

**BASE CLOSURE COMMISSION**

**PERSONNEL ISSUES**

**November 20, 1990**

**Q. How are employees of the Commission classified? Executive Branch Employees? DoD? or Consultants (Independent)?**

**A. Given the statutory language, four ways seem apparent for staffing the Commission:**

- 1. By detail from DoD; limit is not to exceed one third (1/3) of the total staff.**
- 2. By detailing from other Federal agencies.**
- 3. By direct appointment as staff members. We believe that personnel should be appointed in the Excepted Service of the Executive Branch with indefinite tenure. Pay would be administratively determined, not to exceed the pay for GS-18 of the General Schedule. As a guide, the General Schedule ranges could be used for pay ranges for various occupations desired for the staff. The direct appointment could include use of consultants and experts allowed under Federal rules (law prohibits**

use of consultants and experts in supervisory roles).

4. By contract, e.g., for studies and analyses, and for clerical assistance when needed for peak workload (law prohibits contractors from supervising Federal personnel).

Q. Does the Commission have a payroll support office or will it create its own payroll structure with the incumbent independent filing to the Treasury.

A. While the Commission has the option of providing its own support staff for all functions, we believe DoD could serve in an executive support role for various services not related to the technical/substantive work of the agency, e.g., travel, payroll/accounting, personnel, contracting and space management. Accordingly, we do not anticipate the Commission's need for a payroll support office, nor do we believe that the type of support services mentioned above need to be counted against the limitation of not more than one third (1/3) of the Commission staff being from DoD.

Call Hayden  
Bryon -  
contractly help.  
who - how -  
how much -

- clerical help -

① details

② Kelly Girls Help.

- Wire Diagram of  
staff (highlight core  
staff)

Q. Are the employees of the Commission Civil Servants eligible for Federal benefits; i.e., retirement, health and life insurance?

A. By reference to the answer to the first question:

1. Detailees from Federal agencies would receive benefits consistent with their appointments in their agencies. Working on the Commission would not affect these benefits.

2. Direct hire staff on the Commission would be eligible for full benefits if hired on an indefinite tenure basis. If hired for a short, specific timeframe, or as consultants/experts, benefits would not be paid.

3. Contractor employees would receive benefits offered and paid for by their employers.

Q. For continuity and the effective functioning of the Commission in odd numbered years, a "core staff" will have to be maintained in the even numbered years. Are there any limits on a "core" staff to run the Commission in the even numbered years?

A. Other than the budgetary and statutory limits relating to DoD detailees to the Commission staff, no limits exist on the size of the "core staff" in either the "even" or "odd" years. Even though the scope of the work in the "even" years is undefined, significant preparatory work is conceivable. We note no specific limitations on the length of appointment of the Staff Director as long as the Commission exists.

Q. In order for the Commission to "hit the ground running" after confirmation, there will be a "core" staff in place and ready to initiate Commission work immediately. Past discussion has focused on a staff being hired by some Federal entity and then being detailed to conduct Commission business. When, and from where will the preliminary "core staff" be hired and detailed?

A. The initial appointment of "core staff" and/or any detailees to the staff is not technically possible until the Chairman and Commissioner are appointed. Nevertheless, a small number of "detailees" could be designated both within and external to DoD (e.g., General Services Administration or General Accounting Office) to prepare for the Commission's work. To be prepared, we could develop preliminary contingency plans which suggest staff occupational mix, numbers of staff members needed, pay levels and qualifications desired. Then, recruitment sources, types of job advertising, etc., could be determined. We recommend multiple sources of recruitment which would include developing and maintaining a voluntary application file.

Q. How will DoD analytical personnel be recommended and detailed to the Commission?

A. DoD detailees as well as those from any other Federal agency should be recommended by the detailing agency, of course subject to ultimate "veto" by the Staff Director or designee. The Commissioners "personnel servicing agent" (our suggestion is the Washington Headquarters Services Personnel and Security Directorate) would be the coordinating office.

Q. How will other support staff for the odd numbered years be selected and where will they be selected from; i.e., clerical help, administrative help, financial officers, etc.?

A. Selection for core and other staff to work in the odd and even numbered years may be accomplished using the same procedures of detail, temporary appointment, contract, advertisement, etc. Excess staff during the even numbered years could be returned to the detailing organization, terminated or furloughed.

↳ get a copy of appeal rights.

Q. Assuming a January 1 date of hire for a "core" Commission staff, when can "core" staff selections be forwarded and when can

security clearances for these personnel proceed?

A. Since the Commission does not exist until Congressional approval with subsequent appointment action for the Commissioners, the January 1 start date is not feasible. As stated in answer to an earlier question, preliminary contingency planning is conceivable. Otherwise, as soon as selections are made for direct hire staff, we will process any required security clearances for assigned personnel. Detailing organizations will process security clearances for their detailees and notify Washington Headquarters Services. We have wide latitude in granting access immediately to classified information at or below secret level. Our experience has been that most staff members are able to function well with no more than a secret clearance. We suggest that the Commission become part of the Department of Defense Industrial Security Program in order to facilitate clearance processing with any contractors required. Of course, we would intend that Federal agency detailees would be those with appropriate security clearances.

Q. How will commissioners and staff be reimbursed for expenses? Will there be a supporting office to provide forms and process reimbursements?

A. The Washington Headquarters Services Travel Division will provide forms and process reimbursements for the Commission. Funds must be transferred from the Commission to the Washington Headquarters Services for this purpose.

In addition to your questions, issues regarding the filing of financial interest statements with the Office of Government Ethics, EEO complaint procedures, and compliance with other statutory requirements will need to be addressed.

## POINT PAPER

Subject: Desireable Attributes for New Base Closure  
Commissioners and Key Staff.

The new Base Closure and Realignment Commission is fundamentally different from the first base closure commission. The first commission worked in secret, this commission will work in a fish bowl, with bases publicly recommended by DoD for closure. As a result, commissioners and key staff will need to be experienced politically.

The Commission Chairperson is a critical position but may ~~not be the~~ critical position as the Staff Director, by virtue of being available daily, ~~will have a large role also.~~ Both will be hounded by Members of Congress, Governors, Mayors, the media, and interest groups. Experience at being lobbied will be critical for both.

The Commission has been asked to accomplish two diverse tasks: (1) to politically check DoD's recommended closures and deal with the affected parties, and (2), to technically check the details behind the DoD recommendations for conformance with the agreed upon closure criteria. Associated with the technical side would be any analyses the Commission desired to add or substitute bases to the DoD list.

The Commission staff might be organized, under the Staff Director, into three divisions: (1) a research division which would deal with technical issues, (2) an external relations division which would deal with political and public affairs issues, and (3) an administration division to provide support to all elements. The Staff Director will also need a legal counsel.

The Staff Director would manage all three divisions but for best results should focus on the external relations issues. The Staff Director cannot be detailed from within DoD or have been an employee of DoD for the previous year. Political experience will be a must for this position. An experienced Hill AA would be a good starting place.<sup>1</sup>

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<sup>1</sup>The research director can and should be detailed from within DoD. The research division should be staffed with subject matter experts from the Services and OSD. The external relations division could be staffed with part DoD detailees and part outside hires. The external relations director should have DoD experience. The administrative division should primarily be staffed with outside hires to balance the overall staff into 1/3 DoD detailees and 2/3 outside hires as required by the law.

The Commission Chairperson must also have political experience and while "partisan" should be generally viewed by both political parties as non-partisan or bi-partisan. The Commission Chairperson does not necessarily have to have had defense experience. It would be helpful for early organization efforts if the designated Chairperson resides or works near Washington, DC.

The 1988 Commission had as commissioners three retired flag officers from the Army, Navy and Air Force. On technical military issues the commissioners always turned to the appropriate retired flag officer for advice and generally followed that advice. The new commission should repeat this practice.

Of the remaining four commissioners, one should be a recognized, hopefully moderate, environmentalist. In order to make the base closure process work, the law waives the usual environmental process for base closure decision making. Having a recognized environmentalist on the new commission could balance environmental concerns.

Finally, the remaining three commissioners should have defense experience which could come from hill defense committee experience or from previous experience as a high level secretary for either OSD or one of the military departments.

Douglas B. Hansen -- OASD(P&L)/BCU  
1988 Base Closure Commission Executive Secretary and Research  
Director  
x45356  
October 30, 1990

## Position Description

### Executive Director Defense Secretary's Commission on Base Realignment and Closure

#### 1. Nature and Purpose of Work

A. Introduction. The incumbent of this position serves as the Executive Director and leader of the staff supporting the Defense Secretary's Commission on Base Realignment and Closure. The Commission was established by the Secretary of Defense and will, through the co-chairpersons, report directly to him. A copy of the Commission charter is attached.

B. Major Duties. As Executive Director, the incumbent will report directly to the co-chairpersons of the Commission. The incumbent will manage and lead a staff of senior personnel detailed from within the Office of the Secretary of Defense, the Military Departments, and the Defense Agencies.

The incumbent will make recommendations to the Commission on the conduct and topics of research to be performed by the staff and the Military Departments on the problems associated with base realignments and closure, and on possible solutions.

The incumbent will make recommendations to the Commission on the conduct, topics, and witnesses for public hearings on the issues surrounding base closures and realignments. The incumbent will act as the designated officer authorized to chair or attend each Commission meeting as required by Section 10 of P.L. 92-463. The incumbent will ensure that all requirements of P.L. 92-463 are met.

The incumbent will make recommendations and present options to the Commission on the best process, including necessary administrative changes, for identifying bases to be closed or realigned.

The incumbent will make recommendations and present options to the Commission on how to improve and best use Federal government incentive programs to overcome the negative impact of base closure or realignment.

The incumbent will make recommendations and present options to the Commission on the criteria for closing bases.

The incumbent will make recommendations and present options to the Commission on which bases should be closed or realigned in light of current military force structure assumptions.

The incumbent will make recommendations to the Commission on the conduct of legislative and public affairs for the Commission and on administrative matters.

2. Scope and Effect of Work. The Commission will review the worldwide base structure needs of the Department of Defense and make recommendations on candidates for realignment or closure.

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3. Supervision and Guidance Received. Duties are performed under the direction of the co-chairpersons of the Commission and under the general policies of the Department of Defense.

4. Knowledge and Abilities Required. Effective performance of the duties outlined requires an executive with the highest order of judgment, initiative, political awareness, and management talent. The incumbent must have sound knowledge of congressional and executive branch operations and policies, and how they interact.

5. Personal work contacts. Frequent contacts with top executive levels within DoD and OMB; with leaders and members of Congress and their senior staffs; and with the distinguished members of the Commission.

JOB SUMMARY

840-3949

Serves as a Senior Program Analyst for the represented Military Service Staff (USA, USN, USAF, USMC) on matters relating to proposed DoD installation closures and realignments. Incumbent will be detailed as part of the DoD technical staff of the Presidential Defense Base Closure and Realignment Commission, hereinafter referred to as the Commission, with current offices at 1625 K Street, NW, Washington, DC 20006. The Chairman of the Commission is responsible in accordance with Public Law 101-510 in insuring the Commission provides a fair, independent process in reviewing Secretary of Defense recommendations for timely closure and realignment of military installations within the United States.

The work involves reviewing the Services' and overall DoD processes for studying and proposing candidate installations for closure and/or realignment. Incumbent will conduct studies, analyses, evaluations and assessments of Service-specific candidates, draw independent conclusions, and identify problem areas and define related issues in relation to DoD-proposed force structure and final selection criteria.

MAJOR DUTIES AND RESPONSIBILITIES

Incumbent Senior Program Analyst will perform the following:

- \* Review and be intimately familiar with all legislation and policy pertaining to the Commission and the process for reviewing the DoD proposal for base closure and realignment.
- \* Review and be intimately familiar with Service-specific future DoD force structure used in the process for determining proposed closure and realignment actions.
- \* Review and be intimately familiar with the Final Selection Criteria published by the Secretary of Defense on February 15, 1991, used as the basis for recommendations for closure and realignment.
- \* Review field, as well as Service Command and Office of Secretary of Defense data and policy relative to the Secretary of Defense's recommendations for closure and realignment.
- \* Guide the process for Service-specific analysis for closure and realignment candidate installations.
- \* Conduct independent review of Service analysis of closure and realignment candidate installations based on force structure, final selection criteria and military value. Provide independent analysis designed to insure the accuracy and completeness of data provided to the Commission as the basis of recommendations for specific closures and realignments.
- \* Review and/or conduct separate independent capacity analysis as it relates to the future force structure plans and the existing force and base structure.
- \* Conduct independent analysis of Service Command and Office of Secretary of Defense data, within base categories and provide the necessary data required of the

Commissioners to weigh appropriate alternative candidates for closure or realignment.

#### JOB/SUPERVISORY CONTROLS

The incumbent will report directly to the Commission Director of Review and Analysis who in turn reports directly to the Director of Staff. The duties in this position are performed independently under specific guidance from the Director of Review and Analysis and in accord with the policies of the Commission. The incumbent is expected to work with a high degree of initiative and creativity within the limits of scientific research and analysis disciplines. Perceived and emerging problems in the performance of the defined duties and specific assignment of the position are to be brought to the attention of the Director of Review and Analysis immediately. It is the responsibility of the Commission management, and not the incumbent, to resolve conflicts and dispose of impediments to satisfactory completion of assignments. The incumbent will not have the authority to negotiate with DoD personnel assigned requests or in any way alter the initial intent of such requests.

Assignments will be in general form and the incumbent will have input into the course of action to be pursued in meeting the task at hand. Supervision will consist of guidance on policy, overall approach, priorities and schedules. Absolutely key is incumbent must provide independent analysis without regard to DoD or service pressures. Incumbent will provide technical expertise only and will not supervise or provide input to Commission management on policy or direction.

## JOB SUMMARY

Incumbent serves as a member of the staff of the Presidential Defense Base Closure and Realignment Commission, hereinafter referred to as the Commission, with current offices at 1625 "K" Street, NW, Washington, D.C. 20006. The Commission falls within the purview of the Defense Base Closure and Realignment Act of 1990 (Public Law 101-510) and the FY91 DoD Authorization Bill. The purpose of the Commission is to provide a fair, independent, bipartisan process to review SECDEF recommendations for timely closure and realignment of military installations within the United States. The Commission will meet only during CYs 1991, 1993, and 1995. During these years the Commission will actively review the Services' and DoD processes for studying and proposing recommended installations for closure and/or realignment. Within his/her field of expertise, incumbent will assist in conducting studies, analyses, evaluations, and assessments of Service-specific candidates, drawing independent conclusions, and identifying problem areas and defining related issues vis-a-vis the DoD force structure plan, final criteria, and the recommended closures and realignments.

Math-  
Here's a generic job  
summary that I  
think might fit all  
P.D.s since it's not  
job specific, which would  
be covered by  
in major duties  
& responsibilities.  
Arye



OFFICE OF THE SECRETARY OF DEFENSE  
WASHINGTON HEADQUARTERS SERVICES  
PERSONNEL AND SECURITY DIRECTORATE  
THE PENTAGON  
WASHINGTON, DC 20301-1155

TO: Carolyn Cinnamon

ORGANIZATION: Defense Base Closure & Analysis Com

FAX TELE # 696-0550 OFFICE TELE # 696-0504

FROM: Joan Hicks

FAX # (703) 697-8333  
DSN 227-8333

OFFICE # (703) 697-4211  
DSN 227-4211

SUBJECT: Consultants & Experts

REMARKS: Hope this helps.

[Handwritten signature]

PAGES TO FOLLOW: 16

Federal Personnel Manual (FPM)  
ADMINISTRATION AND GENERAL PROVISIONS  
Document Number: CH 304 1  
                  CH3041  
                  CH 304 1

Date: 22 Jan 82  
Subject: Employment  
          Experts and Consultants

Hardcopy Page Count: 6  
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#### 1-1. APPLICABILITY

a. General. The instructions in this chapter apply to the employment of experts and consultants in positions excepted from the competitive service by statute or by the Office of Personnel Management (OPM). The instructions apply to appointments under 5 USC 3109 or similar authorities for agencies to make excepted appointments of experts and consultants, whether the services are paid or unpaid. The instructions also apply to individual expert or consultant services procured by contract if an employer-employee rather than an independent contractor relationship is created.

b. Statutory exceptions. Expert and consultant employment is controlled by the requirements of this chapter unless a statute clearly provides otherwise. An agency that thinks it has a statutory exception to these requirements must have OPM's concurrence in that opinion before it may employ experts and consultants without regard to these requirements. The statutory language must be so plain and unequivocal as to admit no doubt of the exception.

#### 1-2. DEFINITIONS

For paid or unpaid employment, in this chapter:

(1) Consultant means a person who serves primarily as an adviser to an officer or instrumentality of the Government, as distinguished from an officer or employee who carries out the agency's duties and responsibilities. A consultant provides views or opinions on problems or questions presented by the agency, but neither performs nor supervises performance of operating functions (23 Comp. Gen. 497). Generally, a consultant has a high degree of broad administrative, professional, or technical knowledge or experience which should make the advice distinctively valuable to the agency.

(2) A consultant position is one which primarily requires performance of advisory or consultant services, rather than performance of operating functions.

(3) Expert means a person with excellent qualifications and a high degree of attainment in a professional, scientific, technical, or other field. An expert's knowledge and mastery of the principles, practices, problems, methods, and techniques of a field of activity, or of a specialized area in a field, are clearly superior to those usually possessed by ordinarily competent persons in that activity. An expert usually is regarded as an authority or as a practitioner of unusual competence and skill by other persons in the profession, occupation, or activity.

(4) An expert position is one that, for satisfactory performance, requires the services of an expert in the particular field, as defined in paragraph (3), and with duties that cannot be performed satisfactorily by someone not an expert in that field.

(5) Intermittent employment means (a) occasional or irregular employment (b) on programs, projects, problems, or phases thereof, requiring intermittent service. When an intermittent expert or consultant works more than one-half of full-time employment, i.e., he or she is paid for all or any part of a day for more than 130 days in a service year, the employment automatically ceases to be intermittent and becomes temporary. Under these circumstances, the employee may be reappointed in the next service year only on a purely intermittent basis, as defined above. If at any time it is determined that the employee's work is no longer intermittent in nature, the employment must be terminated immediately.

(6) Temporary employment means (a) employment for one year or less (b) on programs, projects, problems, or phases thereof, requiring temporary service for one year or less.

### 1-3. POLICY

a. Proper use. The proper use of experts and consultants is a normal, legitimate, and economical way to improve Government services and operations. Agency activities can be strengthened by the highly specialized knowledges and skills of persons from the private sector brought into the service for brief periods of need. The temporary or intermittent services of experts and consultants properly may be used to get:

(1) specialized opinion unavailable in the agency or in other agencies;  
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(2) outside points of view, to avoid too-limited judgment, on administrative or technical issues;

(3) advice on developments in industry, university, and foundation research;

(4) for especially important projects, the opinions of noted experts whose national or international prestige contributes to the undertaking's success;

(5) the advisory participation of citizens to develop or implement Government programs that by their nature or by statute call for citizen participation;

(6) the skills of specialized persons who are not needed continuously, or who cannot serve regularly or full time.

b. Improper use. The improper employment of experts and consultants is not only illegal, it is wasteful and destroys the morale of the career specialists. Examples of improper employment of an expert or a consultant are to: give a particular person temporary or intermittent appointment solely in anticipation of a career-conditional appointment, do a job that can be done as well by regular employees, do a full-time

continuous job, avoid competitive employment procedures, or avoid General Schedule pay limits.

c. Reappointment. (1) General rules. Intermittent appointments can be renewed from year to year; temporary appointments cannot. Therefore, an expert or consultant who has worked under a temporary appointment, cannot be reappointed to continue serving the following year under temporary appointment in the same position. The following are the exceptions to this general rule.

(2) Reappointment to same position. An expert or consultant who served under a temporary appointment in one service year may be reappointed the next year to the same position on only a purely intermittent basis, as defined in paragraph 1-2(5). Employment must cease, however, as soon as it loses its occasional or irregular character.

(3) Reappointment to different position. (a) The fact that an expert or consultant served under a temporary appointment in one service year does not rule out a new appointment the next year to a position different from the one filled in the previous service year. In this context, a different position is one with duties and responsibilities that are recognizably different from those of the previous assignment and that cannot be considered an outgrowth or extension of that assignment. Here are some obvious indicators of a different position: Different agency; different organizational location within an agency; different area of work; or work on an unrelated program.

(b) In unusual cases two positions may be different even though no obvious indicator is present. But a reappointment under these circumstances should have the prior approval of an official other than the one who authorized the initial appointment. The basis for the conclusion that the positions are in fact different must be made a matter of record placed in the employee's Official Personnel Folder.

(c) Even when different positions are involved, reappointments resulting in service for more than two years in a row on a regular basis can give the appearance of continuing employment; therefore, such reappointments should be made only after careful consideration of all the circumstances involved. Each agency should set up special review and approval procedures for this purpose. These procedures should require the approving official to show that he or she has made the required review and has found the reappointment appropriate. This must be made a matter of record and placed in the employee's Official Personnel Folder.

#### 1-4. HOW TO DETERMINE WHETHER AN EMPLOYER-EMPLOYEE RELATIONSHIP EXISTS

Ordinarily, when an agency appoints a consultant to provide advisory services or an expert to perform operating functions, the agency creates an employee-employer relationship governed by this chapter. Pay for personal service usually indicates an employee-employer relationship, but the relationship also may exist when service is unpaid. The facts in a situation govern whether the relationship exists. An employee-employer relationship subject to this chapter exists when a person meets the formal definition of "employee" in 5 USC 2105. The person must be:

(1) appointed or employed in the civil service by a Federal officer or employee performing in an official capacity.

(2) engaged in the performance of a Federal function under authority of law or an Executive act, and

(3) supervised and directed by a Federal official or employee.

#### 1-5. AUTHORITY TO EMPLOY

a. General. Various statutes authorize agencies to  
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employ experts and consultants. The basic authorities available to most agencies are discussed below.

b. Section 3109, title 5, United States Code. (1) Under this statute agencies may, when authorized in an appropriation or other statute, employ experts and consultants temporarily (one year or less) or intermittently without regard to the laws for the competitive service, position classification, and the General Schedule pay grades. This excepted appointment authority imposes the following conditions:

(a) The positions must be bona fide expert or consultant positions;

(b) Persons employed must be experts or consultants qualified to perform the duties of the positions;

(c) The needed services must be of such a nature that the agency can meet the need by temporary (one year or less) or intermittent employment. The agency may not use this authority to fill a continuing full-time job. A

(2) At times, agencies use section 3109 to employ an individual whose nomination for a Presidential appointment is pending Senate confirmation. By appointment under section 3109, such an individual becomes a Federal employee and subject to the conditions which apply to other Federal employees. As with any other use of section 3109, agencies should be sure such employment meets the conditions of the authority.

(3) Section 3109 states it may not be used as authority to fill Senior Executive Service positions. Therefore, it is not appropriate to assign experts or consultants to the policy making and managerial work which characterizes the Senior Executive Service.

c. Other statutes. Under other statutes, individual agencies may employ experts or consultants, or both, excepted from the competitive service and, sometimes, exempted from the General Schedule. Use of these authorities is subject to the provisions of this chapter except when OPM concurs in an agency opinion as mentioned in section 1-1. A

d. Schedule A. (1) Agencies may employ experts and consultants under section 213.3102(1) of Schedule A in "positions requiring the temporary or intermittent employment of professional, scientific, or technical experts for consultation purposes." This authority excepts the employees from OPM competitive examination but does not except the position from the General Schedule pay and classification requirements. The authority primarily is intended for agencies which do not have authority to use section 3109 or other statutory expert and consultant authority.

(2) The following conditions are applicable: (a) the needed service must be of such a nature that the agency can meet the need by temporary

(one year or less) or intermittent employment;

(b) the position actually is a consulting nonoperating, professional, scientific, or technical position;

(c) the person employed is an expert in the field.

#### 1-6. PAY

a. Maximum daily pay rate. While persons appointed under 5 U.S.C. 3109 are excepted from the position classification and General Schedule grade and pay laws, section 3109 states that agencies otherwise subject to those laws generally may pay up to the daily equivalent of the highest rate payable under the General Schedule. Because of 5 USC 5308, that rate is limited to the rate payable for level V of the Executive Schedule. The Comptroller General has held that highest rate payable is the top step of grade GS-15, except that the grade GS-18 rate may be paid to persons appointed to professional engineering positions primarily concerned with research and development, and professional positions in medicine, and the physical and natural sciences (43 Comp. Gen. 509(1964)). In some instances, the appropriations or other statute may authorize a particular agency to pay a maximum daily rate higher or lower than the rates authorized by section 3109.

b. Agency sets rate. Each agency decides what it will pay, subject to the maximum rate payable under section 3109 or other statutory authority. Agencies should not pay the maximum rate routinely. OPM recommends that pay be commensurate with the level and difficulty of the work to be done, the qualifications of the appointee, and the availability of such services in the labor market.

c. Unpaid employment. To employ experts and consultants without pay, an agency must have either specific statutory authority for this purpose or specific statutory exemption from the General Schedule that permits unpaid employment and does not conflict with other statutes. For example, the General Schedule exemption in 5 USC 3109 permits agencies to employ experts and consultants without pay except when another authority prescribes what the agency pays them. When, under a statute, an agency may employ experts and consultants without pay but it has no special authority excepting the positions from the competitive service, the agency may employ experts and consultants under section 213.3102(k) of Schedule A. This authority excepts from OPM examination employees in positions without pay provided their appointments

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meet the requirements of applicable laws relating to pay (58 Comp. Gen. 383 and 27 Comp. Gen. 194).

d. Reemployed annuitants. Subject to statutes and executive branch policies, an agency may use its employees or may contract out with private firms or self-employed individuals to perform its work.

(1) Employment. The salary of an individual who retires from the Federal civil service and who is reemployed in the Federal civil service must be reduced with a few exceptions, for example, an exemption in an agency's enabling statutes. This restriction applies to Federal civil service retirees who are rehired as experts, consultants, or in any other employee capacity. (See action 1-4 of this chapter; Chapter 300, Subchapter 7, "Employment of Annuitants"; and FPM Supplement 831-1, Subchapter S15.)

A civil service annuitant who provides temporary or intermittent services as an expert or consultant on an employer-employee basis is subject to the setoff provisions of 5 USC 8334(a). The annuity payable to a reemployed annuitant must be deducted from the total pay for the position; the remainder represents the total pay authorized to be paid for a full year of employment or the maximum rate for any lesser period. A daily or hourly rate of pay should be converted to its annual equivalent (260 days or 2,080 hours), this equivalent rate reduced by the annuity, and the balance reconverted to a daily or hourly rate. Lump-sum leave payments (under 5 USC 5551) to retiring employees are not subject to the setoff provision.

(2) Procurement Contract. Agencies have authority to contract with the private sector under the authorities and conditions of titles 10 and 41, United States Code, executive branch policies, and regulations issued by appropriate agencies. For example, an agency may contract with a self-employed independent contractor for the provision of goods or nonpersonal services. If that contractor is a Federal civil service retiree, there is no reduction in fee or annuity since services provided under a bona fide independent contractor relationship are not considered employment (53 Comp. Gen. 702, 53 Comp. Gen. 542, and 36 Comp. Gen. 186). OMB Circular No. A-120 instructs agencies not to give preference to former Government employees in awarding consulting contracts.

e. Overtime and limitation on pay. Because experts and consultants generally are paid on a daily rate basis, they are not entitled to more than the daily rate prescribed in the appointment documents for each day of service regardless of the number of hours worked. The designation of a regular tour of duty in the appointment documents does not necessarily preclude receipt of compensation at the agreed daily rate for work performed outside of that tour of duty--for example, if such an employee works six days a week, the sixth day is paid at the straight time rate rather than the overtime rate.

However, there are aggregate compensation considerations that may limit the flexibility to use expert and consultant service for more than 10 days in any pay period. Since the compensation of experts and consultants is set by administrative action under 5 USC 5307, it is subject to the limitation on compensation imposed by 5 USC 5308 which must be applied on a pay-period basis (5 USC 5504). Thus, an expert or consultant, employed on a daily basis, may be paid the rate of basic compensation for work on days outside the prescribed tour of duty, provided compensation within any biweekly pay period does not exceed the rate of basic pay for level V of the Executive Schedule (58 Comp. Gen. 90).

f. Overtime under the Fair Labor Standards Act (FLSA). When experts and consultants are hired as Federal employees under appropriate appointing authorities, they are employees within the coverage of the FLSA. However, most experts, and consultants are exempt from the minimum wage and overtime pay provisions of the Act since they perform such services in professional or administrative positions which are exempt from the Act. The only experts and consultants subject to the minimum wages and overtime pay provisions of the Act would be those in positions or in professional or administrative positions that do not meet the FLSA exemption criteria (e.g., employees in high-graded technician positions or in professional or administrative positions that do not meet the grade level or percentage of time requirement for

exemption from the Act.) An expert or consultant in a position which does not meet the criteria for exemption (5 CFR 551) from the Act, is entitled to overtime pay for the hours worked in excess of 40 hours in an administrative workweek under the Act.

g. Salary increases. Unless the hiring agency provides in the appointment documents that General Schedule increases under 5 USC 5305 (October pay adjustment) automatically will apply to these individuals, and without administrative action authorizing a consequent increase under 5 USC 5307, an expert or consultant is not entitled to a pay increase on the basis of an increase in the General Schedule (B-131259, July 6, 1976).

h. Holiday pay. Unless the appointment documents  
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expressly provide for holiday pay, an expert or consultant employed on a per diem basis is not entitled to compensation for holidays on which no work was performed (B-131259, January 23, 1976).

The notation of a "Regular Tour of Duty" in the remarks section of an SF 50 refers only to a work schedule and not to the duration of appointment. Such a notation does not make an expert or consultant hired under section 3109 a regular or permanent employee so as to confer entitlement to salary increases or holiday pay without an express statement authorizing the payment in the appointment documents.

i. Setoff of uniformed services retired pay. As required by 5 USC 5532, certain former members of the uniformed services are subject to reduction in retired pay if employed in the Federal service. The hiring agency is responsible for notifying the appropriate uniformed service pay center which determines the amount of retired pay, if any, to be withheld (5 CFR 550, subpart F; chapter 550, subchapter 6; 55 Comp. Gen. 1305 and 51 Comp. Gen. 189).

j. Pay setting upon regular appointment. Except for "superior qualifications appointments," new appointments (the first appointment, regardless of tenure, as an employee of the Federal Government) to positions covered by the General Schedule must be made at the minimum rate of basic pay established for those positions. The Comptroller General has ruled that although an employee previously served under employment authorized by section 3109 that individual is to be considered a new appointee upon regular appointment (30 Comp. Gen. 347; 42 Comp. Gen. 114). Therefore, under those decisions and 5 CFR 531.203(d)(2)(i), the rate of pay received for appointment as an expert or consultant under section 3109 may not be used as the basis for the highest previous rate in determining an employee's rate of basic pay upon regular appointment.

k. Travel expenses. An expert or consultant who serves intermittently may be allowed travel or transportation expenses including per diem allowances while away from home or regular place of business and at the place of employment or service (5 USC 5703).

1. Exception from dual pay restriction. Generally, an individual is prohibited by statute from receipt of basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week. Under one exception to this restriction, an individual is entitled to pay for service on an intermittent basis from more than one consultant or expert position, provided the pay is not received for the same hours of the same day (5 USC 5533(d)(1)).

## 1-7. BENEFITS

a. Annual and sick leave. An expert, consultant, or other employee who serves on

(1) an intermittent or other basis without a prearranged regular tour of duty does not earn annual and sick leave (5 USC 6301(2)(ii));

(2) a regular prescribed tour of duty, full time or part time, does earn annual and sick leave. We recommend agencies determine in advance whether an employee will work a prearranged regular tour of duty and note appointment documents to show whether the employee earns leave (58 Comp. Gen. 167 and 5 CFR 630).

b. Retirement, Life Insurance, and Health Benefits. An expert, consultant, or other employee whose service is intermittent or temporary for one year or less is not covered under the civil service retirement system and is ineligible for life insurance and health benefits. However, if an employee currently covered by retirement, life insurance, or health benefits is appointed as an intermittent or temporary (full-time or part-time) expert or consultant without a break in service or after a separation from the service of three days or less, coverage is continued. To continue life insurance coverage for an intermittent employee, there must be an expectation that the employee will return to the previous position on a full-time basis. (For full information, see 5 CFR 831.201, 5 CFR 870.202, 5 CFR 890.102, and FPM Supplements 831-1 S2, 870-1 S2, and 890-1 S4.)

## 1-8. OPM REVIEW

a. Purpose. OPM reviews the employment of experts and consultants to determine whether (1) the positions are actually consultative or expert in nature, (2) the employees are qualified for the positions, (3) the agencies have determined that no conflict of interest exists, (4) the 130-day limitation on services during the previous year is met in cases of employment extensions, and (5) the employment records are accurate and adequate.

b. On-site reviews. OPM will review expert and consultant appointments during general and special personnel management evaluations of agencies to assure the proper use of the authority to employ experts and consultants and to provide an early warning of problems in individual agencies.

## 1-9. CONFLICT OF INTEREST

Generally, the statutory prohibitions on conflict of  
<Page 304-7>

interest apply. The Office of Government Ethics, Office of Personnel Management, is responsible for overseeing the application of ethical standards, employee financial disclosure reporting requirements, and post employment conflict of interest restrictions by executive branch agencies. Because of their brief service, many experts or consultants may qualify for treatment as special Government employees who serve less than 130 days a year. Such employees are not subject to all of the prohibitions which apply to regular employees. For more information, see Chapter 735, "Employee Responsibility and Conduct", especially Appendix C.

## 1-10. SPECIAL OVERSIGHT REQUIREMENTS

a. General. Experts and consultants who serve as employees are subject generally to the same conditions and restrictions which apply to other Federal employees who are in the excepted service and who work on a temporary or intermittent basis. There are, however, some special conditions of which agencies should be aware.

b. Office of Management and Budget. The Office of Federal Procurement Policy, OMB, provides leadership in the development of Federal procurement policy and oversees agency procurement management practices. While OMB instructions on obtaining consulting services apply to procurement contract actions primarily, certain ones apply to appointments as well.

(1) OMB Circular No. A-76 Revised, Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government, issues March 29, 1979, states the Government's basic policy of relying on the private sector for goods and services and provides the means to determine whether commercial or industrial work shall be done by contract with private sources or inhouse using Government facilities and personnel.

(2) OMB Circular No. A-120, Guidelines for the Use of Consulting Services, published April 14, 1980, establishes definitions, basic policy, internal guidelines, internal management controls, and data reporting requirements for agencies. The Circular requires agencies to justify each consultant service contract in writing, award contracts competitively to the maximum extent possible, warn contractors concerning conflict of interest, and monitor performance. It prohibits agencies from using consulting services to perform work of a policy/decisionmaking or managerial nature which is the direct responsibility of agency officials.

c. Inspector General's annual evaluation. Section 307(b) of Public Law 96-304, July 8, 1980, requires the Inspector General or comparable official of each agency to give Congress, along with the agency's budget justification, an evaluation of the agency's progress to (1) institute effective management controls and (2) improve the accuracy and completeness of the data provided to the Federal Procurement Data System (established under Public Law 93-400) regarding consultant service contractual arrangements.

d. General Accounting Office (GAO). GAO is involved in agency use of experts and consultants through its reports to Congress and case decisions. For agency convenience, several significant Comptroller General opinions are summarized in this chapter. GAO's Civilian Personnel Law Manual, Title 1, Compensation, Chapter 10, contains digests of many key opinions. For full information, GAO recommends that agencies consult the actual case decision.

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\*\*\* End of Document \*\*\*

Federal Personnel Manual (FPM)  
INTERNAL AGENCY CONTROLS ON EMPLOYMENT OF INDIVIDUAL EXPERTS AND  
CONSULTANTS

Document Number: CH 304 APA  
CH304APA  
CH 304 APA

Date: 22 Jan 82  
Subject: Experts and Consultants

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A-1. ESTABLISHMENT OF POSITIONS AND SELECTION OF APPOINTEES

a. Preappointment review and certification. Each proposed appointment (and extension of appointment) must be reviewed and certified by a high agency management official in terms of the:

- (1) necessity for the positions;
- (2) correctness of the judgment that the position requires the services of an expert or consultant;
- (3) propriety of designating the position as temporary or intermittent;
- (4) soundness of the decision that this is the most appropriate appointing authority to use;
- (5) qualifications of the proposed appointee;
- (6) appropriateness of the intended level of pay in relation to the work to be performed, the qualifications of the proposed appointee, and comparable salaries in the private sector.
- (7) completeness of documentation.

b. Certifying official. The certifying official must be an agency management official with knowledge of the legal and other requirements applicable to expert and consultant appointments and extensions, with authority to give final approval to selections, and at a high enough level to accept responsibility for an erroneous action. The official must be authorized by the agency head or his or her designee to certify for the record that each of the required items has been reviewed and that the proposed action is in order.

c. Documentation of preappointment review. (1) Before appointment, a suitable certification attesting that all the requirements in paragraph a have been met must be:

- (a) Prepared for each appointee; and
  - (b) Approved and signed by the certifying official.
- (2) The certification, which must be retained among the permanent records in each appointee's Official Personnel Folder, is to be worded along the lines of the following example:

Consultant Certificate

"In approving the filling of this consultant position without regard to the laws and regulations governing appointments in the competitive civil service, and in approving the rate of pay set for this position without regard to the classification and pay laws, I have considered the requirements of law (5 USC 3109), relevant Comptroller General decisions, and the instructions of the Office of Personnel Management.

"More specifically, I have satisfied myself that:

"(a) The position is necessary;

"(b) The position is a 'consultant position' as defined in FPM chapter 304;

"(c) The work is temporary in nature, that is, will not exceed one year (or, as appropriate' ... requires services only irregularly (that is, with no regular tour of duty) or occasionally'), requires a high level of expertness not available in the regular work force, is of a purely advisory nature, and does not include the performance or supervision of operating functions;

"(d) This authority is the most appropriate appointing authority for meeting the agency's needs;

"(e) The proposed appointee meets the definition of 'consultant' in FPM chapter 304, and does, in fact, possess the kind and level of expertness that will permit him (her) to render the services the agency seeks;

"(f) The daily rate intended to be paid the proposed appointee is commensurate with the level of the work to be performed and his (her) qualifications for the work; and

"(g) Required documentation is in order."

(3) In some situations, it will be necessary for an agency to modify the sample certificate as, for example, when the appointment is made under an authority other than 5 USC 3109, the pay is set under the General Schedule (primarily if an appointment is under Schedule A), or the appointee will serve without compensation. Slight modification will also have to be made if the position is that of an expert rather than a consultant, although all the basic elements of the consultant sample must be included.

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## A-2. INTERNAL REVIEW DURING EMPLOYMENT

a. Quarterly review. Agencies are required to maintain effective controls over use of appointees during employment. Control measures must include frequent reviews, generally quarterly, to assure that in each case the:

- (1) duties performed are still those of an expert or consultant;
- (2) Time limits are being observed;
- (3) documentation is kept current; and

(4) duties of record are actually being performed.

b. Exclusion from quarterly review. An agency may exclude from a quarterly review experts and consultants who have worked for 10 days or less during the quarter covered.

c. Documentation of review. Each quarterly review is to be appropriately documented and the record retained for OPM examination, which usually will be performed at the time of the next onsite evaluation. The record of review, signed by the director of personnel or his superior, should describe the conduct of the review, summarize the findings, and describe the actions taken to correct any deficiencies noted in the review. If, in a quarterly review, an agency decides to use all or some part of the exclusion in paragraph b, it should include in the record of review a statement describing the extent of the exclusion. Records of reviews are to be retained until examined by OPM.

#### A-3. INTERNAL COMMUNICATIONS

Each agency is required to communicate at least annually to its appointing officials relevant highlights of this chapter. Communications may be in such forms as written issuances, orientation sessions for new managers, executive staff meetings, and training modules. They should include:

(1) An explanation of what is permitted under law and instruction and what is not;

(2) Advice on the importance of careful work force planning;

(3) Assurance that agency personnel officials will be available to provide advice and assistance on appropriate staffing methods;

(4) A description of alternative appointing authorities, which, depending upon circumstances, could be more appropriate than the expert and consultant authority for meeting the agency's needs;

(5) A reminder that improper appointment under the expert and consultant authority is a violation of law, representing an illegal exception from civil service appointment and classification laws.

#### A-4. DOCUMENTING EMPLOYMENT

a. For each expert or consultant employed, full-time or part-time or intermittently, whether employed by appointment or by contract, paid or unpaid, and under any authority employed, each agency must establish an Official personnel Folder. The folder must contain the following, filed in accordance with chapter 293:

(1) A description of the position in enough detail to show that the position actually requires an expert's or consultant's services;

(2) A Standard Form 171 or a description of the appointee's background and qualifications in enough detail to show that they fit him (her) for the position;

(3) A description of any regularly scheduled tour of duty for a less than full-time employee;

(4) A Standard Form 50, Notification of Personnel Action, showing the employment;

(5) A Standard Form 50 showing termination of the employment;

(6) Certification that a statement of employment and financial interests has been obtained and it has been determined that no conflict of interest exists;

(7) For all appointments, reappointments, and extensions of appointments for experts and consultants, certification that requirements concerning the appointee's qualifications, pay documentation, and use of the appointing authority have been met.

(8) For all reappointments of intermittent experts and consultants, the number of days worked in the previous service year.

(9) Certifications required by sections 1-3c(3) and A-1 of this chapter.

b. The agency should obtain from each expert, consultant, or adviser a Statement of Employment and Financial Interests at the time of formal employment (see section 1-9). Those who have executed this statement, and who are reappointed immediately following separation, may, at the agency's option, be required to execute a new statement or to certify that the original statement is currently correct. In any case, the statement should be kept current as long as the employee is on the agency's rolls. New entrant, annual, and termination SF 278 public financial disclosure forms should be obtained from each individual meeting the reporting requirements of 5 USC app. 201.

(1) Agencies will be responsible for safeguarding the contents of the Statement of Employment and Financial Interest. Only those employees using the Statement

<Page 304-A-2>

in connection with their official duties should be allowed access to it. SF 278 public financial disclosure forms should be maintained in accordance with the requirements of 5 USC app. 205.

(2) Agencies should retain the Statement of Employment and Financial Interests for no less than five years following the employee's separation from the agency. SF 278 public financial disclosure forms should be retained and made available to the public for a period of six years after receipt of the forms.

#### A-5. REPORTING DATA TO OPM

For each expert or consultant employed, the agency must report all personnel action required to be documented on SF 50 by FPM Supplement 296-33 to OPM's Central Personnel Data File (CPDF). Submissions should be in accordance with the instructions in FPM Supplement 298-1 using the appropriate data element codes, especially the pay plan, contained in FPM Supplement 292-1.

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\*\*\* End of Document \*\*\*

Federal Personnel Manual (FPM)  
GAO REPORT ON EXPERT AND CONSULTANT APPOINTMENTS  
Document Number: LTR 304-4  
LTR3044  
LTR 304-4

Date: 04 Jan 93  
Subject: Appointment - Agency Authority  
Experts and Consultants  
General Accounting Office  
Hiring  
Job Assignments - Restrictions  
Personnel Reports  
Technical and Miscellaneous Civil Service Amendments Act of 1992

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Published in advance of incorporation in FPM  
Chapter 304  
RETAIN UNTIL SUPERSEDED

#### Heads of Departments and Independent Establishments:

1. The General Accounting Office (GAO) has completed a review of expert and consultant appointments made by nine installations during a 30-month period. GAO determined that 37 out of 106 appointments were inappropriate, primarily because the duties were those of career employees or the appointees did not meet the definitions of experts and consultants.

2. Longstanding instructions in FPM Chapter 304 specify the position must warrant the services of an expert or consultant and the appointee must be qualified as an expert or consultant, to have an appropriate appointment under 5 U.S.C. 3109, the excepted appointing authority for agencies to employ individual experts and consultants.

3. GAO also found some instances in which agencies used the authority as a quick way to hire someone destined for other duties or to fill in during staff shortages; did not know of other short-term hiring authorities; misread FPM guidance to allow performance of regular, continuing work; were unaware of or did not follow FPM internal control procedures to ensure proper appointment and use; and lacked documentation, including the preappointment certificate.

4. The expert and consultant appointing authority must not be used when agencies need help quickly, unless the situation meets the expert and consultant FPM criteria. Agency managers should use other appointing authorities described in other FPM chapters, as appropriate, including--

Special need;  
Temporary limited;  
Term;  
Various Schedule A;  
Temporary Schedule C;  
SES limited term; and  
SES limited emergency.

5. Some agencies told GAO they thought they could assign experts to regular, continuing work. In support, they noted the FPM Chapter 304 definition of consultant prohibits performing or supervising operating functions, but the expert definition has no such prohibition. Accordingly, GAO recommended revising the FPM to clarify the definitions, provide examples, and specify that experts cannot do full-time and continuous work that is the responsibility of regular employees.

6. Doing regular, continuing work and performing operating functions do not mean the same thing. The FPM states it is improper to use the expert and consultant appointing authority for a job that can be done by regular employees. Further, the FPM, reflecting the law, says experts and consultants may be assigned only to work requiring temporary or intermittent service.  
<Page>

In short, neither experts nor consultants may be assigned to full-time, continuing work that regular employees otherwise would perform. The purpose of 5 U.S.C. 3109 is to allow agencies to bring in special types of employees to address special situations requiring short-term or occasional attention.

7. It also follows that experts and consultants may not be used to fill in during staff shortages, because that would mean doing regular, continuous work.

8. The FPM definitions of expert and consultant come from GAO decisions. The consultant definition says, in effect, consultants are advisors rather than doers. For example, they may perform studies, offer opinions, and provide alternatives to managers, but they cannot operate as managers by making decisions, supervising employees, or functioning in the chain of command.

9. The FPM definition of expert does not bar experts from being doers. They are specially qualified by education and experience in a particular field to provide a special service. Their ability to perform difficult, challenging tasks beyond the usual range of achievement of regular employees is what makes them experts. Accordingly, they can perform operating functions, because those functions are inherently part of the expertise for which they are employed. For example, an expert plate maker may engrave a novel design, a computer scientist may reprogram a trouble-plagued subsystem, or a microbial contamination specialist may apply new test methods to identify bacteria in products. They may not perform those duties on a regular, continuous basis.

10. In a separate recommendation, GAO asked that agency officials receive appropriate training in making expert and consultant appointments. In response, OPM has added a module on experts and consultants to the revisions to two nationwide, interagency training courses: Basic Staffing and Placement and Personnel Management for Supervisors and Managers.

11. GAO also recommended that 5 U.S.C. 3109 be amended to authorize OPM to issue regulations governing the employment of appointed experts and consultants, in order to achieve better control over their use. Section 3109 has long excepted such appointments from the competitive

civil service, job classification, and pay laws--the key sources of OPM's regulatory authority.

12. Congress recently acted to add GAO's recommendation to new legislation. As required by the "Technical and Miscellaneous Civil Service Amendments Act of 1992" (Public Law 102-378, October 2, 1992), section 2(8), we will issue regulations for the employment and pay of experts and consultants under 5 U.S.C. 3109, and for ensuring agency compliance. We also will issue instructions on the requirement in section 2(8) for each agency to report to OPM annually on the number of days each expert and consultant is employed and the total amount paid to each expert and consultant.

13. In addition to issuing regulations, we plan to update FPM Chapter 304 to reflect GAO's recommendations and the new law, and to delete references to OPM's ethics instructions. The Office of Government Ethics (OGE) has issued uniform standards of ethical conduct, as well as regulations on post employment and conflict of interest, for Federal employees. Also, OGE has issued regulations setting forth the conditions for making public and confidential financial disclosure reports. OGE's regulations, published in Chapter XVI of Title 5, Code of Federal Regulations, supersede instructions in those areas previously issued by OPM. Each agency's designated ethics official can provide information about the content and effective dates of OGE's more recent regulations published in the Federal Register.  
<Page 2>

14. Following GAO's suggestion, we recommend agencies review expert and consultant appointments as part of their internal personnel management evaluation programs. Among other benefits, the program can provide managers with the information they need about OPM requirements to properly manage their organizations.

15. We ask agencies to consider the GAO report and adjust their own expert and consultant hiring practices, as necessary, to conform to FPM criteria. For copies of "Federal Workforce: Inappropriate Use of Experts and Consultants at Selected Civilian Agencies" GAO/GGD 91-99, call GAO at 202-275-6241.

Douglas A. Brook  
Acting Director

Inquiries: Career Entry Group, Staffing Policy Division, 202-606-0960

Code: 304, Employment of Individual Experts and Consultants

Distribution: Basic FPM

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< CONFIRMATION REPORT >

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OFFICE OF THE SECRETARY OF DEFENSE

WASHINGTON, DC 20301

Administration  
& Management

April 3, 1991

Mr. James A. Courter  
Chairman, Defense Base Closure  
19 Hatchery Road  
Hackettstown, NJ 07840

Dear Mr. Courter:

In establishing the Defense Base Closure and Realignment Commission, the Congress created an Executive Branch organization with administrative flexibilities not available to most Government agencies. Based upon our discussions, Washington Headquarters Services is providing a variety of administrative services, including personnel management.

Because of the extraordinary statutory flexibilities available to the Commission, the service we provide rests upon our best judgment and interpretation of law, your acceptance of advice offered, as well as other legal counsel you seek. These flexibilities create alternatives for your appointment which will affect you personally. The nature of your appointment and work schedule will determine your eligibility for benefits, as well as for travel, transportation, and per diem expenses.

Your appointment, unlike those of other commissioners, is of an indefinite nature which may extend beyond one year. Because your appointment is not limited to a year or less, you may receive life and health insurance if your work schedule is full time rather than intermittent. Similarly and according to information obtained from the Hill regarding your previous Federal employment, a full time work schedule would cause you to be covered by the Civil Service Retirement System offset provision. Such coverage would enable you to transfer to the Federal Employees Retirement System (FERS) at any time within six months of being rehired. However, if your work schedule is full time, you will not be eligible for per diem, travel and transportation expenses while in D.C. On the other hand, if your work schedule is intermittent, you would be entitled to travel, transportation and per diem, but not health and life insurance or Civil Service retirement.

With these things in mind, the following alternatives could be pursued if your initial appointment is full time.

- Once the Commission has been set up and is functioning, you could change your work schedule from full time to intermittent. This would entitle you to travel, transportation, and per diem expenses on a prospective basis while in D.C., and your health and life insurance coverage and retirement benefits would continue. The Comptroller General has held (B-128160) that per diem, in lieu of subsistence, may be paid only for 130 days of intermittent service each year. Therefore, you may wish to plan your intermittent service for times during which your schedule will be irregular.
- Designate New Jersey as your duty station; TDY expenses could then be paid when you travel to Washington, D.C. or elsewhere.

This approach captures the best of both worlds, is statutorily proper, and is likely to most closely parallel the actual workaday realities of the Commission as they evolve. We will finalize whatever work schedule you desire. An index of references, with attachments, bearing on your situation is also enclosed. If you need any further assistance or explanation, please call me on (703) 695-4436 or Leon Kniaz, Director of Personnel and Security, on (703) 697-1703.

Sincerely,



D. O. Cooke  
Director

Enclosure

## Index

1. Base Closure Legislation (PL 101-510).
2. Federal Personnel Manual definition (FPM 296-33).
3. Eligibility for retirement coverage (5CFR 831.201 & 5CFR 842.105).
4. Eligibility for life insurance (5CFR 870.201).
5. Eligibility for health insurance (5CFR 890.102).
6. Conditions under which Social Security coverage prevails.
- j7. Thrift Savings Plan Summary.
8. Descriptions of CSRS Offset and Thrift Savings Plan.
9. Who is entitled to per diem, travel and transportation (5USC 5702 and 5703).

April 23, 1995

**MEMORANDUM TO COMMISSION STAFF**

From: Madelyn Creedon   
Subject: Guidelines when seeking other employment.

As all of you are aware, the Commission, by law, will go out of business on December 31, 1995. Understandably, each of you is concerned about future employment and may be actively looking, or preparing to look for your next job. While job hunting is not prohibited, there are certain guidelines which you must follow as a federal employee. Failure to follow these guidelines may be a violation of criminal law. Below are a series of questions and answers which may assist you in complying with ethics regulations as you seek future employment. If you have any questions about the regulations in general or your job search in particular, please contact Elizabeth King at extension 127.

**GENERAL RULE:**

18 U.S.C. § 208 and 5 C.F.R. § 2637 require that employees disqualify themselves from participating in any particular matter that will have a direct and predictable effect on the financial interest of a person with whom he or she is negotiating or has any arrangement concerning prospective employment. Not all "job hunting" efforts require special disclosure or disqualification.

**Q: WHAT IS THE PURPOSE OF RESTRICTIONS ON "SEEKING EMPLOYMENT"?**

**A:** The purpose of these restrictions is to eliminate situations that could put a DBCRC employee in a position where performance or non-performance of his or her official duties with DBCRC could have any affect, either positive or negative, on a prospective employer. Generally, this problem is eliminated by requiring a DBCRC employee to disqualify himself or herself from taking any official action which would involve such a prospective employer.

**Q: ARE RESTRICTIONS ON SEEKING EMPLOYMENT JUST INTERNAL ADMINISTRATIVE REGULATIONS?**

**A:** No. These regulations are based on 18 U.S.C. § 208 which apply to all employees of the federal government.

**Q: ARE ALL DBCRC EMPLOYEES COVERED BY THE ETHICS REGULATIONS ON "JOB HUNTING"?**

**A:** Yes, with one or two exceptions. If you completed either a public or confidential financial disclosure form (SF 278 or SF 450), then you must observe certain "job hunting" restrictions.

**Q: AS A "COVERED EMPLOYEE" MUST I REPORT EVERY ATTEMPT TO SEEK OTHER EMPLOYMENT?**

**A:** No. You must only report attempts to seek employment with firms or individuals which are affected by the performance or non-performance of your official duties at DBCRC. However, you would not need to report attempts to gain employment with any organization which has no interest in your duties as a DBCRC employee.

Usually a federal employee does not have to report an attempt to seek employment with another federal agency. However, in the case of the Commission, DOD and Congress are government entities that may be affected by the performance or non-performance of the official duties of a DBCRC employee. Although it is not required by federal regulations, in order to preserve the integrity of the Commission and avoid the appearance of the loss of impartiality, we ask you to contact an ethics official if you begin to seek employment with DOD or Congress prior to the time when the President submits the Commission's report to Congress.

**Q: AM I PROHIBITED FROM SEEKING ANY TYPE OF EMPLOYMENT?**

**A:** No. DBCRC employees, regardless of their position or duties, may seek future employment with anyone they choose (including DOD and those doing business with DOD or DBCRC). However, if the employee has official responsibilities which may affect the possible employer, he or she must recuse himself or herself from any further dealing on behalf of DBCRC which involve the prospective employer until the negotiations have ended. Recusals will be honored by DBCRC, provided they are consistent with the needs of the agency.

**Q: WHAT ACTUALLY CONSTITUTES "SEEKING EMPLOYMENT"?**

**A:** This is a rather broad term, and may be defined in terms of "beginning" and "ending".

A DBCRC employee begins seeking employment when the employee:

- 1) makes unsolicited communications to a prospective employer regarding possible employment (such as mailing a resume);
- 2) engages in discussions for employment with any person; or

- 3) makes a response other than rejection to an unsolicited communication from a prospective employer regarding possible employment with that person.

A DBCRC employee is no longer seeking employment when:

- 1) the employee does not hear from the prospective employer for two months from the date a resume was sent (any indication of interest from the prospective employer means the employee is still seeking employment);
- 2) when they have withdrawn their resume or application;
- 3) the employee or prospective employer rejects the possibility of employment and all discussions have terminated (a response that simply defers discussions does not constitute a rejection).

**Q: ARE THERE ANY OTHER CONCERNS IF I PLACE MY NAME WITH EMPLOYMENT AGENCIES OR WITH "HEAD HUNTERS"?**

**A:** Yes. When an employment agency or head hunter notifies you of the names of prospective employers which they have contacted on your behalf, then you are considered to be seeking employment with those organizations. You have a positive duty to ask that you be so notified so that you can make appropriate recusals.

**Q: IF I CALL A FIRM AND ASK THEM FOR A JOB APPLICATION, IS THAT CONSIDERED "SEEKING EMPLOYMENT"?**

**A:** No. You are not considered to be "seeking employment" until you complete and submit the employment application. You may prepare and update your SF 171 or your resume, but once you submit it in response to a job advertisement, you are seeking employment.

**Q: HOW IS "DISQUALIFICATION" OR "RECUSAL" ACCOMPLISHED?**

**A:** Recusal may be in writing and given to the agency ethics officials and your supervisor or you can inform them orally. If recusal is appropriate, you must not participate in a matter that to your knowledge would have a direct and predictable effect on the financial interests of a prospective employer with whom you are seeking employment.

**Q: WILL THE DBCRC GIVE TIME OFF/ADMINISTRATIVE LEAVE FOR PREPARATION OF RESUME, COMPLETION OF EMPLOYMENT APPLICATIONS AND JOB INTERVIEWS?**

**A:** Yes, but not until after the President has submitted the Commission's report to Congress.

**Q: I HAVE RECEIVED A RESPONSE TO A RESUME, AND A POTENTIAL EMPLOYER WANTS TO FLY ME TO THEIR HOME OFFICE FOR A JOB INTERVIEW. CAN I ACCEPT ROUND-TRIP TRAVEL AND LODGING TO INTERVIEW FOR EMPLOYMENT?**

**A:** You may accept round-trip travel and lodging from a prospective employer as follows:

- 1) If the prospective employer has a business relationship with DBCRC, then you must obtain prior written approval from an agency ethics official before accepting the travel. The ethics official will review the matter based upon any appearance of conflict of interest, and will issue any disqualifications if deemed appropriate.
- 2) If the prospective employer has no business relationship with DBCRC, then you may accept the travel, but you must report the travel to an agency ethics official no later than two weeks after completion of the travel.
- 3) In all cases, travel must be completed on your own time during weekends, annual leave, or special leave scheduled with your supervisor.

**Q: IN CLOSING, COULD YOU SUMMARIZE DBCRC'S POLICY ON "SEEKING EMPLOYMENT"?**

**A:** Yes. The prior questions and answers should be used in conjunction with the Standards of Ethical Conduct, a synopsis of which you received during your ethics training. In summary, DBCRC employees may seek employment with anyone, and are under **no obligation** to disclose employment negotiations with any person whose financial interests would **not** be affected by the performance or nonperformance of the employee's official duties. DBCRC employees are also free to seek employment with persons whose financial interests **could be** affected by the performance or non-performance of the employee's official duties; **however, in these instances DBCRC employees, prior to seeking employment, must disqualify themselves from taking official actions which could affect the financial interests of the targeted prospective employer.**

Generally speaking, one must keep their official responsibilities separate from their private interest. If there is no official involvement, there won't be a conflict. If there is official involvement, then the employee must recuse himself or herself from that involvement before he or she pursues employment opportunities.

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\*\*\* THIS SECTION IS CURRENT THROUGH P.L. 102-439, APPROVED 10/23/92 \*\*\*

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES  
PART III. EMPLOYEES  
SUBPART D. PAY AND ALLOWANCES  
CHAPTER 55. PAY ADMINISTRATION  
SUBCHAPTER V. PREMIUM PAY

5 USCS @ 5542 (1993)

@ 5542. Overtime rates; computation

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter [5 USCS @@ 5541 et seq.], at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), and all that amount is premium pay.

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

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

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

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5 USCS @ 5542 (1993)

@ 5542. Overtime rates; computation

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter [5 USCS @@ 5541 et seq.], at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), and all that amount is premium pay.

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

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

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

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

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

(4) Notwithstanding paragraph (2) of this subsection, for an employee who is a law enforcement officer, and whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to the greater of--

(A) one and one-half times the minimum hourly rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the hourly rate of basic pay of the employee,  
and all that amount is premium pay.

(b) For the purpose of this subchapter [5 USCS @@ 5541 et seq.]--

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

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

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

(B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involved the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station.

(c) Subsection (a) shall not apply to an employee who is subject to the overtime pay provisions of section 7 of the Fair Labor Standards Act of 1938 [29 USCS @ 207]. In the case of an employee who would, were it not for the preceding sentence, be subject to this section, the Office of Personnel Management shall by regulation prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for the purpose of such section 7 so as to ensure that no employee receives less pay by reason of the preceding sentence.

HISTORY: (Sept. 6, 1966, P.L. 89-554 @ 1, 80 Stat. 485; Sept. 11, 1967, P.L. 90-83, @ 1(24), 81 Stat. 200; Dec. 16, 1967, P.L. 90-206, Title II, @ 222(a), 81 Stat. 641; Oct. 10, 1968, P.L. 90-556, @ 1, 82 Stat. 969; Dec. 15, 1971, P.L.

92-194, 85 Stat. 648.)

(As amended Oct. 12, 1984, P.L. 98-473, Title I, @ 101(c) in part, 98 Stat. 1874; Nov. 5, 1990, P.L. 101-509, Title V, @ 529 [Title I, @ 101(b)(3)(E), Title II, @ 210(1), Title IV, @ 410(a)], 104 Stat. 1439, 1460, 1468; Oct. 2, 1992, P.L. 102-378, @ 2(41), 106 Stat. 1352.)

#### HISTORY; ANCILLARY LAWS AND DIRECTIVES

#### PRIOR LAW AND REVISION:

##### 1966 Act

Derivation	U.S. Code	Revised Statutes and Statutes at Large
(a)	5 USC Sec. 911	June 30, 1945, ch 212, Sec. 201, 59 Stat. 296. Sept. 1, 1954, ch 1208, Sec. 203, 68 Stat. 1109.
(b)	5 USC Sec. 912a 5 USC Sec. 912b	Sept. 1, 1954, ch 1208, Sec. 205(b), 68 Stat. 1110.

In subsec. (a)(1), and (2), the word "officer" is omitted as included in "employee". The word "scheduled" is omitted since Act Oct. 11, 1962, P.L. 87-793, @ 603, 76 Stat. 847, eliminated the necessity of referring to rates as scheduled or longevity. References to the "Classification Act of 1949, as amended" are omitted as unnecessary.

In subsec. (b), former 5 USC @@ 912a and 912b are combined and restated.

Standard changes are made to conform with the definitions applicable and the style of this title (5 USCS @@ 101 et seq.).

##### 1967 Act

Section of title 5	Source (U.S. Code)	Source (Statutes at Large)
5542(a)	5 App.: 911	July 18, 1966, P.L. 89- 504, Sec. 404(a), 80 Stat. 297.

The words "of the Classification Act of 1949, as amended" are omitted as unnecessary.

#### AMENDMENTS:

1967. Act Sept. 11, 1967, in subsec. (a), inserted ", or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day,"; and substituted "GS-10" for "GS-9", wherever appearing.

Act Dec. 16, 1967 (effective 30 days after 12/16/67, as provided by @ 220(a)(4) of such Act), substituted subsec. (b)(2)(B), for one which read: "the travel involves the performance of work while traveling or is carried out under arduous conditions."

1968. Act Oct. 10, 1968, added subsec. (a)(3). Section 3 of such Act Oct. 10, 1968, provided that this amendment shall take effect on the first day of the first pay period which begins on or after the 30th day after Oct. 10, 1968.

1971. Act Dec. 15, 1971, in subsec. (a), substituted "For full-time, part-time and intermittent tours of duty, hours" for "Hours".

1984. Act Oct. 12, 1984, in subsec. (b)(2)(B)(iv), inserted ", including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station."

1990. Act Nov. 5, 1990 (effective as provided by @ 305 of such Act, which appears as 5 USCS @ 5301 note), in subsec. (a), inserted "(including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law)" wherever appearing, added para. (4); and added subsec. (c).

1992. Act Oct. 2, 1992 (effective as of the first day of the first applicable pay period beginning on or after the date of enactment of such Act, as provided by @ 9(b)(9) of such Act, which appears as 5 USCS @ 6303 note), in subsec. (a)(4), substituted "officer," for "officer (within the meaning of section 8331(20) or 8401(17))," and made technical corrections which did not affect the text of such subsection; and, in subsec. (c), substituted the sentence which begins "In the case of . . ." for one which read: "In the case of an employee who would, were it not for the preceding sentence, be subject to this section, hours of work in excess of 8 hours in a day shall be deemed to be overtime hours for the purposes of such section 7 and hours in a paid nonwork status shall be deemed to be hours of work."

#### NOTES:

#### CODE OF FEDERAL REGULATIONS

Customs warehouse officers, compensation of, 19 CFR Part 19.

#### CROSS REFERENCES

This section is referred to in 5 USCS @@ 5543, 5545, 5546, 5547; 14 USCS @ 432; 15 USCS @ 278e; 32 USCS @ 709.

#### RESEARCH GUIDE

#### AM JUR:

15A Am Jur 2d, Civil Service @@ 4, 48.

#### INTERPRETIVE NOTES AND DECISIONS

#### I. IN GENERAL

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## I. IN GENERAL

## 1. Generally

Specific requirement in Civil Service Commission's regulation that agencies should review premium pay determinations "at appropriate intervals" and discontinue payments or revise rates where such action was necessary, authorized Internal Revenue Service to make regulation establishing quarterly plan for determination of eligibility for premium pay. *Fix v United States* (1966) 177 Ct Cl 369, 368 F2d 609.

Employee who occupies position requiring substantial amounts of irregular, unscheduled overtime in which hours of duty cannot be controlled administratively is not compensated on hourly basis but instead receives premium pay on an annual basis. *Sullivan v United States* (1981) 229 Ct Cl 82, 665 F2d 1012.

Invocation of departmental regulations requiring specific written authority for overtime cannot avoid plain requirements of predecessor to 5 USCS @ 5542 when performance of overtime is induced by government. *Byrnes v United States* (1963, Ct Cl) 324 F2d 966, rereported 163 Ct Cl 167, 330 F2d 986.

General Accounting Office declines to assert jurisdiction over union's request for determination as to amount of overtime due employees as result of arbitration award since issue is more properly subject to determination by Federal Labor Relations Authority. (1983) 62 Op Comp Gen p 274.

Travel performed by employee to attend scheduled event conducted by licensee of employee's agency did not qualify as travel to or from event over which government had total lack of control, and employee could thus not be paid overtime compensation for that travel as entitlement to overtime compensation by federal employees while in travel status under 5 USCS @ 5542(b)(2)(B)(iv) requires that travel result from event which could not be scheduled or controlled administratively in that there be immediate official necessity requiring travel in connection with event. (1986) 65 Op Comp Gen p 772.

## 2. Construction of particular terms

Federal law enforcement officers were not entitled to overtime pay for

entitled to collect overtime compensation under predecessor to 5 USCS @ 5542. *Anderson v United States*, 201 Ct Cl 660.

#### 9. Off-duty time at isolated post

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

#### 10. Stand-by duty

Deputy federal marshals on call after basic duty hours who are not restricted to headquarters offices nor to their residences are not entitled to overtime pay for periods in which marshals are free to follow their individual private pursuits; time spent in on call status is not considered work when employee is allowed to leave telephone number or to carry electronic device for purpose of being contacted, even though employee is required to remain within reasonable call-back radius. *Allen v United States* (1983) 1 Cl Ct 649, *affd without op* (CA FC) 723 F2d 69.

Civilian recreation administrator at naval base was entitled to overtime pay for all hours he was scheduled for standby duty status in view of testimony that employee had no choice but to work during hours scheduled for standby duty as result of loss of personnel from department and increased duties assigned to department, and such overtime was authorized in light fact that stated motive for placing employee on standby duty status was to avoid payment of overtime for work that needed to be done and which employee was required to do. *Manning v United States* (1986) 10 Cl Ct 651.

Physical education professor at Naval Academy was entitled to overtime compensation for actual standby hours worked during times he was assigned to serve as duty watch officer. *Savering v United States* (1989) 18 Cl Ct 704.

Firefighters scheduled to work 72 hour tour of duty each week did not come within statutory exception of employees for whom first 40 hours of duty is basic work week since firefighters' first 40 hours consisted of 24 hours on duty and 16 off, and their duties required substantial amount of standby time. *DeCosta v United States* (1990) 22 Cl Ct 165.

Classified civil service employee, employed as correctional officer in charge of cottage at federal reformatory for women, who on alternate duty days was required to remain on duty overnight in cottage, during which time she was subject to call of individual inmates and telephone calls from reformatory personnel, was on duty during such nights and entitled to overtime pay. *Farley v United States* (1955) 131 Ct Cl 776, 127 F Supp 562.

Plaintiff's overnight assignments in federal correctional institution constituted duty time despite her use of room assigned to her on occasions other than when she was assigned to overnight duty. *England v United States* (1956) 133 Ct Cl 768, 137 F Supp 757.

Retired employees of civil defense agency were entitled to recover overtime compensation and night-pay differential for duty officer tours served by each of them at control center during six-year period immediately preceding filing of their respective petitions, but they were not entitled to recover for duty officer tours served at home, for services allegedly performed during certain civil defense test exercises. *Rapp v United States* (1964) 167 Ct Cl 852, 340

F2d 635.

United States government attorney's performance of stand-by duty in home during hours in excess of regular 40-hour workweek, such duty consisting of making himself available in home to answer incoming telephone calls, was not "hours of work" within meaning of predecessor to 5 USCS @ 5542. *Moss v United States* (1965) 173 Ct Cl 1169, 353 F2d 746.

Hours during which Canal Zone policemen employed by United States were required, due to mob activities, to remain while off duty at some place within one of 2 police districts in Zone where they could be reached by telephone were not "hours of work" within meaning of 5 USCS @ 5542, nor did such policemen qualify for compensation therefor under regulation providing compensation for "stand-by duty." *Aldridge v United States* (1973) 202 Ct Cl 365, 479 F2d 1365.

Standby status does not result from geographic isolation alone, but requires official order to remain at station; employee's remaining at station must not be merely voluntary, desirable, or result of geographic isolation; standby status is not appropriate where employee is left on unisolated, uninhabited island for 3 days until picked up by helicopter. *Naval Amphibious Base & Tidewater Virginia Federal Employees Metal Trades Council* (1984) 15 FLRA No. 91.

Grievants were not entitled to standby pay where there was no evidence that round-the-clock coverage by them was needed at the prison facility or that agency required them to remain in state of readiness. *US Dept. of Justice, INS, Washington, DC & AFGE, Nat'l. Immigration & Naturalization Council* (1992) 44 FLRA No. 28.

#### 11. Travel time

Travel time used while in boundaries of official duty station is not automatically compensable. *Mossbauer v United States* (1976, CA9 Cal) 541 F2d 823.

Investigators were not entitled to include ordinary hours of travel as a basis of granting extra pay beyond the per diem allowed while away from official station. *Byrnes v United States* (1963, Ct Cl) 324 F2d 966, rereported 163 Ct Cl 167, 330 F2d 986.

Federal deputy marshal's time spent in travel was not "regularly scheduled" within meaning of predecessor to 5 USCS @ 5545, nor was such time within provisions governing time in travel status included in predecessor to 5 USCS @ 5542, and therefore such time could be compensated under those statutes. *Burich v United States* (1966) 177 Ct Cl 139, 366 F2d 984, cert den 389 US 885, 19 L Ed 2d 182, 88 S Ct 152, reh den 389 US 998, 19 L Ed 2d 504, 88 S Ct 486.

Arbitrator's award of overtime compensation for travel time will be set aside under 5 USCS @ 7122 as being contrary to @ 5542(b)(2)(B)(iv) where award was premised on arbitrator's erroneous conclusion that out-of-town 2-day conference to which employee traveled was event which could not be scheduled or controlled administratively, since conference was administratively scheduled by agency, thus excluding it from purview of @ 5542(b)(2)(B)(iv). *United States Dept. of Labor* (1982) 10 FLRA No. 82.

Hours spent in travel status are hours of employment if travel results from event which could not be scheduled or controlled administratively; union proposal requiring inspectors to be in paid status when they travel outside of normal duty hours in order to be present during hours of operation of nuclear waste disposal sites is negotiable since operating hours of each site are set by private commercial firm over which agency has no administrative control. *Nuclear Regulatory Com.* (1983) 13 FLRA No. 13.

Traveltime away from one's duty station does not constitute "hours of employment" for which overtime or compensatory time may be granted unless travel results from event which cannot be controlled administratively. *Air Force*

## 5 USCS @ 5542 (1993)

Logistics Command & AFGE (1984) 15 FLRA No. 95.

Traveltime does not constitute compensable hours of employment where time is scheduled and controlled administratively; arbitrator's award of compensatory time for required travel during nonduty hours to attend training sessions is improper. Department of Justice & AFGE (1984) 16 FLRA No. 112.

Employee is not entitled to compensation for travel time where airline overbooked flight and booked him on next available flight; event which necessitated his travel, his presence at his duty station the following work day, was not "administratively uncontrollable event." (1979) 59 Op Comp Gen p. 96.

Interpretation of 5 USCS @ 5542(b)(2)(B)(iv) that travel to training course scheduled by employee's agency does not qualify as compensable travel has no relation to whether such travel time is hours worked under Fair Labor Standards Act (29 USCS @@ 201 et seq.). (1981) 60 Op Comp Gen p 434.

Entitlement to overtime compensation while in travel status under 5 USCS @ 5542(b)(2)(B)(iv) requires at least that travel results from event which could not be scheduled or controlled administratively, and immediate official necessity in connection with event requiring travel to be performed outside employee's regular duty hours. (1981) 60 Op Comp Gen p 681.

Travel to and from accident sites by air safety investigators on commercial airlines, performed under access-to-aircraft (cost free) authority and emergent situations, is compensable work for purposes of 5 USCS @ 5542(a) and (b); however, where access-to-aircraft travel was utilized in non-emergent situations and no work was performed or was required during travel, such travel only served purpose of transporting investigator and is not compensable overtime work; air safety investigators who travel by means other than aircraft, usually by automobile, to and from accident sites, and who perform their investigative function while traveling under emergent conditions, are performing compensable overtime work under @ 5542(a) and (b); air safety investigator who is ordered to transport documents, equipment and exhibits and who is required to personally travel with items in order to protect their integrity or ensure they are not damaged, lost or tampered with, can have such travel time considered work for purpose of overtime under @ 5542(a) and (b). (1982) 61 Op Comp Gen p 626.

Statutory provision which permits overtime if travel results from event which could not be scheduled or controlled administratively has been interpreted to require satisfaction of two conditions; first, event requiring off-duty travel must be administratively uncontrollable, and second, there must exist immediate official necessity occasioned by unscheduled and administratively uncontrollable event. Benjamin Brown and John R. Schacht (1990) 69 Comp Gen 385.

Employees of Defense Logistics Agency were entitled to receive overtime pay while in travel status outside of regular working hours to attend training, since training courses were offered by private institution and were not conducted for benefit of government, such that training was not event which could be scheduled or controlled administratively. William A. Lewis, et al. (1990) 69 Comp Gen 545.

Instructors of Department of Defense Security Institute, who traveled away from their official duty stations on Sunday in order to teach agency training courses beginning on Monday morning, are not entitled to overtime or compensatory time for their travel. Defense Security Institute Instructors (1992) 71 Comp Gen 228.

## 12. -To and from place of work

Time spent by civilian employee of Department of Navy in traveling between his government-furnished quarters at one end of federal installation and his job site at other end of same installation did not come within meaning of term