expense reimbursement to the average amount reimbursed to other employees attending same training program is arbitrary. Since the IRS has failed to substantiate a basis for the reduction, the employee's claim is allowed. Coleman Mishkoff, B-212029, August 13, 1984.

G. Authorized reimbursement

Exceeds statutory maximum (7-9)

Members of the Cultural Property Advisory Committee may not be reimbursed for actual subsistence expenses exceeding the maximum amount of $75 per day, as limited by 5 U.S.C. § 5702(c). The Federal Advisory Committee Act, Public Law 92-463, incorporated by reference in the Advisory Committee's enabling legislation, provides that advisory committee members are to be paid the same travel expenses as authorized under 5 U.S.C. § 5703 for intermittent employees. Under 5 U.S.C. § 5703 and the Federal Travel Regulations, intermittent employees serving as experts or consultants may not be reimbursed for actual subsistence expenses exceeding the maximum rate, absent specific statutory authorization for the payment of a higher rate. We find that no such specific statutory authority is included in the Advisory Committee's enabling legislation. Cultural Property Advisory Committee, 64 Comp. Gen. 34 (1984).

I. Interruption of subsistence status

Subsistence status interrupted for personal reasons (7-11)

An employee on a temporary duty assignment returns home late in the day after being notified of a death in the family and is required by the motel to pay for his room for that day due to the lateness of his departure. Since the employee was in a travel status on official business at the time he became obligated to pay for the motel room, his lodging costs may be considered an actual and necessary expense of travel within the meaning of the Federal Travel Regulations and included in his actual subsistence expense allowance for that day. A. Brinton Cooper III, B-213163, February 6, 1984.

CHAPTER 8

TRAVEL OVERSEAS

C. Educational allowances (8-1)

Child Residency and Purpose of Travel (NEW)

The children of an employee of the Panama Canal Commission who live in San Francisco with the employee's wife are not eligible for tour renewal travel to Panama to visit the employee during summer vacation. Unless the children return to Panama to live they cannot be considered members of the employee's household within the meaning of the Federal Travel Regulations. James R. Dunworth, B-212480, February 15, 1984.

E. Miscellaneous (8-2)

Loss on Currency Exchange (NEW)

An employee on official travel may not be reimbursed for loss he sustains in reconverting travelers checks and cash, drawn in British pounds, into United States dollars. As a general rule, the risk of incurring an exchange loss while on temporary duty in a foreign country lies with the employee. 23 Comp. Gen. 212 (1943). Absent statutory or regulatory authorization, losses incurred on a currency exchange may not be reimbursed. Similarly, there is no authority for the agency to recoup any gain in currency conversion from the employee. Chester M. Purdy, 63 Comp. Gen. 554 (1984).

CHAPTER 12

TRAINING

B. Relocation expenses or per diem

Generally (12-2)

An employee assigned to long term training may receive temporary duty allowances or permanent change-of-station allowances but not both. When an employee is authorized only temporary duty allowances the issuance of a Government bill of lading for the transportation of an employee's household goods in itself does not provide a basis for finding the agency intended to authorize permanent change-of-station allowances contrary to the terms of the travel order.

An employee who received per diem incident to a training assignment and, thus, could not have been authorized transportation of household goods for the same assignment, must reimburse the Government to the extent the General Services Administration certifies payment of a carrier's bills for transportation of her household goods performed under an erroneously issued Government bill of lading. Rosemarie E. Naguski, B-212335, February 28, 1984.

E. Travel and miscellaneous expenses (12-5)

Thesis Preparation Costs (NEW)

Defense Logistics Agency civilian employee requests reimbursement for full cost of typing and copying a thesis prepared in association with a long-term training program. Agency has broad discretion to pay all or part of the expenses of training, including all or part of thesis preparation costs. In employee's travel orders agency limited reimbursement to $200, and stated that it was agency policy to so limit reimbursement unless orders specified differently. Based on the record before us, we will not overrule the agency's denial of reimbursement for these expenses. However, it is clear that the agency has authority to pay these expenses and we would have no objection if the agency chooses to do so. Margaret J. Janes, B-212362, June 28, 1984.

CHAPTER 13

SPECIAL CLASSES

SUBCHAPTER I - FOREIGN SERVICE TRAVEL

G. R&R travel

Alternate R&R point--Fly America Act (13-10)

A foreign service officer stationed in Nepal was authorized rest and recuperation travel to Los Angeles, California, instead of Hong Kong, the designated relief area for employees in Nepal. He traveled by a circuitous route to Los Angeles where he stayed for just over a day before beginning his return travel to Nepal. Since he did not spend his rest and recuperation time in the continental United States as contemplated, he may be reimbursed only for the constructive cost of travel to Hong Kong, the designated relief area. John M. Ryan, B-214549, October 5, 1984.

SUBCHAPTER II - OTHER SPECIAL CLASSES

D. Witnesses (other than Government employees testifying in their official capacities) (13-21)

Separated Government Employee (NEW)

An individual who was separated through a reduction-in-force prior to the expiration of her term appointment in March 1982, appealed the separation in hearings before the Merit Systems Protection Board in May 1982. The appellant prevailed, was awarded backpay for the unexpired period of her appointment, and now claims travel expenses for her attendance at the hearings. The appellant may not be allowed travel expenses authorized for a Government employee under 5 U.S.C. §§ 5702 and 5704, since she traveled to the hearings after the expiration of her term appointment. Furthermore, she is not eligible for travel expenses payable to non-employee witnesses under 5 U.S.C. § 5703, since she was a party to the proceeding. Gracie Mittelsted, B-212292, October 12, 1984.

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OFFICE OF GENERAL COUNSEL
U.S. GENERAL ACCOUNTING OFFICE

CHAPTER 1

INTRODUCTION

A. RELOCATION EXPENSES UNDER 5 U.S.C. §§ 5721-5733

Statutory authority (1-1)

Section 120 of Public Law 98-473, October 12, 1984, 98 stat. 1839, 1968, made several changes to the provisions governing relocation allowances.

1. Amended 5 U.S.C. § 5723(a)(1)(C) to eliminate the Senate confirmation requirement for Presidential appointees.
2. Amended 5 U.S.C. § 5724b to permit reimbursement of "substancially all" income taxes, including "local" income taxes required to be paid by the employee and spouse on relocation expense reimbursement amounts.
3. Amended 5 U.S.C. § 5724c to permit the President to regulate relocation service contracts by Executive order.

Employees covered

Consultant in manpower shortage position (1-5) (New)

Where an individual consultant's services were established as an employer-employee relationship with the Government rather than an independent contractor relationship, his entitlement to travel and relocation expenses is that of a Government employee. Where the consultant was apparently employed in a manpower shortage position, he may be allowed reimbursement under 5 U.S.C. § 5723 for his travel expenses and for the transportation of his household goods and dependents from his residence at the time of his initial employment to his duty station, but not for return to his residence upon completion of the contract. Lynn Francis Jones, 63 Comp. Gen. 507 (1984).

Employees not covered

Presidential appointee (1-8) (New)

The Chairman of the National Credit Union Administration (NCUA) was reimbursed for relocation expenses he incurred following his appointment to that position in 1981. Prior decision that Chairman was not entitled to such expenses is affirmed because: (1) at the time of the Chairman's appointment, there was no authority in 5 U.S.C. Chapter 57, Subchapter II, for payment of relocation expenses to Presidential appointees; (2) the NCUA's operating fund constitutes an appropriated fund, subject to statutory restrictions on the use of such funds; (3) it is not material that

the NCUA's Central Liquidity Facility (CLF) reimbursed NCUA for the Chairman's relocation expenses, since the Chairman is an employee of NCUA, not CLF; and (4) the Government cannot be bound by erroneous advice provided to the Chairman by NCUA officials. Edgar T. Callahan, 63 Comp. Gen. 31 (1983), affirmed on reconsideration, B-210657, May 25, 1984.

Reemployment more than one year after RIF (1-8) (New)

Employee voluntarily resigned after being notified that he was to be separated in a reduction-in-force (RIF). Approximately 15 months later he was reemployed by a different agency in a different location. Since he did not meet statutory requirement of 5 U.S.C. § 5724a(c) (1982) that he be reemployed within 1 year of separation for eligibility purposes following a RIF, he may not be reimbursed his relocation expenses. Neither agency regulation nor agency official can waive or modify statutorily imposed 1-year limit. Jay L. Haas, B-215154, November 29, 1984.

Employee of a nonappropriated fund activity (1-8) (New)

Relocation expenses for changing duty stations are reimbursable only if the receiving and losing agencies meet the definition of "agency" under 5 U.S.C. § 5721(1). Since a nonappropriated fund activity is not such an "agency," its employee is not entitled to relocation expenses upon transfer to a civilian position with the U.S. Army. John E. Seagriff, B-215398, October 30, 1984.

G. RETURN TO UNITED STATES FOR SEPARATION (1-14) (New)

An employee stationed in Puerto Rico was authorized to make an early return to his home in the United States for retirement. His travel authorization erroneously authorized him to incur relocation expenses. Employee seeks reimbursement under 5 U.S.C. § 5724 and § 5724a. The claim is denied. Those provisions apply only to employees who are transferred between duty stations to perform permanent duty at new station. Travel rights of employees returning to continental United States for retirement or separation are governed by 5 U.S.C. § 5722, and FTR, para. 2-1.5g(2)(b), which do not permit reimbursement of any of the expense items claimed. Arnold Krochmal, B-213730, April 17, 1984.

CHAPTER 2

GENERAL CONDITIONS AND REQUIREMENTS

A. GENERAL REQUIREMENTS

Effective date of transfer or appointment

Approved reporting date delay (2-7) (New)

An employee's permanent change-of-station travel orders designated his reporting date at his new duty station as "on or about September 26, 1982," but the employee delayed reporting until October 4, 1982, because he was authorized annual leave. He is entitled to increased relocation benefits effective for employees who report to their new duty stations on or after October 1, 1982, since the actual rather than designated reporting date governs entitlement to benefits. Daniel Dorris, B-213697, April 16, 1984.

B. TRANSFER

Overseas transfer

Residency determination authority (2-29) (New)

An employee who was locally hired for a position in Puerto Rico with HUD after having served 5 months with IRS in Puerto Rico claims entitlement to renewal agreement travel under 5 U.S.C. § 5728(a), claiming that his place of actual residence is New Jersey where he had lived prior to his transfer to Puerto Rico with the IRS. Based on information evidencing his intent to relocate to Puerto Rico on a permanent basis, HUD properly determined that the employee's residence at the time of his appointment was Puerto Rico. Prior residency determination made by IRS would not be binding on HUD. Miquel Caban, 63 Comp. Gen. 563 (1984).

D. RENEWAL AGREEMENT TRAVEL

Eligibility

Fulfilling eligibility requirements (2-39)

An employee who executed an agreement to remain with IRS in Puerto Rico for 24 months but who obtained an appointment in Puerto Rico with HUD only 5 months later, did not satisfy the terms of his original agreement by remaining with HUD for an additional 19 months. An agency may require an an employee to satisfy an agreement to remain in the service of that particular agency at a designated overseas post of

duty for a specified period as a condition of return travel. Miquel Caban, 63 Comp. Gen. 563 (1984).

Completion of tour of duty (2-39)

An employee who had been stationed in Montreal, Canada, for 2 years agreed to serve there for an additional 2-year period and performed renewal agreement travel under 5 U.S.C. § 5728 (1982). After returning to that duty station in Montreal for approximately 18 months, the employee transferred to a position in the United States. Although the employee did not complete the agreed period of overseas service, she may retain renewal agreement travel expense reimbursement since she served for more than 1 year under the new agreement. Virginia M. Borzellere, B-214066, June 11, 1984.

CHAPTER 3

TRAVEL OF EMPLOYEE AND IMMEDIATE FAMILY

G. PER DIEM

Travel by POV

Vehicle breakdown (3-27) (New)

Employee who performed travel incident to transfer of duty station was delayed by breakdown of automobile. Employee may be allowed per diem and traveltime for period of delay since, during the entire trip, he averaged more than the daily minimum driving distance specified in FTR, para. 2-2.3d(2), FPMR 101-7 (May 1973), as amended, and arrived at new duty station within time authorized. However, per diem entitlement is subject to reduction since employee resided with relatives during period of delay, unless he can show that his relatives incurred additional expenses as a result of his stay. Richard Coon, B-194880, January 9, 1980, overruled in part by Oscar Hall, B-212837, March 26, 1984.

Per diem extended

Justifiable delay (3-29)

An employee who is delayed by a breakdown of his automobile en route to a new duty station may be allowed travel time and be reimbursed for an additional day of per diem where the agency determines that the reason for delay was beyond the employee's control and acceptable to the agency. Thomas S. Swan, Jr., B-215305, December 26, 1984 (64 Comp. Gen. __)

I. FRAUDULENT TRAVEL VOUCHERS (3-33) (New)

Where the employee deliberately misstated his per diem expenses by including both his own subsistence expenses (which would be reimbursable) and his wife's alleged subsistence expenses where there is no evidence that she performed any travel, per diem for those days must be entirely disallowed. Fraudulent Travel Vouchers, B-204295, August 27, 1984.

CHAPTER 4

MISCELLANEOUS EXPENSES

F. DETERMINING AMOUNT OF REIMBURSEMENT

Reimbursement of minimum allowance

Requirement that expense be incurred

IPA assignments (4-7) (New)

Employee who returned with his family to permanent duty station following an IPA assignment, claims a $200 miscellaneous expense allowance. The provisions of 5 U.S.C. § 3375(a)(5) (Supp. III 1979), added by the Civil Service Reform Act of 1978, specifically authorizes reimbursement for miscellaneous expenses incurred in connection with IPA assignments if the employee's change of station involves movement of household goods. Since the employee shipped household goods, he may be allowed a $200 miscellaneous expense allowance as provided under FTR, para. 2-3.3a. F. Leroy Walser, B-211295, March 26, 1984.

G. REIMBURSABLE EXPENSES

Postal expense (4-14) (New)

Postage for correspondence with realtors incident to a PCS transfer is a reimbursable miscellaneous expense. Also, postage expense for notifying subscription publishers, financial institutions, and the like, of change of address now may be allowed as a reimbursable miscellaneous expense since such costs are inherent in a change of residence. Gregory J. Cavanagh, B-183789, January 23, 1976, overruled by John J. Jennings, 63 Comp. Gen. 603 (1984).

H. NONREIMBURSABLE EXPENSES

Mobile home related expenses

Rent (4-21)

Prior to a PCS transfer, an employee purchased a mobile home to be used as his residence at old station. The purchase was covered by a promissory note and installment loan contract. Under its terms, title remained in seller until note was paid, the mobile home would remain in trailer park until note was paid, and purchaser would pay monthly space rental fee. Employee contends purchase agreement precluded him from moving trailer and claims reimbursement for cost of monthly space rental under FTR para. 2-6.2h for months following transfer. Employee has duty to avoid or minimize such expenses, if possible. Jeffrey S. Kassel,

56 Comp. Gen. 20 (1976). According to agreement, the balance due on note could be prepaid without penalty. Record does not show that employee made any attempt to pay off the remaining balance on the note, which would allow him to move the mobile home, or to take any other action that would have mitigated his costs. Therefore, reimbursement is not authorized. Daniel J. Price, B-210918, March 20, 1984.

Postal expenses

Postage stamps (4-24)

Decision Gregory J. Cavanaugh, B-183789, January 23, 1976, disallowing postage stamp cost reimbursement for change of address notices on transfers is overruled. However, postage expenses to obtain general information about the environs of the new duty station to which an employee is being transferred may not be reimbursed as a miscellaneous expense. While such information may be desirable, the expense of obtaining it is not an inherent part of the move. John J. Jennings, 63 Comp. Gen. 603(1984).

CHAPTER 5

TRAVEL TO SEEK RESIDENCE QUARTERS

C. PROCEDURAL REQUIREMENTS

Agreement to transfer

Refusal to transfer (5-3)

Employee declined transfer after house-hunting trip, contending that he could not find suitable and affordable housing at new duty station. If reason for declination was acceptable to agency, GAO will not object to agency's payment of expenses of house-hunting trip. However, whether or not reason meets this test is primarily for determination by agency, and GAO will not disturb agency's decision unless it is clearly erroneous, arbitrary, or capricious. Murrel C. Hoage, 63 Comp. Gen. 187 (1984).

E. NATURE OF TRIP

Round trip

Interim reporting for duty (5-9) (New)

An employee was authorized a house-hunting trip to facilitate a permanent change of station. FTR, para. 2-4.1a provides that an employee's round trip for house-hunting, "must be accomplished prior to his/her reporting to the new official station." Since the employee reported for duty before completing the house-hunting trip, she must repay certain monies advanced to her for the trip. That she reported for duty only to wait for her relocation check to arrive does not affect the application of the regulation. Sheryl Templeman, B-212261, February 6, 1984.

G. REIMBURSABLE EXPENSES

Per diem

No return travel (5-13) (New)

An employee was authorized an advance house-hunting trip. Where return travel is not performed before the employee reports for duty, the travel actually performed is regarded as the employee's PCS travel and is reimbursable on that basis. However, house-hunting per diem would be payable for the days spent seeking permanent quarters in advance of reporting for duty, not to exceed house-hunting days actually authorized. Gary E. Pike, B-209727, July 12, 1983; and Huai Su, B-215701, December 3, 1984.

CHAPTER 6

TEMPORARY QUARTERS SUBSISTENCE EXPENSES

E. OCCUPANCY OF TEMPORARY QUARTERS

What constitutes temporary quarters

Quarters that are not temporary

Occupancy of residence at new station

Leased quarters (6-24) (New)

A transferred employee rented an apartment at his new duty station under a 1-year lease with plans to buy a residence at the end of the lease term and when a house he owns is sold. The employee's claim for temporary quarters subsistence expenses for the first 30 days he occupied the apartment may not be paid. His execution of a 1-year lease indicates an initial intent to occupy the apartment on other than a temporary basis. His intent to purchase a home at some time in the future does not change the nontemporary character of his initial occupancy so as to permit reimbursement of temporary quarters subsistence expenses under the rule stated in FTR, para. 2-5.2c. Johnny M. Jones, 63 Comp. Gen. 531(1984).

F. TIME LIMITATIONS

Time to begin occupancy

Staying with friends or relatives delay (6-25) (New)

The Federal Travel Regulations require that in order to qualify for expense reimbursement, occupancy of temporary quarters must begin no later than 30 days after the employee reports to his new duty station or not later than 30 days from the date the family vacates the residence at the old duty station. A transferred employee who timely vacated his residence at his old station, but who stayed with friends for more than 30 days after he and his family traveled to the new station may not be reimbursed for temporary quarters and subsistence expenses incurred when they stayed in a motel after time to qualify had expired. Mark W. Spaulding, B-214757, September 5, 1984.

Running the period of occupancy

Runs concurrently for employee and family (6-27)

An employee, pursuant to a PCS transfer, reported for duty on February 8, 1983. He was paid temporary quarters

subsistence expenses for himself for the period February 8-26, 1983. Family members arrived at the new station on June 26, 1983, and remained in temporary quarters until July 6, 1983. The employee's claim for subsistence expenses for himself and his family during the second period, in addition to that claimed for the first period, is not allowed. Entitlement to temporary quarters subsistence expenses under Chapter 2, Part 5 of the FTR, is for a consecutive day period only, not to exceed 30 days, and runs concurrently for all family members. However, under FTR, para. 2-5.2(e), the period of temporary quarters may be deferred until the family members arrive at the new station. Therefore, the employee has the option of claiming either the earlier period or the later period, whichever provides the greater benefit. Huai Su, B-215701, December 3, 1984.

Period interrupted

Approved sick leave (6-30) (New)

An injured employee on sick leave was transferred to Dallas, Texas. On arrival in Dallas he reported by telephone to his supervisor and was officially entered on duty on January 17, 1983, without physically appearing at the office. Following surgery and recuperation, he reported for duty on March 7, 1983. He claims temporary quarters expenses for January 11 through 14 and March 6 through 26, 1983. The claim is allowed. While that interruption of temporary quarters occupancy did not involve "official necessity" as that term is used in FTR, para. 2-5.2a, it is a proper basis to permit extension of the 30 consecutive days since the period of surgery and recuperation was covered by approved sick leave. Bobby L. Cook, 63 Comp. Gen. 222(1984).

H. REIMBURSABLE EXPENSES

Evidence of lodging expenses

Requirement for receipts

Staying with friends or relatives (6-34) (New)

A transferred employee claims entitlement to lodging and subsistence expense reimbursement at his new duty station while occupying temporary quarters provided by a relative. The claim was administratively disallowed on the basis of insufficient information to establish the reasonableness of the claimed expenses. The claim is denied, but on other grounds. While reasonableness of expenses is always in issue, under FTR, para. 2-5.4(b), proof that the expenses were incurred is also required. Where a receipt given by a commercial establishment for lodging establishes both payment and reasonableness, a statement from a relative regarding the value of similar lodging does not. Since

reimbursement is based on the incurrence of expenses which an employee is required to pay, unless proof of payment is submitted, the issue of reasonableness will not be considered. William J. Toth, B-215450, December 27, 1984.

Fraudulent claims (see RELOCATION, Supp. 1984, pg. 6-2)

When an employee submits a voucher where part of the claim is based on fraud, those items which are based on fraud may be denied. With regard to subsistence expenses, the voucher may be separated according to individual days with each day constituting a separate item of actual subsistence expenses. Thus, expenses are denied for those days for which an employee submits fraudulent information, while claims for expenses on other days which are not tainted by fraud may be paid. Fraudulent Travel Vouchers, B-204295, August 27, 1984.

I. COMPUTING REIMBURSEMENT

Daily rate

High-rate geographical areas (6-41)

An employee argues that based on 1982 amendment to FTR, para. 2-5.4c referring to "maximum per diem rate prescribed for the locality," his temporary quarters subsistence expense reimbursement should be based on the high-cost geographic area rate used when actual-costs-while-on-temporary-duty is authorized, rather than the statutory per diem rate. Although the regulation could be misinterpreted, the statute authorizing temporary quarters sets a ceiling on the amount payable by reference to the maximum per diem rate, not the actual subsistence rate. Therefore, reimbursement of temporary quarters subsistence expense is limited to $50 within the continental United States. Paragraph 2-5.4c has since been changed to make this clear. Stephen A. Bartholomew, B-212967, May 23, 1984.

CHAPTER 7

RESIDENCE TRANSACTION EXPENSES

SUBCHAPTER I -- ENTITLEMENT

B. ELIGIBILITY

Change of official station

Employees not eligible

Position change at permanent station (7-5) (New)

An employee, transferred for training and reimbursed for those expenses, subsequently claimed expenses associated with a change of residence at his permanent duty station. The claim may not be allowed. An employee's eligibility for relocation expenses authorized by 5 U.S.C. §§ 5724 and 5724a (1982) is conditioned on expense incurrence pursuant to a permanent change of station. The employee was reassigned to another position at the same duty station and, therefore, did not undergo a change of duty station. Although agency officials advised the employee that he could be reimbursed for expenses incurred in a local move, the Government is not bound by such erroneous acts or advice. Stephen J. Musser, B-213164, February 22, 1984. Compare Edwin C. Hoffman, Jr., B-213085, January 16, 1984 on pg. 7-2 of this supplement.

C. PROCEDURAL REQUIREMENTS

Authorization

Pre-vacancy announcement sale (7-7) (New)

Employee anticipated transfer to a new position at a new duty station and offered his residence at old duty station for sale. This residence was sold before the new position vacancy was announced, before the employee was selected, and before he was first definitely informed of the transfer. In the absence of previously existing administrative intent to transfer the employee, the real estate sales expenses may not be paid. George S. McGowan, B-206246, August 29, 1984.

Pre-position selection sale (7-7) (New)

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. James K. Marron, 63 Comp. Gen. 298 (1984).

Transfer not approved or effected (7-7) (New)

An employee was selected for a position away from his duty station. In anticipation of transfer, he put his residence up for sale. Shortly thereafter, he was selected for the same position at his current duty station. Employee seeks reimbursement for cost of selling old and purchase of new residence, claiming he was commited to the sale before acceptance of the position at his old station. Employee's claim for reimbursement is denied. Anticipatory expenses may not be paid unless the transfer is authorized, or actually approved and effected. No such authorization was ever issued, and employee chose to remain at old duty station for personal reasons. Edwin C. Hoffman, Jr., B-213085, January 16, 1984.

Sale prior to reinstatement transfer (7-7) (New)

An air traffic controller in Ohio who was selected for a higher grade position in Illinois, was removed from his position prior to actual transfer. Upon reinstatement to his former position in Ohio as a result of an MSPB decision reversing his removal, the employee requests reimbursement of real estate expenses incurred. The employee may not receive reimbursement for real estate expenses where he entered into the sales agreement to sell his home after he had received notice of his imminent removal. George F. Ackley, B-214828, October 11, 1984.

E. SPECIFIC CONDITIONS OF ENTITLEMENT

Title requirements

Title in name of spouse and former husband (7-19) (New)

Transferred employee claims reimbursement for expenses incurred incident to the sale of a residence at his old duty station. Title to that residence was in the name of employee's wife and former husband, but employee and his wife resided in the house and she received all of the proceeds of the sale. Employee may be reimbursed for the expenses of sale to the extent of his wife's title interest in the residence, in this case 50 percent. Ferrel G. Camp, B-213861, May 21, 1984.

Settlement date limitation

Equitable title refinancing (7-26) (New)

An employee purchased a residence at his new duty station through a real estate installment contract under which he obtained equitable title upon the execution of the contract. He may be reimbursed for additional expenses associated with refinancing the contract paid within 1 year of the transfer. John W. Pitts, B-215012, December 4, 1984.

Pro rata reimbursement rule (7-28)

Flat fee real estate expenses (New)

Where employee sells a two-family house incident to a transfer,otherwise allowable real estate expenses which are based on a flat fee, without regard to purchase price, should, if reasonable, be reimbursed in full. Dikran Hazirjian, B-213385, March 23, 1984.

Use of land (New)

Where employee sells a two-family house incident to a transfer and both sections are identical in area but only the employee had use of the land, otherwise allowable real estate expenses which are based upon the sale price of the house may be reimbursed to the employee on a pro rata basis calculated in accordance with a formula based on allocation of the total land value to the employee's residence area. Dikran Hazirjian, B-213385, March 23, 1984.

Multiple occupancy - Pro ration

A transferred employee purchased as a residence at his new station a structure being extensively renovated. The employee is occupying the second and third floors as his residence, reserving the first floor for tenant occupancy, a commercial venture. Under FTR para. 2-6.1f, expenses of residence purchase shall be prorated for multiple occupancy dwellings which are only partially occupied by the employee. Since employee was not occupying one-third of the structure, expenses related to residence purchase which would be otherwise reimbursable to him are to be reduced by one-third. J. Dain Maddox, B-214164, July 9, 1984.

SUBCHAPTER II -- REIMBURSABLE EXPENSES

A. REAL ESTATE BROKER'S COMMISSIONS

Generally

Commission paid as purchaser (7-34)

A transferred employee purchased a lot suitable for residence construction near his new duty station. His claim for reimbursement of a broker's commission for finding the lot is denied since FTR, para. 2-6.2a specifically prohibits such commission in connection with the purchase of a home. Although the commission reimbursement prohibition in FTR, para. 2-6.2a specifically relates to purchase of a home, by implication it includes the lot on which the home is to be situated. Edmund J. Koenke, B-214362, August 7, 1984.

Commission paid as seller (7-34) (New)

Employee claims reimbursement of real estate expenses for sale of a lot incident to his transfer. He was not able to finish construction of a residence on the lot prior to his transfer. His claim is denied. Real estate expenses are payable only for the sale of a lot when the lot is integrated with a dwelling or used as a mobile home site in accordance with FTR para. 2-6.1, and he did not live in a residence on the lot when he was first notified of his transfer. Donnie R. Sparks, B-213769, May 1, 1984.

Customary locality charge (7-39) (New)

Transferred employee of the Veterans Administration (VA) seeks reimbursement of 7 percent real estate broker's commission he paid in connection with the July 1983 sale of his residence near former permanent duty station. The VA determined that 6 percent was the prevailing rate customarily charged in locality and reimbursed the employee at that rate. The Federal Travel Regulations in paragraph 2-6.2a require that the applicable rate is the rate generally charged by real estate brokers in the area, not the rate charged by the particular broker used by the employee. If employee, to expedite sale, pays commission greater than that usually charged, he cannot be reimbursed for the extra commission. Raymond L. Hipsher, B-214555, August 28, 1984.

E. TITLE EXAMINATION AND INSURANCE

Paid for by purchaser

Split costs (7-43) (New)

A transferred employee purchased a residence at his new station and assumed the seller's mortgage. The cost of title search and examination were split equally between the employee and the seller. The employee seeks reimbursement of his share of that cost on the basis of local custom. Under FTR, para. 2-6.2c(1), the cost of title search and examination is reimbursable, if it is customarily paid by the employee and if it does not exceed amount customarily charged in the area. These conditions are met in the present case. Dennis D. Gabel, B-215552, December 11, 1984.

F. ATTORNEY'S FEES AND LEGAL EXPENSES

Rule for settlements after April 27, 1977

Settlement date (7-46) (New)

A transferred employee sold a mobile home which he had been using as a residence at his old permanent station. Not all the legal and related expenses charged employee may be allowed, since some were incurred after the date of closing for the sale. In absence of a showing that the additional legal expenses incurred after that date necessarily related to the sale, only those expenses which were incurred by the employee through the designated date of the closing may be allowed. David J. Price, B-210918, June 12, 1984.

Unexpired lease settlements (7-46) (New)

An agency questions whether an employee can be reimbursed attorney's fees and costs incident to litigation to settle an unexpired lease. The employee may be reimbursed the litigation costs since the Federal Travel Regulations do not preclude such expenses incurred incident to settling an unexpired lease, the amounts claimed are reasonable, and the potential liability of the Government was considerably greater than the amount settled on. B-175381, April 25, 1972, is overruled in part. William H. Hutchinson, 64 Comp. Gen. 24(1984).

G. FINANCE CHARGES

Rule following Regulation Z

Exclusions from finance charge

Tax service charge (7-55)

Employee who purchased a residence incident to transfer may not be reimbursed for tax service and tax certificate fees paid to a title company, as such payments are service charges imposed incident to the extension of credit and thus are finance charges under the Truth in Lending Act and therefore not reimbursable under FTR, para. 2-6.2d(2)(e). John S. Derr, B-215709, October 24, 1984.

Loan service fee (7-56) (New)

A transferred employee incurred a 1 percent loan service fee when he purchased a residence at his new duty station. Paragraph 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (May 1973), in effect at the time, prohibited reimbursement for any fee constituting a finance charge under Regulation Z, 12 C.F.R. § 226.4(a). Since a loan service fee is a finance charge, the employee may not be reimbursed for any part of the fee unless shown to be excludable from the definition of a finance charge under 12 C.F.R. § 226.4(e). Ronald J. Walton, B-215699, October 2, 1984.

Loan origination fee (see RELOCATION, Supp. 1984, pg. 7-6)

Customary locality charge determinations (7-6) (New)

Transferred employee claimed 2.5 percent loan origination fee but agency limited reimbursement to 2 percent where HUD advised agency that 2 percent was the usual and customary rate for loan origination fees in the area of employee's new duty station. Information provided by HUD creates a rebuttable presumption as to the prevailing rate, and the employee has not provided information sufficient to rebut this presumption. Gary A. Clark, B-213740, February 15, 1984.

Mortgage discount or "points" (7-6) (New)

A transferred employee who purchased a new residence incurred a 5 percent loan fee which was described in the loan agreement as a "loan origination fee." The agency allowed reimbursement for only 1 percent of the loan amount, based on HUD's advice that a 1 percent loan origination fee is customary in the local area. The employee has reclaimed the additional 4 percent. The agency's determination to allow reimbursement for 1 percent of the loan amount is sustained, based on the advice provided by HUD. The employee's

claim for the additional 4 percent is denied because that portion of the fee represents a nonreimbursable mortgage discount. Roger J. Salem, 63 Comp. Gen. 456 (1984); and Harvey B. Anderson, B-214277, June 25, 1984

Loan assumption fee (see RELOCATION, Supp. 1984, pg. 7-6) (New)

Employee transferred to new duty station incurred a loan assumption fee upon purchasing a residence. Federal Travel Regulations, as amended in October 1982, permit reimbursement of loan origination fee and similar fees and charges, but not items which are considered to be finance charges. Loan assumption fee may be reimbursed where it is assessed instead of a loan origination fee, and reflects charges for services similar to those covered by a loan origination fee. Edward W. Aitken, 63 Comp. Gen. 355 (1984).

I. Taxes

Business privilege or gross receipts tax (7-59)

If sellers of mobile homes customarily collect state sales or "gross receipts" tax from purchasers, an employee may be reimbursed the tax he paid for a mobile home at his new duty station, even though sellers are not required under state law to shift the tax to purchasers by collecting it from them. 54 Comp. Gen. 93 (1974) overruled by Irvin W. Wefenstette, 63 Comp. Gen. 474 (1984).

J. CONSTRUCTION OF NEW RESIDENCE

Existing structure renovation (7-62) (New)

Progress inspection fees

A transferred employee agreed to purchase as a residence at his new duty station a structure being extensively renovated which required as a condition of financing additional site inspections. Basic reimbursement for appraisal expense was allowed by the agency, but expense of additional inspections disallowed. On reclaim, disallowance is sustained. Under FTR, para. 2-6.2d, only expenses associated with existing residence purchase are allowed, and while renovation of an existing structure is not new residence construction, it is analogous so as to preclude reimbursement. J. Dain Maddox, B-214164, July 9, 1984.

K. OTHER RESIDENCE TRANSACTION EXPENSES

Incidental services

Weatherization inspection and repairs (7-65) (New)

Transferred employee claims real estate expenses of $2,000 for weatherizing his residence prior to sale as required by lender consistent with state law. The claim is denied. While the cost of a weatherization inspection required by state law is reimbursable under FTR, para. 2-6.2f, expenses claimed for weatherization itself are operating and maintenance costs specifically disallowed by FTR, para. 2-6.2d. Robert J. Holscher, B-215410, November 14, 1984.

CHAPTER 9

TRANSPORTATION OF HOUSEHOLD GOODS

D. DEFINITION OF "HOUSEHOLD GOODS"

Items excluded

Canoes (9-10) (New)

A transferred employee who ships a canoe as part of his household goods must bear the expense, since boats are expressly excluded by regulations from the definition of "household goods" that may be shipped at Government expense, even though a Government travel officer mistakenly advised that a canoe was not considered a boat under the regulation. Jay Johnson, B-215629, November 27, 1984.

E. WEIGHT LIMITATION

Liability for excess weight

Collection from employee

Prior credits not time barred (9-15) (New)

To reduce his indebtedness for travel funds that his agency had advanced him, the employee submitted a claim for expenses he had incurred 11 years previously to ship his household goods incident to a permanent change of station. Even though his previous claim was time barred by 31 U.S.C. § 3702(b)(1), the employee's debt for the advance may be reduced to the extent of the allowable transportation expenses of the previous claim since both expenses involve the same type transaction so that the employee had the defense of recoupment, which is never time-barred. Cullen P. Keough, 63 Comp. Gen. 462 (1984).

Not subject to waiver

Carrier failed to provide estimate (9-16) (New)

An employee who was transferred in May 1983 shipped 16,700 pounds of household goods by a Government Bill of Lading. He was assessed charges for the weight in excess of the 11,000-pound statutory maximum then in effect. The employee may not be relieved of his liability for the excess of 11,000 pounds even though he was not given an estimate of the weight of his household goods in advance of shipment. Rayburn C. Robinson, B-215221, September 5, 1984.

CHAPTER 11

TRANSPORTATION AND STORAGE OF POV

B. ELIGIBILITY

Transfers within the U.S.

Handicapped employees (11-5) (New)

Employee without use of her arms who shipped her specially equipped automobile between duty stations within the continental United States may be reimbursed for shipping costs. The agency found, pursuant to the Rehabilitation Act of 1973, that employee was a qualified handicapped employee, that reimbursement was cost beneficial, that it constituted a reasonable accommodation to the employee, and that such reimbursement did not impose undue hardship on the operation of the personnel relocation program. Authorization under the Rehabilitation Act satisfies the "except as specifically authorized" language in 5 U.S.C. § 5727(a) (1982). Norma Depoyan, 64 Comp. Gen. 30(1984).

C. PROCEDURAL REQUIREMENTS

Proof of ownership (11-7) (New)

Although State Department employee states that he owned an automobile when shipped from factory, his claim for transportation costs of new vehicle from Japan to Thailand is disallowed since he had not paid full purchase price, nor produced any clear evidence that legal title of the automobile had passed to him at time of shipment as required by section 165.1, Volume 6, Foreign Affairs Manual. Richard A. Virden, B-214412, August 23, 1984.

Retroactive determination of entitlement (11-7) (New)

An employee seeks reimbursement for shipment of an automobile to his new duty station in Hawaii. Shipment at Government expense was not authorized at time of transfer and the employee shipped his automobile at personal expense. An appropriate official at the new duty station authorized shipment of the automobile, and his travel authorization was retroactively amended. However, this amendment to the travel orders was not based upon a new determination of necessity but rather was an attempt to change a determination previously made by an authorized official. Since the general rule is that legal rights and liabilities are established at the time authorization is issued and the travel is performed, it may not be modified at a later date to increase or decrease travel allowances. Therefore, payment based on the amendment after the transportation took place is not authorized. Dale T. Coggeshall, B-212642, February 23, 1984.

E. RETURN SHIPMENT OF POV

Travel to pick up POV (11-8) (New)

Employee transferred from Germany to Richmond, Virginia, claims travel expenses and mileage for three trips from the Richmond area to Norfolk in order to pick up his automobile which had been transported back to the United States at Government expense. The employee may not be allowed reimbursement for more than one round trip to Norfolk. As authorized by the applicable provision in Volume 2 of the Joint Travel Regulations, he may be allowed transportation expenses for one trip to the port at Norfolk and mileage for one trip back to the Richmond area. Roger E. Dexter, B-214904, September 5, 1984.

CHAPTER 12

OVERSEAS ALLOWANCES

C. HOME SERVICE TRANSFER ALLOWANCE

Reimbursable expenses

Extension of period (12-6) (New)

Employee of Department of Agriculture completed an overseas assignment in Saudi Arabia. He had been assigned there under the Foreign Assistance Act of 1961, as amended, 22 U.S.C. Chapter 32 and was thus eligible under 22 U.S.C. § 2385(d) (1982) to receive the home service transfer allowance given to Foreign Service Officers. He performed permanent change of station travel from Riyadh, Saudi Arabia, to Winchester, Virginia. Due to a delay in receiving his household goods shipment which was not his fault, he seeks extension of the home service transfer allowance beyond the maximum 30 days allowed by regulation. We hold that such a regulation has the force and effect of law, and is not subject to waiver or exception by the agency on a case-by-case basis. William P. Hubbard, B-215362, October 1, 1984.

CHAPTER 13

RELOCATION OF FOREIGN SERVICE OFFICERS AND OTHERS

C. TRAVEL OF EMPLOYEE AND FAMILY

Incident to appointment, transfer, or separation

Home leave (13-6)

United States Information Agency employee and family performed official transfer travel from Montevideo, Uruguay, to Washington, D.C., with home leave en route at Burlington, Iowa. Foreign Service Travel Regulations require all official travel be performed directly by "usually traveled route" which is one or more routes essentially the same in cost and travel-time. We find that segment of employee's travel performed over 16 days on a Mississippi riverboat between New Orleans and Burlington was a deviation from the usually traveled route for the employee's personal convenience and for which he must bear the extra expense. Christopher Paddack, B-212445, February 14, 1984.

Travel for separation

Alternate destination (13-8) (New)

Under 5 U.S.C. § 5722, civilian employees who are separated 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 destination, within or outside the United States, provided, however, that the cost to the Government shall not exceed the cost of 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. Thelma I. Grimes, 63 Comp. Gen. 281 (1984).

D. TRANSPORTATION AND STORAGE OF EFFECTS

Origin and destination of shipment

Shipment upon separation

Alternate destination (13-13) (New)

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 United

States. We hold that she is entitled to household goods shipment incurred in her move to Scotland, not to exceed the constructive cost of household goods shipment to her place of actual residence in the United States. Thelma I. Grimes, 63 Comp. Gen. 281 (1984).

E. TRANSPORTATION AND STORAGE OF POVs

Ownership (13-15)

Although State Department employee states that he owned automobile when shipped from factory, his claim for transportation costs of new vehicle from Japan to Thailand is disallowed since he had not paid full purchase price, nor produced any clear evidence that legal title of automobile had passed to him at time of shipment as required by section 165.1, Volume 6, Foreign Affairs Manual. Richard A. Virden, B-214412, August 23, 1984.

Foreign cars - excepted duty stations (13-15) (New)

State Department employee purchased a foreign-made vehicle in 1978 during tour of duty in Leningrad, Russia. At that time, Leningrad was not one of the posts of duty granted an exception to the restriction on the shipment of a foreign-made, foreign-purchased vehicle to the United States at Government expense. 6 FAM 165.9-2. In 1980, claimant transferred from Leningrad to Copenhagen, Denmark, and his vehicle was shipped at Government expense. Leningrad was added to the list of posts granted exceptions in 1982, but employee's vehicle does not qualify for shipment to the United States since Leningrad was not added to list of excepted posts until after his transfer to Copenhagen and Copenhagen is not on such list. Travel authorization may not be amended to authorize shipment. Roger E. Burgess, Jr. B-213806, May 16, 1984.

F. HOME SERVICE TRANSFER ALLOWANCE (13-15) (New)

The home service transfer allowance, under 5 U.S.C. 5924(2)(B) prescribed in the Standardized Regulations (Government Civilians, Foreign Areas), provides reimbursement for subsistence and miscellaneous expenses for employees (including Foreign Service members) only when they are transferred to the United States "between assignments to posts in foreign areas". Under authority of the Foreign Service Act of 1980 the restriction "between assignments" in foreign areas was removed from the regulations. That change is valid as to Foreign Service members and others whose relocation allowances are authorized under the Foreign Service Act, but the restriction still applies to other employees not covered by the Act. William J. Shampine, 63 Comp. Gen. 195 (1984).

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